SUMMARY

In May 2008 the Bundeskartellamt launched an inquiry into the state of competition in the markets for petrol and diesel fuel. The aim of the inquiry is to assess whether the fuel markets in Germany are functioning properly. As a first step the sector inquiry is to examine the general market conditions and identify possible distortions of competition.

In the first part of the sector inquiry the Bundeskartellamt focused on the market structures in the fuel sector. It identified several market levels and markets and analysed the way they function. Based on the investigations made so far the most important interim results of the first part of the Bundeskartellamt's sector inquiry can be summed up as follows:

1. **The high vertical and horizontal concentration throughout the sector poses a significant hindrance to more competition in the fuel sector.** In particular the five companies BP/Aral, ConocoPhilips/Jet, ExxonMobil/Esso, Shell and Total, which hold a joint dominant position in the petrol station markets, are fully integrated companies covering all levels of the mineral oil sector, which means they are active not only at the retail level but also in the procurement markets and in the transport sector. Furthermore, the companies mentioned above are interlinked with collective refineries, pipelines and tank farms. The interlinks between the market participants have led to far-reaching mutual interdependencies between the oil companies. For several years, for example, they have been practising a system of fuel exchange.

   The external competitors are unlikely to be able to effectively limit the oligopoly’s scope for action. The medium-sized mineral oil sector e.g. is largely fragmented and dependent on the members of the oligopoly for its supplies.

2. In the Bundeskartellamt’s view the prevailing oligopolistic market structures make it **necessary to stop further concentration in the fuel sector by applying restrictive merger control.** For this reason the Bundeskartellamt has prohibited Total Deutschland GmbH from acquiring the east German petrol station network of OMV (“Total/OMV” merger project). This concentration would have resulted in the strengthening of dominant positions. The “Shell/Lomo” merger project could
only be cleared subject to the condition that a certain large and centrally located petrol station would be excluded from the merger project.

Generally, further mergers between the five companies mentioned above will not be possible in the future. Mergers with significant external competitors will either not be possible at all or only subject to conditions.

3. **Costs and conditions of sale of fuel at petrol stations are very transparent.** However, it is the integrated oil companies above all which benefit from this transparency as they can extensively monitor the prices of their competitors and maintain a continuous overview of the competitive prices. Over time pricing patterns have therefore emerged, such as higher prices at the beginning of the travel season. These pricing patterns are often misunderstood by motorists as the outcome of collusion. They are, however, the visible expression of a chiefly uniform pricing strategy pursued by at least the oligopolists, and not the expression of price agreements or other anti-competitive pricing behaviour.

4. The inquiry revealed in some individual cases that the efforts undertaken by the oil companies and their petrol stations to obtain prompt information about the competitive prices could overstep the mark, thus raising competition law concerns, and could result in inadmissible market information systems. The Bundeskartellamt will take up information on incidents where petrol stations of various companies informed each other by telephone of their own price changes, and initiate suitable measures to demonstrate the limits between the admissible monitoring of competitors’ prices and the exchange of information which is prohibited under competition law.

5. In 2000, the Bundeskartellamt prohibited several integrated oil companies from demanding higher prices for supplies to independent petrol station operators than they charged end consumers at petrol stations they operated themselves. However, the Düsseldorf Higher Regional Court criticised essential points of the Bundeskartellamt’s prohibition decision and revoked it. The fact that the legal basis for taking up sales below cost price has meanwhile been amended and the large number of complaints made by independent petrol stations have induced the Bundeskartellamt to use a modified approach for examining whether these complaints should be followed up by proceedings.
6. In the course of the sector inquiry, Tank & Rast GmbH (Tank & Rast), a successor of the originally government-owned GfN service facilities company, stated that it planned to restructure the decade-long **quota system of issuing licences for the supply of fuel to motorway petrol stations in Germany** (*Bundesautobahn-Tankstellen*, BAT). In order to avoid the discrimination of small and medium-sized petrol station operators, the licences for the supply to the BAT motorway petrol stations had so far generally been allocated on the basis of each oil company’s market share in the off-motorway petrol station business. To support this allocation mechanism a BAT Working Group was set up in which the BAT suppliers are represented. The Chairman of the working group acts as a coordinator between Tank & Rast and the oil companies concerned in the adjustment of the supply licences in proportion to the companies’ shares in the sale of fuel to off-motorway petrol stations.

As of 2013, Tank & Rast plans to issue these supply licences to the market participants in an auction procedure.

7. The Bundeskartellamt has informed the sector concerned that while it continues to consider Tank & Rast to be a dominant company in the award of supply licences to BAT petrol stations, a dominant company should also be able to change its award criteria as long as these do not violate the prohibition of discrimination under competition law. The Bundeskartellamt will give the companies and associations involved an opportunity to comment on this aspect. In this context it will also be possible to discuss further questions, e.g. the extent to which medium-sized petrol station operators can cooperate with one another or set up bidding syndicates, and how to handle e.g. fleet card contracts.

In particular the interim results of the sector inquiry have shown that the fuel sector is marked by complex strategic interdependencies. As the inquiry progresses the Bundeskartellamt will examine key aspects in greater detail. These aspects include the competitive effects of fleet card systems, agency agreements and sales below cost price. Furthermore, the Bundeskartellamt will carry out econometric analyses of fuel prices.
The Bundeskartellamt and the competition authorities of the Ländere can react at any time to any hindrances to competition which come to light in the course of the inquiry. They can, for example, prevent any foreclosure strategies or harmful concentration. Irrespective of the factors already mentioned, the inquiry will supply valuable information on market conditions and mechanisms in the fuel sector, which, mirrored by the resonance which the Bundeskartellamt receives every day, will be of paramount interest to those in politics as well as the wider public.
1 Introduction

Since 1 July 2004, the Act against Restraints of Competition, ARC (Gesetz gegen Wettbewerbsbeschränkungen), has empowered the Bundeskartellamt to carry out so-called sector inquiries under Section 32e of the ARC, if rigid price structures or other circumstances give reason to assume that competition might be restricted. It is not a precondition for sector inquiries that individual companies have violated competition law; the inquiries are therefore not targeted against individual companies. The purpose of a sector inquiry is to examine and analyse the competition and market conditions in the overall market concerned. The new regulation provides the Bundeskartellamt with extensive investigatory powers which extend beyond individual violations of competition law.

The launch of a sector inquiry does not require any formal decision, but reasons for possible investigations must be explained in detail. The Decision Division which is competent for the business sector concerned makes the decision to launch a sector inquiry. The investigation methods which can be used by the competition authority which conducts the investigations are requests for information and formal decisions requesting information as well as interviews and, if necessary, searches and unannounced inspections.

In the Bundeskartellamt’s view there were several reasons for a comprehensive examination of the fuel sector. Indications of possible competition law problems in the fuel sector emerged in merger control proceedings and had to be examined more closely. Consumers and independent petrol station operators also filed complaints about a number of issues in the oil sector. In addition, the Bundeskartellamt wanted to gather fundamental up-to-date market data because the last comprehensive nationwide survey had been conducted several years ago.

In parallel to the sector inquiry, the Bundeskartellamt had to examine several company mergers in the oil and fuel sector. From these merger control proceedings additional insights could be gathered for the further course and scope of the sector inquiry. These have also been included in this interim report. In this context the Bundeskartellamt’s decision in the “Shell/HPV” merger control proceedings is of key significance (cf. decision of 7 March 2008, Ref. B8-134/07). In these proceedings the Bundeskartellamt for the first time conclusively established that the very transparent German petrol station markets are dominated by an oligopoly of five integrated oil
companies. On the basis of this important decision the Bundeskartellamt's sector inquiry first of all focused on the upstream market levels, i.e. the refinery level (refinement of crude oil into oil products) and the wholesale markets. Pricing at these upstream market levels is particularly interesting and also influences the development of prices at the petrol station level.

The opportunities of the Bundeskartellamt and, if applicable, the competition authorities of the Länder, to react to the restraints of competition identified by the sector inquiry are provided by the Act against Restraints of Competition. Under Section 32 ARC, for example, agreements which have a foreclosure effect can be identified and the companies concerned can be obliged to take measures to bring the infringement to an end. Abuses of market power can also be prohibited. Finally, the instrument of merger control can at least stop a concentration from progressing if it has been found to raise competition concerns. However, under German law the competition authorities cannot actively dissolve companies which have merged.

The results of the sector inquiry will also provide the political sector with in-depth insights into the competitive situation in the fuel sector which could e.g. serve as the basis for a possible discussion on legislative interventions.

More generally, the inquiry’s results demonstrate to the public how the fuel sector works and how certain processes in the fuel market are to be evaluated. As mirrored by the many letters and phone calls received by the Bundeskartellamt, the inquiry is of extraordinary interest to the public.

2 Characteristics of the German fuel sector which are relevant to competition

2.1 Market levels and market structures

2.1.1 From petroleum to crude oil: Upstream end of the fuel sector

The upstream end of the fuel sector includes the exploration of oil, the exploitation of oil deposits and extraction. The integrated oil companies are active at the upstream level as well as the state-owned oil production companies and providers of oil services which, however, solely perform technical assistance services. For this purpose the companies acquire licences or concessions from the oil-producing countries in a cooperation process which, according to press reports, has led to several problems.
In 2008, 3.95 billion tonnes of raw crude oil were produced worldwide. The highest oil output was achieved by Saudi Arabia with 514.0 million tonnes, followed by Russia with 486.8 million tonnes. The world’s third largest producer of oil is the USA with 315.0 million tonnes, fourth largest is Iran with 208.1 million tonnes, followed by China (189.7 million tonnes), Mexico (177.1 million tonnes) and Canada (157.8 million tonnes). In 2008, the European share of world oil production was 5.7%. Norway (114.5 million tonnes) and the UK (71.0 million tonnes) have the highest oil output. Germany merely produced 3.1 million tonnes in 2007. In 2008, OPEC produced 1.75 billion tonnes of crude oil (cf. Annual Report “Mineralöl-Zahlen 2008” of the Association of the German Petroleum Industry (Mineralölwirtschaftsverband e.V.)). It can generally be observed that in reaction to the rising oil price drilling for oil takes place at greater depths which requires the use of more expensive technologies. After Russia, Canada has the largest reserves of sandstone and shale oil which are more difficult to exploit. It remains to be seen to what extent these exploration activities will be continued now that prices have fallen in the wake of the so-called financial crisis.

