

Unclassified

DAF/COMP/AR(2016)28

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

18-Nov-2016

English - Or. English

Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE

## ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- 2015 --

29-30 November 2016

*This report is submitted by Germany to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 November 2016.*

JT03405625

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/AR(2016)28  
Unclassified

English - Or. English

## TABLE OF CONTENTS

1. Executive Summary .....	3
1.1 Digital economy .....	3
1.2 Action against anticompetitive practices .....	3
1.3 Merger control .....	3
2. Changes to competition laws and policies .....	4
2.1 Government proposals for new legislation .....	4
2.2 Working Papers and Reports .....	4
3. Enforcement of competition laws and policies .....	5
3.1 Action against anticompetitive practices, including agreements and abuses of a dominant position .....	5
3.2 Mergers and acquisitions .....	12
3.3 Sector inquiries .....	15
4. Cooperation in international fora .....	15
4.1 International Competition Network (ICN) .....	15
4.2 ECN/ECA .....	15
4.3 Annual Meeting of the Working Group on Competition Law .....	16
5. Resources of the Bundeskartellamt .....	17
5.1 Annual budget .....	17
5.2 Number of employees .....	17
6. References to new reports and studies on competition policy issues .....	17

## ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- JULY 2015 - JUNE 2016 --

**1. Executive Summary****1.1 Digital economy**

1. New digital products and business models have created new challenges for competition policy and competition law enforcement. A current proposal for new legislation includes provisions that aim to address these challenges. In the period covered by this report the Bundeskartellamt was already able to make significant use of the "Internet Platforms Think Tank", an inhouse project group it had launched in the beginning of 2015. The Bundeskartellamt conducted, for example, a second phase merger proceeding to examine a merger between dating agency platforms and opened proceedings against Facebook. In the latter case the Bundeskartellamt is following up suspicions that by violating data protection rules Facebook is abusing its possibly dominant position in the market for social networks.

2. In June 2016 the Bundeskartellamt published a working paper which deals with the "Market Power of Platforms and Networks" in the Internet.<sup>1</sup> The report focuses on the factors relevant for assessing the market position of platforms and networks and on the specifics of antitrust enforcement in the digital economy. It complements a report on "Competition Law and Data" which the Bundeskartellamt published with the French Competition authority in May 2016.<sup>2</sup>

**1.2 Action against anticompetitive practices**

3. Cartel prosecution remained a key area for the Bundeskartellamt. Planned legislation includes a reform of the current provisions dealing with the liability of companies for administrative fines which will further enhance effectiveness. In the period covered by the report the Bundeskartellamt imposed several fines totalling approximately EUR 225 million. The proceedings concerned various sectors, such as e.g. automotive part manufacturers, mattress manufacturers, providers of container transport services and manufacturers of prefabricated garages.

4. In the period covered by this report the Bundeskartellamt closed several abuse of dominance proceedings in the energy sector as well as proceedings against Deutsche Post AG and Deutsche Bahn AG.

**1.3 Merger control**

5. For several years the number of notified mergers has remained stable. During 2015 the Bundeskartellamt decided on 1,169 merger control cases, 13 of which were decided after an in-depth examination, i.e. in the so-called second phase. One merger was prohibited (Edeka/Kaiser's Tengelmann<sup>3</sup>)

---

<sup>1</sup> The full report in German (<http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht.html?nn=3591568>), a summary in English (<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.html?nn=3591568>) as well as a brief presentation of its findings and recommendations for further action in English ([http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Kurzzusammenfassung\\_Englisch.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Kurzzusammenfassung_Englisch.html?nn=3591568)) can be found on the Bundeskartellamt's website.

<sup>2</sup> [www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591568).

<sup>3</sup> See also Annual Report on Competition Policy Developments in Germany 2014.

and another cleared only subject to conditions (car spare parts market - Wessels & Müller SE acquires Trost Auto Service Technik SE).

6. In March 2016, at the request of the companies in the Edeka/Kaiser's Tengelmann merger case, the German Federal Minister for Economic Affairs and Energy granted a ministerial authorisation based on the public interest grounds 'job preservation' and 'maintenance of workers rights'. Out of 22 cases so far it was the ninth ministerial authorisation granted since this instrument came into existence in 1973. The ministerial authorisation is an exceptional procedure in which the Federal Minister for Economic Affairs and Energy examines whether in a specific merger case the restraint of competition is outweighed by advantages to the economy as a whole or an overriding public interest. Other companies in the food retail sector (REWE, Norma and Markant) have appealed against the ministerial authorisation.

## **2. Changes to competition laws and policies**

### **2.1 *Government proposals for new legislation***

7. In September 2016 the Federal Cabinet adopted a proposal of the German Federal Ministry for Economic Affairs and Energy for the 9th amendment to the GWB which will implement the EU directive on antitrust damages, intends to close loopholes in the current system of liability for administrative fines and aims to adapt the current competition law regime to the increasing digitalization of markets.

8. The EU directive on antitrust damages, which has to be implemented into German law by the end of 2016, will entail some amendments to the current GWB. Since German competition law already corresponds to most specifications of the directive, the need for changes will be limited to some provisions only. For example, there is no need for an adjustment of German competition law with respect to one central element of the EU directive: the binding effect of final decisions of competition authorities on subsequent legal proceedings (damages actions). The current legal situation in Germany concerning the conditions for private compensation claims also already corresponds to the provisions of the EU directive. Mainly procedural rules need to be amended.

9. In the area of administrative fines the proposal intends to close loopholes in the current legislation that left opportunities for undertakings to escape fines by means of corporate restructuring, universal succession or economic succession. The proposal provides for the liability of the acting subsidiary and the decisively influencing parent by transposing the European concept of undertaking into the rules governing fines.