The oil industry differentiates between different types of crude oil according to their origin, their sulphur content and their specific weight. Sour crude oils are heavier and have a higher sulphur content than sweet crude oils. Sweet crude oils have a lower density and contain more valuable components than heavy crude oils. Currently, the demand for low-sulphur products is increasing as recent environmental and quality provisions have required lowering the sulphur content of the products. However, low-sulphur sweet crude oil is mainly found in countries where conditions are difficult, e.g. in Iraq or Nigeria. High-sulphur heavy crude oil is produced e.g. by Saudi-Arabia. All of the OPEC members supply relatively heavy crude oil which, however, cannot be processed everywhere by every refinery. The spot market for crude oil in Rotterdam focuses on “Brent North Sea” oil which has a comparatively low sulphur content. The common feature of all crude oils is that they mainly consist of a chemical combination of carbon and hydrogen. After the petroleum oil has been extracted from the oilfield and prepared for transport to the refineries, it is called crude oil. Most of the common oil products can be processed from all types of crude oil.

Germany has a broadly diversified crude oil supply structure: The crude oil processed in Germany during the last few years has come from more than 20 countries. In 2008, a total of 105.2 million tonnes of raw crude oil were imported into Germany.
Russia was the largest supplier with a quantity of 44.4 million tonnes, followed by Norway with 15.7 million tonnes and the UK with 14.0 million tonnes. The OPEC countries accounted for 22.3 million tonnes. In comparison to these volumes, the quantity of crude oil produced in Germany in 2008 amounted to approx. 3 million tonnes (cf. Annual Report “Mineralöl-Zahlen 2008” of the Association of the German Petroleum Industry (Mineralölwirtschaftsverband e.V.)).

2.1.2 From crude oil to oil: Downstream end of the fuel sector

The downstream end of the fuel sector comprises all activities following the extraction of oil, such as the processing of crude oil into oil and marketing and transport of oil products. Although the downstream sector also includes research and development, these areas are not relevant to the issues covered by the sector inquiry.

2.1.2.1 Refineries

Most of the oil products required in Germany are produced in domestic refineries. The remaining requirements are covered by imports of products manufactured abroad, nearly one third of the oil products used in Germany enter the country as finished products. The largest part of the imports consists of crude oil which is then processed in refineries.

Crude oil is a mixture of hydrocarbons. Processing it always initially leads to the production of the commodities naturally present in crude oil. During the first treatment process (crude oil distillation) the hydrocarbons are grouped according to molecular size. The crude oil is heated whereby products with different boiling points and different molecular sizes can be manufactured and subsequently processed. The basic products thus include naphtha and middle distillates (diesel or light heating oil) and heavy heating oil. The ratio of the crude oil products obtained is very difficult to change through distillation. A refinery will therefore have difficulties in promptly meeting an increasing demand for light products.

Additional facilities are required to adapt the output to market demand, i.e. to convert the heavy components of crude oil, for which there is less demand, into lighter products (petrol, diesel, light heating oil) without having to use more crude oil. During the second treatment process conversion processes are used by which the products’ molecular size can be changed. Large, heavy hydrocarbon molecules can be broken down into smaller, lighter molecules. This so-called cracking can take place in three
different processes: Thermal cracking, catalytic cracking and hydrocracking. While distillates obtained by vacuum distillation are used in the catalytic cracking and hydrocracking processes, the residue from vacuum distillation is used in the thermal cracking process. Residues from vacuum distillation and thermal cracking processes can be converted into gases, petrol, middle distillates and petroleum coke in a so-called coker. Further processing then removes undesirable product components and improves product features (colour, odour, stability).

The decision of which combination of treatments is the optimal one depends on the crude oils used, the desired products and the economic conditions. The higher the output of light products achieved by a certain process, the higher the costs. Therefore, not every refinery can manufacture all products as their production depends on the type of facilities available. In the past, crude oil processing capacity was thus reduced while on the other hand the conversion facilities were expanded in order to bring the refinery structure in line with the demand shift toward fuels and raw materials for the chemical industry and the increasing environmental requirements.

Each of the leading oil companies supplies its fuels throughout the Federal Republic of Germany, but does not have its own crude oil processing capacities in every major region. A total of 14 refineries process crude oil in Germany today. A quarter of the capacities are located in the north and a further quarter in the west of the country, 31% are in the south and 19% are in eastern Germany. According to the results of the investigations, no increase or decrease in capacity is to be expected in the forecast period, which means that the amount of fuels available is unlikely to undergo any major change in spite of the likely further decline in domestic demand.

The domestic production capacities are largely in the possession of integrated oil companies. Shell, for example, operates the northern German refineries in Heide/Holstein and in Hamburg and the western German Rheinland refineries in Godorf and Wesseling near Cologne, and has total capacities of some 10.5% of total domestic production. In northern Germany BP, ConocoPhillips and Holborn also operate one refinery each, while Petroplus and OMV operate in the refinery sector in the west, as does Total in the east of Germany. The independent refineries, importers and wholesalers either do not operate in every region or do not operate at all levels of the fuel sector.
The integrated oil companies not only control a major part of the production capacities, however, but also have major holdings in four collective refineries: MiRO Mineraloelfaffinerie Oberrhein GmbH & Co. KG in Karlsruhe, whose shares are held by Shell Deutschland Oil GmbH (32.25%), Esso Deutschland GmbH (25%), Ruhr Oel GmbH (a joint venture between Deutsche BP AG and the state-owned Venezuelan oil company Petróleos des Venezuela S.A. (PdVSA)) (24%) and ConocoPhillips Continental Holding GmbH (18.75%). With a processing capacity of 14.9 million tonnes in 2008 MiRO is also Germany’s largest refinery.

Bayernoil Raffineriegesellschaft mbH in Vohburg/Neustadt, in which OMV holds 45% of the shares (since 2003), Agip Deutschland GmbH 20%, Ruhr Oel GmbH (BP/PdVSA) 25% and Deutsche BP AG directly holds 10%. Bayernoil has two refinery facilities connected by pipelines in the Bavarian cities of Vohburg and Neustadt.

PCK Raffinerie GmbH Schwedt near the German-Polish border, in which Shell Deutschland Oil GmbH holds 37.50% of the shares, Ruhr Oel GmbH (BP/PdVSA) 37.50% and AET Raffineriebeteiligungs ges. mbH (a joint venture of Agip and Total) 25%.

Ruhr Oel GmbH with its plants Scholven and Horst based in Gelsenkirchen, of which Deutsche BP AG and PdVSA each own 50%.

The collective refineries operate as so-called contract processors for their owners, with the parent companies taking all the entrepreneurial decisions and only entrusting the operating companies with implementing them. The parent companies procure the crude oil for processing that they supply in proportion to the size of their participation in the facilities under company law. Both the crude oil and the refinery products obtained remain proportionately the property of the partners. Thus, the capacities and production of the joint refineries are directly (proportionately) attributable to the parent companies.

2.1.2.2 Transport and storage

The refinery locations are supplemented by a national network of tank farms, which are supplied by the refineries by ship, tank wagons or in a few cases by product pipelines.

There are more than 279 tank farms in Germany with a total capacity of some 68 million m³. An estimated 95% of storage capacities are currently being utilised. Government oil reserves comprise somewhat more than 50% of the capacities. Between
10% and 15% of the other 50% of capacities are used for light heating oil. Thus, fuel storage capacities are significantly lower than the overall capacity. Tank farm operators are both integrated oil companies that produce fuel themselves, and independent commercial storage companies functioning as service companies for all the oil companies and independent fuel traders. Thus, on the one hand the integrated oil companies have their own storage capacities, some of which are operated as joint ventures, while on the other hand they rent further capacities from independent storage operators.

It is to be observed in the tank farm sector that integrated oil companies in some cases have dissolved existing links based on company law by quitting joint storage companies. However, according to the results of the investigations, these trends away from concentration do not hamper the access of integrated oil companies to storage capacities. This is on account of the so-called joint storage by a number of traders or oil companies in rented tank farms, the entire capacity of which they jointly occupy in some cases. Joint storage is possible because the products stored are homogeneous; they are so-called homogeneous bulk goods. The respective producers' fuels are only given their specific characteristics upon delivery through additives at the refinery or tank farm. In comparison with joint storage, individual storage is expensive and less efficient, as ultimately it is not nominal capacity but throughput that is decisive for the economic efficiency of a storage company, i.e. how often a storage tank can be refilled and emptied within a certain period. This frequency is generally higher in the case of joint storage than when fuel is stored by just one trader. Thus, if a new market participant attempts to join a joint storage facility, it would have to come to an agreement with the joint storage companies, not with the tank farm operator. Although use of the joint tank farms generally takes place on the basis of annual contracts, these are extended automatically unless they are terminated, impeding the access to joint storage.

Interlocks between the companies also exist in the area of the transport of crude oil and fuels through pipelines. Most of the crude oil must be transported from distant production sites to the processing and consumption centres. Due to the large volumes to be transported, tankers and pipelines are used. Germany is supplied through different channels. Russian crude oil reaches Germany via pipelines and sea tankers. All other oil supplies are transported by sea in sea tankers which not only supply
German ports but also European ports that are logistically situated, such as Trieste, Marseille and Rotterdam. The crude oil is temporarily stored in tanks and supplied on demand to the German refineries through pipelines. The oil products manufactured by the refineries are stored in tank farms. They are then transported to the consumer by inland vessels, tank wagons and road tankers.

Not only crude oil but also semi-finished products and end products are transferred from the refineries to tank farms, airports or the chemical industry.

Finished oil products are transported via so-called product pipelines, occasionally also via crude oil pipelines. The overall length of the German pipeline network is 5,372 kilometres; 2,041 km for crude oil and 3,331 km for product transports.

The crude oil pipelines that are most important for Germany are jointly operated by the integrated oil companies. For southern Germany these are Deutsche Transalpine Oelleitung GmbH (TAL) which operates a pipeline running from the Mediterranean port of Trieste/Italy to Ingolstadt and Karlsruhe, and Société du Pipeline Sud-Européen (SPSE) which operates a pipeline running from Lavéra in France to Karlsruhe. West German refineries are supplied by a pipeline operated by N.V. Rotterdam-Rijn Pijpleiding Maatchappij (RRP) which runs from Rotterdam to Venlo and from Venlo to the refineries in Cologne. The pipeline operated by Nord-West Oelleitung GmbH (NWO) also runs to Cologne and transports North Sea oil from the key German port of Wilhelmshaven. The Northern German refineries are not only connected to the NOW pipeline, but also to the pipeline of Norddeutsche Oelleitungsges.m.b.H. (NDO) which transports crude oil from the coast to the refineries in Hamburg. The Eastern German refineries are supplied via the Russian “Drushba” pipeline which carries Russian oil and connects to the pipeline owned by Mineralölverbundleitung GmbH (MVL) which leads to the Spergau refinery.

Apart from the crude oil pipelines the products pipelines are also under the sole ownership of the large oil companies which use them exclusively. The most important product pipelines are RRP and Rhein-Main-Rohrleitungstransportgesellschaft mbH (RMR) which run from Rotterdam via Cologne to Ludwigshafen. For petrol and diesel fuels sold at petrol stations the civilian use of the military pipeline networks Central European Pipeline System (CEPS) and Northern European Pipeline System (NEPS) has no practical relevance.
2.1.2.3 Wholesale sector
The wholesale and retail sectors are supplied with petrol and diesel fuel by the refineries or independent importers such as Mabanaft GmbH & Co.KG, Hamburg, (Mabanaft). Intermediaries and distributors are active in the wholesale sector. Apart from Mabanaft, major traders are e.g. Diersch & Schröder GmbH & Co. KG, Bremen, or HGM Energy GmbH, Bremen (HGM). Those oil companies that had been asked by the Bundeskartellamt whether any new oil wholesalers had entered the German market since 2001, referred to Orlen Deutschland AG in northern Germany and Petroplus in southern Germany, as well as ConocoPhillips, Orlen, Agravis Raiffeisen AG in northern Germany, and Petroplus and OMV Deutschland GmbH in the South and South West. Important regional shifts were also mentioned, such as the acquisition of shares in Aral Direct by medium-sized companies such as Friedrich Scharr KG in Baden-Württemberg, the sale of the Ingolstadt refineries to Petroplus and the refinery in Neustadt to OMV. According to the oil companies, HGM had become more active in Northern Germany and AIC Deutschland GmbH & Co. KG, Ludwigsburg, had increased its activities in Southern Germany. Larger traders were expected to show a trend towards more concentration due to weak 2006 sales figures and the tightening of legislation with the Act on the Promotion of Renewable Energies in the Heat Sector (Erneuerbare-Energien-Wärmegesetz, Renewable Energies Heat Act, EEWG).

2.1.2.4 Domestic fuel sales through petrol stations
In the retail sector the largest part of fuel sales is achieved through petrol stations. The leading suppliers of fuel via petrol stations operating in Germany are international groups of companies such as BP/Aral, Shell, Exxon/Esso, ConocoPhillips and Total, among others. To an overwhelmingly large extent, they are vertically integrated across the levels of the value chain (extraction, transport and refinement of crude oil and sale of the oil products obtained from it). There are also a number of smaller group-bound suppliers (Agip, OMV, Orlen, Q1, OIL! and others), which have already been operating in Germany since the early 1960s (Agip) or which only started to operate in Germany for the first time after 2001 in the wake of petrol station sales in accordance with the obligations to divest in the large merger cases BP/E.ON (Aral) and Shell/ DEA (OMV and Orlen). There are also a large number of small and micro enterprises which operate only at the retail level. Many small and medium-sized operators in particular are not group-bound, but are so-called independent petrol sta-
tions, operating only as fuel retailers in the petrol station sector or in the adjacent heating oil market. Some larger regional medium-sized enterprises have joined forces under the brand and purchasing syndicate AVIA, while a large number of independent companies use the joint brand of the Federal Association of Independent Petrol Stations (Bundesverband Freier Tankstellen e.V. - bft).

2.2 Price formation mechanisms

2.2.1 International influence on the price formation of oil products

The price development of oil products must be considered in the context of global developments in the economy as a whole. In particular in the summer of 2008, the situation on the international markets for crude oil and oil products was strained, due mainly to the opposing trends of demand and supply.

The strongest demand impulses are currently coming from the developing countries in Asia, the Middle East and South America whose energy demand is continually rising due to increasing prosperity and population density. The strongest growth in demand is in China and India. These demand growth rates are not equally distributed across all products, but apply mainly to middle distillates and petrochemicals. Irrespective of rising prices, these countries, and also Brazil, require huge amounts of energy whereas in Germany the demand for energy is generally falling. One reason for this development is that in particular those countries with a strong demand subsidise their domestic energy prices, with the result that high prices do not result in a lower equilibrium price when demand falls. On the supply side, the behaviour of all companies participating in the supply process has to be considered: First of all a differentiation must be made between oil producing companies from OPEC countries and those from non-OPEC countries. The refineries producing oil products must also be considered. In its Medium-Term Oil Market Report of July 2008 the International Energy Agency (IEA) expects the supply growth rates in the OPEC countries, and above all in non-OPEC countries, to drop, a development which it says is due to delays and problems in realizing projects to boost supply. There has been much press coverage recently on problems in the cooperation between the state-owned oil companies which manage the sources and private oil companies which provide technical expertise and specialised staff for the extraction of oil. The IEA does not expect supply growth rates to rise again before completion of the investments. Although, accord-
ing to the IEA, substantial investments are being made to increase capacities for middle distillates, the continuing growth in demand in this sector will continue to strain market conditions.

In Germany, fuel demand is mainly covered by domestic production (refineries producing fuel from crude oil) and, to some extent, by imports. The domestic production of oil products is limited to a small number of sites and in 2007 covered a crude oil throughput capacity of 119 million tonnes which accounts for approx. 3% of global crude oil processing capacity. The sites’ capacity utilization rate was 91.7% in 2007, down by 4.8% over the previous year’s rate due to maintenance works. The production structure continued to shift towards diesel fuel (up 3%) and away from light heating oil (down by 15%). The share of diesel fuel in the refineries’ overall production thus rose to 29%. The production of petrol, on the other hand, was further reduced to just under 22% of refinery production. In 2008, overall domestic fuel sales amounted to 30.0 million tonnes of diesel fuel and 20.5 million tonnes of petrol. It should also be noted that in the last few years Germany has been a net exporter of fuel.

2.2.2 Price formation in the wholesale sector

In general, trade in oil products is a global business. Products are either purchased on a short-term (spot) or longer term basis. In term contracts provisions are made e.g. for one whole year for a certain quantity of a product to be supplied each month. The price formula mainly used in these contracts is an average price which is based on the relevant quotations by Platts, Argus or, at the national level, e.g. on the Oil Market Report (O.M.R.). Platts, Argus and also the O.M.R. are providers of energy information services which determine the market price which is based on the sum of all physical spot contracts concluded.

The Rotterdam spot market for crude oil is based on “Brent North Sea” oil. The market is considered to be highly liquid. In the Amsterdam-Rotterdam-Antwerp (ARA) area any product is traded at any given time in the form of so-called standard lots of 1,000 to 2,000 tonnes. However, the Rotterdam spot market is not an institutionalised trading platform. Where sellers and buyers do not meet bilaterally, agents and brokers are active as intermediaries between the supply and demand side. While in most cases agents are active on behalf of their clients, brokers bring buyers and sellers
together to buy or sell either physical or paper products and receive a brokerage commission in return for their services. Banks can equally act as brokers.

The crude oil exchange, where futures transactions also take place, is based in London. ICE Futures (formerly the “International Petroleum Exchange”; IPE) is the most important European exchange platform for options and futures on oil, natural gas and electrical energy and a trading platform for Europe’s leading type of oil, Brent. Only certified tank farms participate in the exchange trade. Customers receive the physical commodities, sellers in turn receive the stock exchange products which, apart from money, can take the form of futures or derivatives.

The stock exchange considerably influences price formation in short-term spot transactions. In spot transactions, the commodities are traded at the stock market price applicable in the respective month concerned, the so-called front month trading, with premiums or discounts. Alternatively, procurement contracts are based on the Platts average price instead of the front month price with a premium/markup. In order to determine the market price based on the sum of the physical spot contracts concluded, Platts has been using an approach for the last three or four years that is different from the method applied by national sector information services such as OMR which request information on wholesale prices from the market participants and then prepare a price framework for various regions in Germany. Platts considers the market processes taking place on a trading day to be too complex to allow for a clear picture. Only the closing market at the end of a working day is therefore fully reported on.

In contrast to heating oil, diesel or jet fuel, petrol is not quoted on the London stock exchange. The petrol market is a fixed price market. However, petrol is quoted on the NYMEX (New York Mercantile Exchange) in the form of RBOB, i.e. a petrol component which is used for blending with ethanol. The New York stock exchange does have a considerable influence on European markets. At times the New York and London stock exchanges move at the same pace.

2.2.3 Price formation in the retail sector (petrol stations)

At the retail level, petrol and diesel fuel are sold by petrol stations. With regard to price formation in the retail sector, a differentiation must be made between so-called ‘A companies’ and ‘B companies’. ‘A companies’ are the brand-name companies, in
particular Shell, Aral, Esso and Total, whereas independent petrol stations and regional brand-name companies are known as ‘B companies’. The petrol station prices of B companies are generally lower than those of A companies. According to their own statement, however, A companies take care to ensure that their prices do not deviate by more than plus one cent from those of the B companies. Exceptions from this rule are the oil companies ConocoPhillips with its ‘Jet’ brand and Orlen with its ‘Star’ brand. Although these are brand-name companies that are active at a nationwide or supra-regional level, their prices equal those of B companies. A price difference of more than one cent (usually two cents) is maintained by supermarket petrol stations and stations which are operated jointly with car wash facilities.

As a rule, motorists are very sensitive to price differences, at least in the case of neighbouring petrol stations. Due to their higher prices it is particularly important for A companies to tie customers to their (higher priced) brand by means of customer loyalty programmes (bonus or discount schemes) and image campaigns. The prices at neighbouring petrol stations are nevertheless highly relevant to the pricing strategy of A companies. For this reason they require their petrol station operators to regularly monitor the prices of neighbouring petrol stations and to report these to their oil company. The companies use this price information for their own pricing strategy. The fuel prices at stations owned by A companies are generally set by the oil company, not by the station’s operator. It is therefore the oil companies which determine the fuel prices. According to the Bundeskartellamt’s knowledge it is not relevant whether the petrol station is owned by the oil company or whether it sells oil products on behalf of and on the account of this company within the framework of a branded reseller agreement or agency contract. In both cases it is the oil company which determines the prices on the basis of the contractual provisions.

Independent petrol stations, on the other hand, determine the prices charged at their petrol station themselves and so enjoy pricing supremacy in this respect.

The gross fuel price at petrol stations includes several components which the oil companies or independent petrol stations must pay to the state. These include in particular energy tax amounting to 65.45 cent per litre of petrol or 47.04 cent per litre of diesel and value added tax at 19% on the commodity price and on the energy tax. The price remaining after the deduction of these taxes from the gross fuel price is the net fuel price charged at petrol stations. The petrol station profit margin results from the difference between the net price charged at petrol stations minus current re-
placement costs ex refinery/storage facility and minus freight costs. According to estimations by industry analysts the operational costs of a petrol station are covered at a profit margin of 5 cent per litre (cf. Energie Informationsdienst 26/09).

Apart from the petrol station profit margin, the price setting process at petrol stations also takes particular account of the station’s volume of sales. Due to the high price elasticity of demand in the choice of a petrol station the price has a direct effect on the sales volume. According to petrol station operators their sales volumes will decrease noticeably as soon as their price is higher than the one charged at a neighbouring petrol station.

For this reason A companies in particular monitor very closely how neighbouring petrol stations react to price increases. If a neighbouring B petrol station does not promptly react to a price increase initiated by an A company, the A company will reverse the price increase as such a situation is only tolerated for a few hours. As in the meantime the customers’ willingness to buy may have risen considerably, independent suppliers can increase their volumes. If an independent petrol station does not adopt the price increase, its profit margin will, however, be relatively low. This is why independent petrol stations often do not increase their prices immediately after being informed of a price increase but try to compensate for a lower profit margin by increasing their sales volume.

These price setting patterns are frequently and regularly repeated. A companies as well as B companies and independent petrol stations are well versed in and practise the procedure described above in the case of price increases. Due to the frequent recurrence of these price setting patterns it is not necessary for the oil companies to expressly agree on price increases. It is sufficient to be able to predict almost perfectly the reaction of the other petrol station companies. This is how certain price setting patterns have established themselves and are adhered to by almost all petrol stations. One typical price setting pattern is the development of the prices at petrol stations over the course of a week. As A companies usually only increase their petrol station prices from Monday to Friday, price increases often occur on Fridays but are subsequently reversed, at least partially, during the weekend. This price setting pattern can be found in almost all companies and therefore does not require an agreement.
3 Competitive analysis of the fuel sector

Particularly significant for the decisions of the Bundeskartellamt is the question of which markets are affected by concentrations or economic activities of companies. A precise definition of the competitively relevant markets is therefore crucial. Due to the dominant oligopoly in the oil and fuel sector, which the Bundeskartellamt has established in this survey, an exact market definition is particularly important in these sectors.

3.1 Definition of the relevant markets

In recent merger cases, the Bundeskartellamt has defined the retail trade of fuels via petrol stations as an independent market or market level. Further investigations within the framework of the sector inquiry will be necessary to decide which other markets are to be defined on the up-stream levels. The following paragraphs express the preliminary view of the Bundeskartellamt. Accordingly, the three market levels of procurement of crude oil, wholesale trade with fuels and retail trade with fuels are to be differentiated.

3.1.1 Procurement of crude oil on the production level

In Germany, crude oil is exclusively bought by refiners who then produce oil products in their refineries. Independent importers without their own production capacities, in contrast, directly import refined oil products. In the examination proceedings of the merger case “Shell/HPV” the Bundeskartellamt therefore conducted a survey among the refiners active in Germany in the manufacture of fuels and questioned them on the competition conditions on the procurement market for crude oil. A significant question in defining this market was whether there are regional differences in the supply structures.

The replies of the respondents on existing supply and distribution structures were largely uniform. The companies who participated in the survey stated that in principle there are three procurement channels for refineries in Germany, depending on the respective location of the refinery: The north and west of Germany can choose between maritime shipping and pipeline, the east has access to a pipeline from Russia and the south has access to two pipelines from the Mediterranean. It has not been clarified to what extent procurement prices differ in these three regions. When examining procurement prices it has to be considered that refineries use different types of
crude oil, depending on from which crude oil reserves they can technically best procure the oil, and their product specifications. It is not entirely clear from the replies to the surveys so far conducted what economic impact transport costs have, in particular when compared to commodity prices. Further investigations in this respect will be necessary.

3.1.2 Sale of fuels at the wholesale level

Suppliers at the wholesale level for refined oil products are not only the refineries as producers, but also independent importers and traders who procure these products from German refineries and foreign producers. It remains to be clarified whether traders and refineries are active on a single market for the sale of fuels or whether the wholesale level and the primary distribution ex refinery constitute two separate markets, as has been assumed by the courts and administration for the electricity sector. The exact definition of the geographic market is also still open.

So far the Bundeskartellamt has established the following facts for the wholesale market level:

When asked about domestic competitors, the refineries basically stated the same. A large number of the companies questioned see as their competitors all enterprises with access to refinery capacity, i.e. Shell, BP, Esso, Total, AGIP, Conoco, Petroplus, OMV, and Oil Invest. In addition, trading companies using the open logistic structure are seen as competitors. Such companies are either independent stock holders with import terminals they offer for rent, or independent tank farm operators. According to the refineries, the tank farms along the Rhine are particularly well-suited for imports. The tank farms are used by oil companies with their own refineries and by trading companies wishing to offer products manufactured abroad on the domestic markets. Having one’s own production capacities therefore seems to have a significant impact on market position. The procurement behaviour of market participants also differs according to whether or not they have their own domestic production capacities. The integrated oil companies mainly sell products they have produced themselves, buy small amounts or exchange fuel products with other integrated oil companies. Purchasing prices are usually based on international (Platts) or national (OMR) price quotations. The final contract price is agreed in bilateral negotiations with the customers and often includes surcharges or reductions depending on the specifics of the place of delivery (such as freight and handling charges).
Independent traders and importers, on the other hand, purchase from the larger German refineries on the basis of short-term and, sometimes, long-term supply contracts. The price formula for these purchases consists of the variable international quotation (international trade price for oil), premiums and surcharges, as well as taxes and duties. According to the companies questioned, the wholesale business is extremely volatile. Although traders aim to buy when prices are low and sell when prices are high, it is not always possible to store the commodities over a longer period due to limited storage capacities.

To sum up, the circumstances of the market participants differ greatly. While the integrated oil companies exchange fuel products with one another and only buy small amounts on the spot market, the large independent traders buy significantly greater amounts on the spot market from the integrated companies, and smaller amounts from the large oil companies or from abroad. A decisive factor in this context is the storage capacity available. The customer groups the market participants supply to also differ. The integrated oil companies not only exchange fuel products with other refineries, they also supply large-scale industrial customers, intermediaries, resellers and petrol stations. The large importers and traders also supply large-scale industrial customers, intermediaries, resellers and petrol stations, but they do not exchange fuel products. Smaller traders do not exchange fuel products and do not supply large-scale customers; instead, they supply other traders or larger end consumers.

The market survey revealed that the location of a refinery is a significant factor for its sales. For the majority of the refineries, location factors are of greater importance on the sales side than on the procurement side; some, however, point out that there is a balancing effect if the transport sector is well developed. In principle, it is advantageous if the refinery is located in an area where demand is high, since this can avoid additional freight costs. The location matters also with regard to the possibility to sell products internationally. In addition, the refineries stated that sales potential and the density of production sites differ. This is due to differing population and industrial densities in the individual regions in Germany. Principally all suppliers can offer their goods in all regions. Any imbalances between regions are evened out through fuel exchanges or imports and exports. According to the refineries, all market participants have access to transport infrastructure: in the west transport is usually by inland waterways, in the north/east by rail.
The geographic market for the sale of oil products seems to be mainly national, but in parts also regional. Depending on the location of the production site of the individual refineries, the radii of the distribution areas differ. Transport structures, e.g. pipelines, also play a significant role. Imports and exports are also possible alternatives. However, based on the replies to its survey, the Bundeskartellamt gained the impression that the refineries first try to sell their products on the domestic market, their regional trading area and those areas they have easy access to, and only import or export in order to even out existing imbalances on these markets.

It is questionable, whether the markets are indeed also regional and if so, which areas they cover. According to the Bundeskartellamt’s knowledge, both the contracts between refineries (fuel exchange agreements) and the contracts between refineries and traders, importers and traders, and between refineries or traders and their customers are based on quoted average prices which apply to different regions in Germany. However, the quoted average prices differ only marginally between the regions, which rather suggests a uniform market. The fact that the individual tank farms only supply their surrounding regions, on the other hand, could be an indication that this is not the case.

3.1.3 Market for the sale of fuel at petrol stations

In the merger cases „Shell/HPV“ (ref. B8-134/07) and “Total/OMV” (ref. B8-175/08), Shell and Total claimed that the planned mergers concerned a uniform market for the sale of petrol and diesel fuel at public petrol stations, since the competitive conditions were essentially the same for both fuel types. This corresponds to the previous practice of the Bundeskartellamt in the proceedings „Shell/Dea“ (ref. B8-120/01) and “BP/E.ON (Aral)” (ref. B8-130/01) and to previous decisions of the European Commission such as in the “BP/Mobil” (IV/M.727), “Shell UK/Gulf Oil” (IV/M.1013) and “Exxon/Mobil” (IV/1383) cases.

However, already in the „Shell/HPV“ merger proceedings the Bundeskartellamt had questioned this practice and its underlying reasoning. The Bundeskartellamt has now abandoned its previous market definition and differentiates between the product markets for the sale of petrol and diesel at public petrol stations. Public petrol stations are all petrol stations that are publicly accessible and can therefore be used by any driver. Petrol stations that are, e.g., located on the premises of a commercial enterprise and only accessible for vehicles of that company are not part of the relevant
market. The assumption of a uniform sales market for petrol and diesel fuels under competition law does not seem appropriate. In accordance with the so-called demand market doctrine, petrol and diesel are not substitutable from a purchaser’s point of view once he has taken a decision in favour of a particular engine technology (system decision). The demand market doctrine stipulates that the definition of the competitively relevant markets depends on whether products are substitutable from a purchaser’s point of view (in that case the products in question belong to the same market) or not (in that case more than one market is affected). Although all petrol stations supply both petrol and diesel, the conditions of competition are not necessarily the same for petrol and diesel and the product range argument does not apply here to substantiate that there is a uniform sales market.

The diagram below illustrates that there has been a significant difference between the development of petrol and diesel prices at petrol stations, at least at times. The diagram shows the difference between the prices for petrol and diesel in 2007 and 2008. Although this difference is almost always positive, i.e. petrol is sold at a higher price than diesel, the amount of the difference varies. At the beginning of 2007, the difference was approximately 15 cents per litre, increasing to more than 25 in summer 2007. From summer 2007 to summer 2008, this difference fell gradually to approximately 0 cents per litre. In the second half of 2008, the price difference fluctuated from between 0 cents and approximately 10 cents per litre. This development may be explained partly by the fact that there is usually greater demand for middle distillates (heating oil, diesel) in winter than in summer, while the demand for petrol is higher in summer than in winter.

![Diagram showing price difference between petrol and diesel](image-url)
The product range argument is equally inappropriate for supporting the assumption of a uniform market for the sale of petrol and diesel as it is based on the presumption that consumers demand not just one but a number of products from the range on offer. The attractiveness of a range thus grows with its breadth. These considerations play no role in the retail sales of fuel, however, as a consumer will always demand either petrol or diesel, but never both products at the same time on account of his initial decision in favour of one system. For this reason, the attractiveness of the product range in the fuel trade does not increase with its breadth. For a purchaser of petrol it is irrelevant whether diesel is also available at a particular petrol station alongside the petrol he requires.

Geographically, too, consumers' real alternatives are decisive for assessing competition under the demand substitutability principle. It must (still) be economically reasonable for them to purchase the products concerned in the area concerned. Accordingly, petrol station fuel markets are to be defined geographically as at least being no larger than Germany. In the Bundeskartellamt’s view, however, the actual demand behaviour indicates a regional market definition. Demand behaviour can be approximated in terms of distance or accessibility in minutes by car. Defining regional markets by distance conforms to recognised practice (cf. Federal Court of Justice, Wirtschaft und Wettbewerb/E DE-R 1301, 1304 „Sanacorp/ANZAG“; Düsseldorf Higher Regional Court, Wirtschaft und Wettbewerb/E DE-R 1625-1631 „GfK Köthen“). The point of reference has to be an overall economic assessment of the actual market situation based on the demand side of the market and thus ultimately on the geographic substitution possibilities available to purchasers with regard to the economic good concerned.

The oil companies generally favour a nationwide market definition. They substantiate such a broad geographic market definition by saying that there is no major regional difference between the conditions of competition and that consumers' purchasing behaviour is homogenous. Moreover, they claim, that there is a so-called collective reaction in the petrol station sector: A price impulse is transmitted to neighbouring petrol stations, thus spreading across the whole of Germany. In the view of the Bundeskartellamt, however, the arguments concerning the demand side prevail. According to general experience, it is appropriate to define the markets for fuel sales to
final customers as regional, since experience suggests that petrol station customers meet their fuel needs in a variable radius around their place of work or residence (concerning the abuse provision of Section 20 (4) second sentence ARC, cf. the Düsseldorf Higher Regional Court, Wirtschaft und Wettbewerb/E DE-R 589-600 Freie Tankstellen [Independent Petrol Stations]).

It is difficult to define the areas in which it is (still) economically reasonable for motorists to drive to alternative petrol stations. It was not appropriate to carry out traffic surveys of customers at the relevant petrol stations with regard to their location-specific demand behaviour. Also, the sale of fuel at petrol stations, a high-volume everyday business, is largely anonymous, and thus petrol station companies cannot provide information easily on where their customers come from or on the distance they have travelled to the petrol station. In the “Shell/HPV“ and the “Total/OMV“ proceedings, the Bundeskartellamt applied the so-called accessibility model, which was developed for land planning purposes by the Federal Office for Building and Regional Planning (Bundesamt für Bauwesen und Raumordnung (BBR)).

The accessibility model can help to ascertain which other petrol stations can be reached from a particular target petrol station within certain driving times, based on the actual situation in the local road infrastructure. Starting from each of the petrol stations affected by the concentration, the Bundeskartellamt asked the BBR to use this method to ascertain which petrol stations could be reached within a certain travel time in each case. This makes it possible to show which alternative petrol stations a motorist can actually reach by car within certain travel times from each of the petrol stations affected by the concentration.

The merger cases “Shell/HPV“ and “Total/OMV“ both have the characteristic that they concern petrol stations in regions of low population and infrastructure density on the one hand (rural areas), and petrol stations in areas of high population and infrastructure density on the other (urban areas). In rural areas, the Bundeskartellamt considers a maximum journey time of 60 minutes to be acceptable and defines the rural markets around the petrol stations concerned accordingly. A journey time of max. 30 minutes, on the other hand, seems to be appropriate for petrol stations in urban areas. This already corresponds to a very wide market definition in such densely populated areas.

In the “Total/OMV“ case the Bundeskartellamt further developed the accessibility model with the objective of defining the geographic market as accurately as possible
in accordance with the regional market conditions and the alternatives that actually exist for motorists. However, the demand side does not see all petrol stations within a geographic market as equal alternatives. Even within an accessibility area with a maximum travel time of 30 or 60 minutes, a motorist will - ceteris paribus - tend to choose a closer rather than a more distant alternative. Also, where there are price differences between petrol stations, a motorist will purchase fuel at a more expensive petrol station if the costs (actual travel expenses and opportunity cost of time) required to reach a cheaper petrol station are higher than the price difference. Therefore, the Bundeskartellamt decided to weight the individual petrol stations within a geographic market comprising all the petrol stations that can be reached within 30 or 60 minutes on the basis of their distance to the centre of the geographic market. This enables the different intensity of competition emanating from petrol stations to be represented, depending on their distance from the centre of the market. In calculating market shares, the sales data of petrol stations in urban areas that can be reached from the centre of the geographic market within five minutes are multiplied by a factor of 4, of petrol stations between five and ten minutes away by a factor of 3, of petrol stations between ten and 20 minutes away by a factor of 2 and of petrol stations between 20 and 30 minutes away by a factor of 1. Petrol stations in rural areas are weighted in an analogous manner.

3.2 Competitive analysis of the wholesale trade industry

3.2.1 The special role of refineries for production and wholesale trade

For several reasons, the refineries play a key competitive role within the fuel sector. Firstly, the refineries constitute a link between refined product markets and prices for crude oil. The trade with different types of oil products, such as diesel and petrol, constitutes separate markets that have to be distinguished from the market for crude oil. Consequently, the price of a product only reflects demand for and supply of the product in question. Crude oil, however, is a key element for the production of diesel and petrol, which is why the price for crude oil is not only influenced by supply and demand for crude oil. The price for crude oil is also affected by the strength of demand for the individual products and by the price the refineries can achieve for these products (derived demand). If refineries are able to achieve high prices for fuels due to a strong demand from customers, they will also be willing to buy crude oil at a higher price.
Secondly, refineries have a competitive advantage in the wholesale trade due to their ability to produce crude oil themselves. Both refineries and independent traders can purchase oil products on the spot market. As a consequence, integrated oil companies cannot demand a price that is higher than the spot market price when supplying the wholesale trade, or else their customers would satisfy their demands on the spot market. If the integrated oil companies supply their petrol stations, independent petrol stations and independent suppliers alike at spot market prices, and if all petrol station operators incur basically the same costs for transport, staff, etc., the profit margins of petrol stations will differ only slightly. If the spot market price increases, however, the refineries could supply their petrol stations at a price below the spot market price, while the independent competitors would have to buy oil products at the spot market price. Nevertheless, for two reasons this situation is likely to last only for a limited period of time. If the oil price rise is the result of a short-term market shock (e.g. due to capacity constraints owing to production losses) the spot price will soon fall back to its former level. If the market shock is longer term, higher crude oil prices are very likely to result, with a certain delay, in higher production costs for the refineries, which means that internal transfer prices can be expected to rise as well. In order to prove such a price discrimination, one would therefore have to ascertain the prices for internal supplies of oil products and compare them with spot market data.

Thirdly, the refineries determine the level of product supply. Just as is the case with high demand, limited supply can also result in higher wholesale prices. Limited supply could theoretically be explained by insufficient production capacities of the refineries. The European Commission challenges the practical relevance of this assumption, arguing that the refineries would incur economic losses from combined production. In its Medium-Term Oil Market Report of July 2008, however, the International Energy Agency (IEA) claims that the coincidence of both effects, i.e. strong demand and limited capacities, coupled with a change in product specifications have been the cause for rising crude oil prices since 2004.

Fourthly, in a multi-levelled business sector, integrated companies can in principle generate a higher margin at a level with weak competition than at a level with a larger number of competitors. Since the integrated oil companies hold, at least regionally, a quasi-monopolistic position at the refinery level, they are able to generate higher margins at this level than at the retail level. This conclusion coincides with statements in the trade press, according to which the profit margin in the fuel sector is
generated at the refinery level. This impression was confirmed in many talks the Bundeskartellamt had with independent petrol station operators and their associations, in which the low profit ranges of patrol stations was always stressed, and by the results of the Bundeskartellamt's own investigations.

3.2.2 Development and planning of production capacity

Capacity data of refineries in Germany, published by the Association of the German Petroleum Industry (*Mineralölwirtschaftsverband*), show that refinery capacity in Germany has slightly increased over the past ten years. While in 1999 refinery capacity amounted to around 111 million tonnes, in 2007 this number had increased to approx. 119 million tonnes. This increase in capacity is not, however, the result of market entries of new refineries, but of changes in the capacities of existing refineries.

The Bundeskartellamt has questioned the refineries to clarify the reasons for these changes in capacity. The survey showed that no oil company is planning to develop new refinery capacity in Germany. According to the oil companies, a capacity build-up by companies that do not operate a refinery in Germany is just as unlikely, since there are excess capacities in Germany, the necessary investments are too high and demand for oil products in Germany is declining. Nevertheless, some oil companies reported on implemented or planned changes in production capacity that did not result in a change of the overall capacity. For example, the production capacity for diesel and petrol (super) was increased, while capacity for light heating oil and petrol (normal) was reduced. Capacity changes are also planned for the future to improve product quality. For instance, adjustments for a blending of bio-components with fuels are being made and facilities to increase the desulphurization capacity are being built or in preparation. According to the companies, this may lead to minor changes in the production capacities of particular products to the detriment of other products.

The survey of the refineries shows that they pay heed to general trends in the market. The realised investments and capacity changes, for example, reflect the increased demand for low-sulphur crude oil, the changed structure of consumer demand and the legal requirements for bio fuels. It is yet to be determined whether supply in Germany has already been sufficiently adjusted to the changed structure of consumer demand. How far the extent and point of time of the capacity changes can
be explained by economic and strategic considerations would have to be investigated in detail in the subsequent survey.

Refineries not only have to decide on long-term investment but also continuously plan on how to use their production capacities. The refineries participating in the survey indicated a planning period for production adaptations of between one week and one month. The length of a planning phase ultimately depends on the quality of the crude oil purchased, the source of supply, the conditions of crude oil transport via tanker and/or pipeline and the storage capacity available. For the refineries, production planning also involves, where technically possible, a decision on the type of products manufactured. The decision on what products are to be selected for manufacture is based on criteria such as, in particular, the market price of the products and crude oil, related costs, the actual availability of crude oil, transport costs and constraints, other variable costs, technical and physical limitations of the refinery, facility availability and storage capacity, as well as possible logistic restrictions for raw materials and products.

3.2.3 Interdependencies in the wholesale trade

The integrated petrol station companies have been using a fuel exchange system for a long time. This involves reciprocal (framework) purchase agreements on the regional exchange of fuel from the refinery or storage facility. In legal terms, these are bilateral wholesale agreements on the reciprocal purchase and sale of fuels to avoid transporting fuel over long distances. Accordingly, a refinery in northern Germany would agree with a refinery in southern Germany on the reciprocal purchase and sale of fuels at both locations. The respective agreements are concluded for a calendar year and renegotiated at the end of each year. These agreements also concern the fuels stored jointly by exchange partners. Even if only one petrol station company has concluded an agreement with the relevant tank farm operator, the latter also supplies this company's exchange partner upon the instruction of its contractual partner and holds a supply of its additives. Since fuel prices fluctuate noticeably within a year or even within weeks or days, in the annual fuel exchange agreements the exchange partners agree on a price formula for fuel exchanges that is based on independent data from the market information provider Platts for the respective regional market area, plus a surcharge for logistical expenses.
The oil companies who participated in the survey have stated that they used the exchange contracts to an extent ranging from appreciable to sometimes very significant. In the Bundeskartellamt’s view, the system of fuel exchange agreements has an impact on market structures. On the one hand, the system facilitates blanket coverage by the leading suppliers, and on the other hand it further increases the market transparency on the supply side, which is high in any case, and also leads to oil companies entering into a reciprocal regional dependence on one another on the procurement side.

3.3 Competitive analysis in the retail sector

3.3.1 Dominant oligopoly at petrol stations

A dominant position by a number of undertakings exists according to Section 19 (2) second sentence ARC when firstly no substantial competition exists between the oligopolists (internal competition) and secondly the oligopolists have a paramount market position in relation to their competitors and are not exposed to any substantial competition. Joint market dominance does not necessarily mean that the oligopoly members collude by agreeing on their fuel prices or otherwise concluding anticompetitive agreements. Rather, a joint dominant position can also lie in the fact that the oligopoly members are tacitly essentially satisfied with the market shares they have reached, without there being any effective internal competition between them anymore and without any external competition or the demand side threatening the success of such limited competitive conduct on the part of the oligopolists. According to the economic aspects outlined in this respect by the Court of First Instance of the European Communities in the “Airtours” judgment (judgment of 6 June 2002, file No T-342/99), the affected market must firstly be so transparent that the oligopolists can sufficiently recognise whether their tacit coordination is being maintained. Secondly, there must be a kind of deterrent mechanism against deviations from the joint approach for reasons of discipline. Thirdly, the reactions of companies not taking part in the coordination, such as current or potential competitors, or the reactions of customers should not call into question the likely effect of the coordination.

The Bundeskartellamt has applied the examination concept presented above to establish the existence of joint dominance in a number of decisions. Most recently, the Federal Court of Justice explicitly confirmed this application practice in its decision.
“E.ON/Stadtwerke Eschwege” (cf Federal Court of Justice, decision of 11 November 2008, file No KVR 60/07).

According to this decision, the features determining the market structure are of special significance within the context of the necessary overall assessment.

All in all it should be examined whether the market structure provides an incentive not to deviate from the joint approach and whether long-term uniform conduct by the oligopolists is therefore likely. Key indicators in this case are market transparency and a deterrent mechanism against deviations from joint conduct.

The framework conditions existing in the oil sector favour oligopolist tendencies. The integrated oil companies trade with homogeneous goods in transparent markets with a shrinking overall demand. As a result, there is comparatively little scope for applying competitive parameters in the markets for fuel sales through petrol stations. At the same time, whether and to what extent a company has competitive influence in upstream procurement markets is increasingly significant for entrepreneurial success.

The Bundeskartellamt considers the companies BP/Aral, ConocoPhillips/Jet, ExxonMobil/Esso, Shell and Total as joint dominant undertakings in fuel retailing through petrol stations. The dominant undertakings are all oil companies that are integrated across all levels of the oil sector. Thus, they operate not only in retailing, but also in the procurement markets - both in the wholesale trade and in production – as well as in the transport sector. Particularly in these upstream markets, there are structural features that have a significantly restraining effect on internal and external competition in general and thus also on the final consumer markets of interest here, on the one hand in opening up great retaliatory potential and on the other hand in creating a paramount market position of the dominant companies.

3.3.1.1 Market shares

Fuel suppliers in Germany cannot increase their market shares by participating in a growing market, but only by enticing customers from their competitors or through external growth. This is because domestic fuel sales through petrol stations are stagnating in spite of an increasing number of motor vehicle registrations. In 2008, fuel sales amounted to some 20.6 million tonnes of petrol and some 30.1 million tonnes of diesel. While petrol sales declined by 3.4% on the previous year, diesel sales increased by 3.4% (cf Schiffer, Deutscher Energiemarkt 2008, in: Energiewirtschaftliche Tagesfragen 59, 2009). By 2025, the oil sector expects fuel sales to decrease
by 25% and petrol sales by as much as 40%. The reasons for the falling demand are
generally believed to be changed driving habits in connection with a general increase
in the fuel price level as well as technical innovations in the automotive industry and
the resulting greater efficiency of combustion engines. However, near the German
borders, factors such as so-called fuel-tank tourism may play a role, with motorists
benefiting from comparatively low fuel taxation by filling up their vehicles in
neighbouring countries.
As already explained under para. 2.1.2.4, the leading suppliers of fuel through petrol
stations operating in Germany are international groups of companies such as
BP/Aral, Shell, ExxonMobil/Esso, Conoco-Phillips, Total among others. The market
share development in fuel sales through petrol stations during the period 2007 to
2009 shows that with shares of 72% to 73% in the nationwide market, and effectively
also in a number of regional markets, Shell, together with BP/Aral, ConocoPhil-

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The oligopoly members have maintained a consistently large market share of fuel sales through petrol stations, with a joint total of more than 70%. In view of this, it should not be overlooked that large market shares, especially when they remain unchallenged over a number of years, as is the case here, are a particularly clear and significant indication under competition law that the oligopoly members’ scope for action is no longer sufficiently controlled by competition. This is because the unchallenged existence of a large market share over a number of years suggests that other possibly opposing factors are of no major significance.

### 3.3.1.2 Market transparency

The market for the sale of fuels through petrol stations is not only extremely concentrated on the supply side; it is also considered to be very transparent. On account of the concentration, this transparency is of particular benefit to the integrated oil suppliers.

According to Section 8 of the Price Indication Ordinance (Preisangabenverordnung), the prices of fuel at petrol stations are to be indicated such that they are clearly legible to motorists approaching from the road. However, transparency in the petrol station fuel market is extremely asymmetrical, even though the display on so-called monolith signs enables both motorists and competitors to find out the prices currently being charged at a particular petrol station, which are de facto not individually negotiable. This is because this only gives individual motorists a first impression, but not an overview of the prices of alternative petrol stations he can reach economically and within a reasonable time. To obtain this information, motorists would generally have to expend considerable effort, either in terms of time and fuel costs in driving to all the possible petrol stations or in terms of internet research. However, price quotations on the internet make no claim to being either up to date or complete and cannot be obtained automatically or evaluated using navigation systems. Some oil companies and other bodies (e.g. automobile associations) provide some petrol station
prices on the internet, but prevent them from being searched automatically by motorists or third parties. The major suppliers obtain a constantly updated survey of their competitors' price quotations, however. According to information from the integrated oil companies, their petrol station staff collect this data several times each day and feed it decentrally into data processing systems. The electronic aggregation and evaluation of these data give companies an edge on information, enhanced by the use of other sources (sector information systems, production data and wholesale price quotations).

3.3.1.3 **Product homogeneity and price elasticity**

Both petrol and diesel have a high level of product homogeneity. Apart from differences in the additives which the oil companies mix with the fuels after refinement in order to give the fuel certain qualities, the fuels supplied at petrol stations are identical.

A high level of product homogeneity generally implies that price is regarded as playing an important or very important competitive role in the petrol station business. The petrol station companies surveyed indicated that they consider the price to play an important or very important role in competition in the petrol station sector. The companies substantiated this by stating that there was high level of price sensibility on the part of the consumer. All the suppliers are aware of the price sensibility of customers and consumer behaviour is therefore predictable to a certain extent. In this connection it is noteworthy that the oil companies do not advertise their fuels by reference to price although they themselves state that price is an important competitive parameter. Rather, marketing has always been based mainly on supposed or actual quality features. Only ConocoPhillips advertises explicitly that it generally sells its fuels at its Jet petrol stations more cheaply than other brand-name companies. In addition, suppliers attempt to win motorists' loyalty through special programmes, including discount and bonus schemes as well as loyalty cards.

The price elasticity of demand is generally assessed by experts as being very low. As a consequence, changes in the price of fuels generally do not result in significant changes in customer behaviour. This is at least true in the short-term perspective of the customer, i.e. when the decision for a vehicle with a particular engine technology has been taken which requires specific petrol or diesel fuels (cf. Erdmann/Zweifel, Energieökonomik, 2008, p. 103 ff.). Empirical studies can confirm this assessment, at

3.3.1.4 Frequency of interaction
The economic activity of the petrol station operators is greatly influenced by the behaviour of the other petrol station operations on the relevant market. This manifests itself in price decisions and changes and also the fact that the operators continuously observe the price situation at other petrol stations.

On account of the frequent interaction and high level of transparency, price-setting patterns have developed in the course of time, which are regularly implemented by petrol station operators. These price-setting patterns have emerged both on a weekly basis (particularly with high prices on Fridays and falling prices on Saturdays) and on a seasonal basis (higher prices at the beginning of the holiday period or before public holidays) and are used by petrol station companies accordingly, without the need for coordination on prices or similarly anti-competitive measures.

These price-setting patterns are not evidence of lively competition on price, but are rather an expression of largely uniform price-setting conduct, at least of the oligopoly suppliers. The Bundeskartellamt does not share the view here that the fuel retail trade is determined wholly by international crude oil and product markets. Wholesale price listings for crude oil and products in spot markets, e.g. in Rotterdam, by no means indicate that there is no longer any scope for competition on retail price. That would require suppliers operating at the retail level to have completely identical costs and margins.

3.3.1.5 Product innovations
Within the context of the Shell/HPV concentration, the integrated petrol station companies were polled on the significance of product innovations. The petrol station companies assessed innovation as having a subordinate role in relation to price. Thus, the competitive impact of product innovation in the fuel market is to be regarded as small. This is because on the one hand, the investigations showed that an oil company's premium products are quickly imitated by other oil companies. On the other hand, the sale of premium products is negligibly small in comparison with total
fuel sales and bears no relationship to the role which the suppliers' marketing strategy suggests it has.

3.3.1.6  Interlocks
The leading oil companies are interlocked to a certain extent under company law, with joint refineries, pipelines and tank farms. Third parties have no access to the jointly maintained production and pipeline capacities. Moreover, the integrated petrol station companies have been practising a system of fuel exchange agreements for a long time.

The Bundeskartellamt views the corporate and contractual interlocks in production, storage and logistics as providing the companies involved with an information and competitive advantage, raising the already high degree of market transparency on the supplier side and providing credible means for competitive retaliatory measures within the oligopoly in the market for the sale of petrol and diesel through petrol stations. This could, for example, jeopardise or even disrupt the hitherto smooth cooperation on the logistics side.

Thus, the contractual interdependencies of exchange relationships also constitute a credible sanctioning mechanism against deviations in the relationship among the oligopoly suppliers. In the context of exchange contracts concluded on an annual basis, for example, only limited quantities are available for regional competitive thrusts. The hitherto smooth cooperation in the reciprocal supply of fuels, too, could be called into question or disrupted. Quantitative limits or pricing not based on quotations in international wholesale fuel markets, currently the usual practice, are conceivable in this context.

3.3.1.7  Fragmentation of competition
As already presented above, the market shares of the other suppliers which are not regarded as being part of the oligopoly were in the low, and predominantly very low, single digits in all the relevant markets in the period from 2006 to 2008. It is to be taken into account here that the products supplied by the members of the Bundesverband freier Tankstellen e.V., which present themselves under the uniform "bft" brand, as well as by the trademark and purchasing syndicates AVIA and UNITI, which represent small and medium-sized companies, have a large number of petrol station suppliers that only operate locally or regionally and that are only represented
collectively in the sales statistics. The independent petrol stations are not backed by one single entrepreneur. The great majority of independent petrol station operators are also dependent on supplies from the integrated oil companies. It is therefore unlikely that this very fragmented group of external competitors could effectively limit the oligopoly suppliers' scope for action, either individually or jointly. This assessment is further supported by the fact that subsidiaries of international oil companies which have a high level of competence and large market shares in the petrol station sector in their home markets are among the suppliers with small or negligible market shares. These include Agip, which belongs to the Italian ENI Group, the Austrian company OMV and the Polish company PKN Orlen. These latter two undertakings have only succeeded since approximately 2003 in entering focal regional markets through the purchase of petrol stations in northern and eastern Germany (in the case of PKN Orlen) or in southern and eastern Germany (OMV) in the context of the implementation of commitments in the Shell/DEA and BP/E.ON (Aral) merger control proceedings. The Polish company Orlen purchased some 500 petrol stations and the Austrian company OMV some 280 petrol station from BP/Veba Oel. This shows that even efficient suppliers in the German petrol station markets cannot easily eliminate or even significantly reduce the market share advantages of established companies.

3.3.1.8 No effective buyer power
The scope opened up to the oligopoly suppliers in the petrol station sector is also not effectively limited by countervailing buyer power. The prerequisite for such a counterweight would be strong buyers who distribute their purchases in the market according to strategic considerations, possibly to a number of suppliers, so as not to become dependent on a group of (dominant) suppliers (cf Federal Court of Justice, Wirtschaft und Wettbewerb/E 1749, 1752 Klöckner-Becorit). The millions of individual motorists, representing extreme fragmentation on the demand side of the petrol station fuel markets, clearly do not fulfil these prerequisites.

3.3.1.9 Barriers to market entry
On the basis of its experience in merger control the Bundeskartellamt regards the availability of a suitable petrol station location and corresponding financial power as essential requirements for market entry. To make a larger market entry it is also necessary for a newcomer to be able to build up and advertise a petrol station network.
The difficulty lies firstly in establishing the necessary logistics for operating a petrol station network and securing supplies of the oil products to be sold there. However, the small margins in petrol station business would suggest that it is strategic rather than economic reasons which motivate companies to enter the petrol station business. For this reason the Bundeskartellamt does not expect the emergence of a competition counterweight to the members of the oligopoly in the near future in the form of new market entries. This is also reflected in the submissions of the integrated oil companies polled in the Shell/HPV merger proceedings on their assessment of new market entries. Market entries are considered possible but it remains to be seen what significance the new market participant would have as a competitor in the market. However, according to the results of the investigations, the emergence of a counterweight to the members of the oligopoly or a market player which can match the market leaders is unlikely.

3.3.1.10 Effects of the structural conditions on the competitive situation

According to the Bundeskartellamt's assessment, the structural conditions in the petrol station markets have a direct effect on the competitive situation in this market with the effect that the oligopolists jointly hold a paramount market position and are not exposed to any substantial competition. They are therefore jointly able to proceed uniformly in the German petrol station fuel markets to a considerable extent, regardless of their competitors, customers and consumers.

According to industrial economics, the structural conditions presented above facilitate implicit coordination by the oligopolists (for a detailed description, cf for example, Ivaldi/Jullien/Rey/Seabright/Tirole, The Economics of Tacit Collusion, 2003, and Motta, Competition Policy, 2004). In detail, implicit coordination can be achieved all the more easily if

- the market is transparent enough to be able to observe deviations from the implicit coordination,
- the products are sufficiently homogeneous to raise the market's transparency,
- the products have a low level of price elasticity,
- the companies often interact with one another and thus, sanctioning mechanisms can quickly be used,
- product innovations have little role to play,
the companies are interlocked and mutually dependent, leading to the disciplining of oligopolists

The structural conditions of high concentration in the petrol station markets, the homogeneity of the products, the interlocking of companies and the mutual dependencies mean that there is no substantial competition between the oligopolists (internal competition). The fragmentation of the competition and the ineffective demand side of the market imply that the oligopolists hold a paramount market position vis-à-vis competitors and are not exposed to any substantial competition. The economic aspects summarised in the relevant case law are also fulfilled in the petrol station markets concerned. The level of market transparency and particularly the level of price transparency are so high that the oligopolists can sufficiently recognise adherence to their tacit coordination. Secondly, there is the possibility of a sanctioning mechanism against deviations from the common approach in order to ensure discipline. Thirdly, the reactions of companies not taking part in the coordination, such as current or potential competitors, or the reactions of customers should not call into question the likely effect of the coordination.

3.3.1.11 Consequences of market dominance

According to Section 36 ARC, mergers which are expected to create or strengthen a dominant position can be prohibited by the Bundeskartellamt. As a consequence mergers of the five jointly dominant oil companies with one another are not possible from a competition point of view. The acquisition of petrol stations, which do not belong to the dominant oligopoly, can be problematic for the dominant oil companies under competition law because the Bundeskartellamt intensively examines such mergers in the markets affected. For this reason the Bundeskartellamt has prohibited Total Deutschland GmbH from taking over the east German petrol station network of OMV Deutschland GmbH. The acquisition of fewer or comparatively smaller petrol stations remains the only option open to dominant companies and only as far as this results in marginal growth. Consequently the Shell/Honsel merger (file no. B8-31/09) could be cleared because the acquisition of a single petrol station by Shell only insignificantly strengthens the oligopoly's dominant position. The Shell/LOMO merger project (file no. B8-32/09) could only be cleared subject to the condition that the largest petrol station to be acquired as part of the merger project was not sold to Shell.
3.3.2 Exchange of information between petrol station operators

As already explained above, market transparency among the oil companies is very high because the petrol station operators are generally contractually bound to notify their oil company of the prices charged by competitor petrol stations in the immediate vicinity. This then bases its own price strategy on the collected price information. The way in which the petrol station operators obtain price information from competitors, however, is not stipulated in their contracts with the oil companies. The operator can read competitors’ prices directly from the displays on monolith signs at competitors’ petrol stations. He can also look for price information, where available, in the internet.

However, direct contact between two petrol station operators in which competition relevant information is exchanged, is problematic under competition law. The Bundeskartellamt has been informed that occasionally petrol station operators comply with their obligation to notify price information about rival petrol stations by exchanging current price information with the operators of the stations over the telephone. In one specific case the Bundeskartellamt followed up this lead and examined the allegation of the exchange of information by unannounced inspection in accordance with Section 59 ARC. During the inspection evidence was found that at least three petrol stations which stand in competition with one another, exchanged information on prices several times a day over the telephone. Individual cases of this have also been detected within the area of competence of some of the competition authorities of the Länder.

Market information systems such as these do not constitute a price agreement per se. However, they do raise transparency on the prices of the competitors in a way that, given the special conditions of fuel sales at petrol stations, can constitute a violation of the ban on cartels under Section 1 ARC, since by exchanging competition-relevant information the petrol station operators participating in the market information system aim at or at least cause a restraint or distortion of competition.

The Bundeskartellamt assumes that the case of information exchange revealed in the inspection is not an isolated one. Rather, it is likely that the exchange of price information and other competition-relevant information at the petrol station operator level occurs in other regions as well. However, it is difficult to estimate how many petrol station operators are involved in the local exchange of information and whether the oil companies are aware of this or support such market information systems. The
Bundeskartellamt will therefore take appropriate steps against all the integrated oil companies to prevent such information exchange between petrol station operators in future.

### 3.3.3 Sales below cost price

In 2000 the Bundeskartellamt prohibited several integrated oil companies from demanding higher prices (plus a freight surcharge) for supplies to independent petrol station operators than they charged end consumers at their own petrol stations. The proceedings were preceded by numerous complaints from small and medium-sized petrol station operators and associations throughout Germany. The integrated oil companies were suspected of opening up a price gap and charging higher ex-refinery sales prices to small and medium-sized petrol station operators than they did to final customers at their own petrol stations and thus of unfairly hindering independent petrol station operators. In contrast to the vertically-integrated oil companies, the small and medium-sized firms have no access to the crude oil market nor to the financial resources to cushion any possible losses on the fuel market. However, the Düsseldorf Higher Regional Court criticised key points of the Bundeskartellamt’s prohibition decision at that time and revoked the decision (decision of 13.11.2000 = WuW/E DE-R 589).

In the meantime the legal basis for taking up cases of sales below cost price in Section 20 (4) ARC has been amended. The Bundeskartellamt has also received a large number of complaints from independent petrol stations that they have been unfairly hindered in certain regions by sales below cost price on the part of integrated oil companies. Both of these factors have prompted the Bundeskartellamt to in future examine with a modified approach whether these complaints warrant the initiation of proceedings. It is now accessing data banks documenting refinery prices on a daily basis and asking the companies concerned about their relevant sales prices.

### 3.3.4 Agency agreements

The market surveys in the various merger proceedings have revealed that a number of independent petrol stations have concluded brand partnership or agency agreements with oil companies and (at least to some extent) sell fuel on behalf of the respective company and/or on its account. It is frequently not even evident to motorists that a petrol station is an independent petrol station, as the petrol station displays the name of the oil company and not “Independent Petrol Station”. Market investigations
have also shown that some petrol stations presenting themselves to the outside as independent petrol stations (e.g. supermarket petrol stations) are in fact subsidiaries of major oil companies. For this reason in calculating the market shares the Bundeskartellamt bases its attribution of sales figures on the criterion of who was responsible for setting prices, i.e. it is not decisive which brand name is displayed in a petrol station’s external presentation but rather who determines the fuel price of the petrol station concerned.

However, it is currently unclear to what extent the oil companies make use of brand partnership or agency agreements. Recently oil companies, in some cases to a significant degree, have concluded such agreements and in this way have been able to increase their market presence. The Bundeskartellamt has obtained model contracts from all the relevant oil companies and shall examine their effects on competition as part of the sector inquiry. A key focus of the examination will be under what circumstances brand partnership or agency agreements can be subject to merger control or whether the provisions of Section 1 ARC or Article 81 EC are applicable.

### 3.3.5 Motorway petrol stations

In the course of the sector inquiry, Autobahn Tank & Rast GmbH (Tank & Rast), a successor of the originally government-owned service facilities company GfN, stated that it planned to restructure the decade-long system of issuing licences for the supply of fuel to petrol stations on the German motorways. The system had hitherto been structured in such a way that licences for the supply of fuel to the motorway petrol stations had generally been awarded according to each oil company’s market share in the petrol station business. The reason for the introduction of the quota system was that until the early 1960s small and medium-sized petrol station operators had often complained that they were being hindered in their access to the motorway petrol station business. Since Tank & Rast in its present form has always had a dominant position in the award of supply licences, it is obliged to award such licences in a non-discriminatory manner (see Bundeskartellamt, Tätigkeitsbericht 1967, BT-Drucks. V/2841,S. 38.). To accompany this award mechanism the motorway petrol stations have set up a working group in which the major oil companies and the associations of the small and medium-sized oil companies are represented. On the basis of individual reports from the petrol station operators the chair of the working group examines Tank & Rast’s quota allocation figures for their plausibility and calculates
the volumetric excess and short supplies per oil company. On the basis of this calculation he holds bilateral talks with the oil companies and associations with a view to the reallocation of licences for the supply of motorway petrol stations and submits proposals to Tank & Rast for the allocation of new supply licences. Moreover the working group addresses numerous technical and practical questions concerning the award of licences to supply motorway petrol stations.

Tank & Rast now plans to award these supply licences to the market participants in an auction procedure starting in 2013. The Bundeskartellamt has emphasized to the industry that any plans by Tank & Rast to change its award criteria need not be to the detriment of market participants because as a dominant company, Tank & Rast may not violate the prohibition of discrimination under competition law. The quota-based allocation of supply licences hitherto in place runs the risk of establishing supply areas and foreclosing the business segment concerned to fuel suppliers which are not already or do not wish to be represented in the petrol station business. The Bundeskartellamt does not need to examine this aspect more closely because supply licences will be allocated differently in future.

The Bundeskartellamt and Tank & Rast agree that any changes to the award procedures also have to satisfy the requirements of the prohibition of discrimination under competition law. Accordingly, the Bundeskartellamt will give the companies and associations involved an opportunity to comment on this aspect. Representatives of the small and medium-sized oil companies have already made use of this opportunity and have contributed not only critical but also constructive comments. There will also be the possibility to discuss further questions in the envisaged consultation process, e.g. the extent to which small and medium-sized petrol station operators can cooperate with one another or form bidding syndicates or how to deal with e.g. fleet card contracts.

4 Further course of action in the sector inquiry

In the first section of the sector inquiry the Bundeskartellamt primarily examined market structures in the fuel industry. In the next section the Bundeskartellamt plans to analyse in detail the following competition-relevant aspects:

- The significance of agency and brand partnership agreements. The Bundeskartellamt is particularly interested to know to what extent the oil companies make use
of these agreements and what commercial calculation lies behind these agreements. Based on the knowledge obtained by surveying the oil companies the Bundeskartellamt hopes to classify agency and brand partnership agreements under competition law.

- Above all, independent petrol station operators argue that fuel and service card systems, in particular those by which cards are issued to commercial drivers by the oil companies, have structural effects. With these "fleet cards" drivers can pay at a petrol station by monthly account, enabling e.g. haulage companies to pay for and book fuel costs centrally instead of equipping truck drivers with cash or a credit card. Fleet cards are usually accepted not only by the oil company which has issued the card but also by other companies which have joined existing systems. However, it is unclear whether discounts granted by the oil company issuing the fleet card at its own petrol stations are also granted by petrol stations which, although they do not belong to the company, participate in the card system. In order to answer this question and to assess whether fleet card systems create barriers to market entry and whether other aspects of the systems can be regarded as problematic under competition law, the Bundeskartellamt is to conduct further investigations.

- An area of focus of the next section of the sector inquiry will be the elaboration of econometric studies on fuel prices. Using a model-based approach the Bundeskartellamt plans to examine what factors influence the price of fuel at the petrol station and how these factors alter over a period of time. It also plans to examine whether a rise in the price of primary products is passed on to motorists more quickly than a fall in the price of primary products. Another aspect which is to be examined more thoroughly is what influence the presence of independent petrol stations or supermarket petrol stations has on the level of fuel prices.

- The role of the wholesale sector is a further area of focus, which is to be analysed in more detail in the next section of the sector inquiry. A key question in this connection is what profit margins are realized at the upper end of the value-added chain and what scope of action the refineries have in this.

- Furthermore, the Bundeskartellamt reserves the right to deal in greater detail with further topics and, above all, to follow up indications by market participants of practices which raise concern from a competition law point of view.