10. New digital products and business models have created new challenges for competition law enforcement. Many markets evolve much faster than in past decades. Especially online and databased business models could expedite market concentration. Thus, the proposal introduces a new transaction-value based threshold of EUR 400 million and clarifies that services provided free of charge can constitute a market for competition law purposes. Against the backdrop of declining sales and advertising revenues, the current proposal also contains an exemption from the prohibition of restrictive practices for non-content related co-operations between publishing houses.

## **2.2 *Working Papers and Reports***

### **2.2.1 *Working paper on "Market Power of Platforms and Networks"***

11. Published in June 2016 the working paper on "Market Power of Platforms and Networks" presents the first work results of the Bundeskartellamt's "Internet Platforms Think Tank". The report focuses in particular on market definition and the assessment of market power in the digital platform sector. It elaborates on existing literature and case practice, evaluates whether scientific concepts and

models are suitable for application in the Bundeskartellamt's case practice and illustrates relevant proceedings of the authority in this economic sector.

### 2.2.2 *Joint Competition Law and Data Report*

12. In May 2016 the French Autorité de la concurrence and the German Bundeskartellamt published a joint paper on data and its implications for competition law.<sup>4</sup> The paper analyses the implications and challenges for competition authorities resulting from data collection in the digital economy and other industries.

### 2.2.3 *Paper on how to uncover bid-rigging agreements*

13. In August 2015 the Bundeskartellamt published a paper on how to uncover bid-rigging agreements.<sup>5</sup> A checklist including typical indicators aims to help contracting entities recognise indications of possible agreements among companies in the context of award procedures.

## 3. **Enforcement of competition laws and policies**

### 3.1 *Action against anticompetitive practices, including agreements and abuses of a dominant position*

#### 3.1.1 *Statistics and summary of activities*

14. With regard to cartel detection, the Bundeskartellamt received 47 leniency applications from July 2015 to June 2016. It conducted 18 dawn raids relating to its own proceedings, four inspections on behalf of the European Commission, assisted two other ECN Member States and accompanied one dawn raid relating to a public prosecutor's proceeding. In the period covered by the report the Bundeskartellamt imposed several fines totalling approximately EUR 225 million.

#### 3.1.2 *Description of significant cases*

15. Some of the cases described below are still pending and some decisions have not yet become final.

##### 3.1.2.1 *Agreements*

- Hardcore restrictions
  - *Price-fixing agreements between armaments suppliers*: In July 2015 the Bundeskartellamt imposed fines of EUR 1.3 million on three suppliers of the Bundeswehr (German Federal Armed Forces), which sell so-called rubber track pads and vibration dampers for military vehicles. The companies concerned are accused of concluding price and mutual sub-contracting agreements between 2010 and 2014 at invitations to tender issued by the German Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support.

<sup>4</sup> The joint paper on Competition Law and Data is available on the Bundeskartellamt's website: <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591568>.

<sup>5</sup> The guidance document on how to uncover bid-rigging agreements in German can be found on the Bundeskartellamt's website: <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Broschueren/Submissionsabsprachen.html?nn=3591568>.

On account of a suspicion of collusive tendering under Section 298 of the German Criminal Code, the proceedings against the natural persons involved were transferred to the Public Prosecutor's Office in Koblenz.

- *Price-fixing concerning container transport services in German seaports*: In August 2015 the Bundeskartellamt imposed fines of approx. EUR 4.56 million on seven companies, the persons responsible within these companies and an association of companies on account of concerted practices concerning container transport services provided in the area of the German seaports of Hamburg, Bremen and Bremerhaven.
  - *Territorial agreements between publishers of advertising newspapers*: In December 2015 the Bundeskartellamt imposed fines of EUR 12.44 million on three publishers of advertising newspapers and persons responsible in the Dresden and Chemnitz region. The companies are accused of having concluded illegal agreements on the closure of advertising newspapers which competed with one another in various regions.
  - *Price-fixing between automotive part manufacturers*: In December 2015 the Bundeskartellamt concluded the proceeding against manufacturers of acoustically effective components for cars by imposing a fine on HP Pelzer Holding GmbH, Witten. Fines had already been imposed on five other companies in June 2015. In total, the fines imposed in this proceeding now amount to around EUR 90 million. The proceeding was triggered by an anonymous notification to the Bundeskartellamt's electronic whistle-blowing system.
  - *Price-fixing agreements between manufacturers of railway sleepers*: In February 2016 the Bundeskartellamt concluded its investigation proceedings against manufacturers of concrete and wooden railway sleepers and imposed a fine on one manufacturer of concrete railway sleepers. The proceedings were initiated in 2012 after the so-called rail cartel case had revealed indications of anticompetitive agreements.
  - *Agreements to divide up tenders and projects in the market for track construction material*: In March 2016 the Bundeskartellamt imposed a fine of just under EUR 3.5 million on the company Vossloh Laeis GmbH, Trier, for concluding agreements with other companies on the supply of rails and switches which aimed to divide up tenders and projects in the market for track construction material. In the same proceedings fines totalling almost EUR 100 million were already imposed in July 2013 on eight companies by way of settlement.
  - *Price-fixing agreements in the sanitary sector*: In March 2016 the Bundeskartellamt imposed fines of approximately EUR 21.3 million on nine wholesalers and an individual involved in the sanitary, heating and air conditioning sector on account of concluding anti-competitive agreements.
- Non-hardcore horizontal restrictions
    - *Prohibition of the joint marketing of round timber in Baden-Württemberg*: In July 2015 the Bundeskartellamt issued its final decision in the round timber proceedings against the federal state of Baden-Württemberg. Via its state company Forst BW Baden-Württemberg had so far marketed wood not only from its own state forest but also from communal and private forests. In the view of the Bundeskartellamt the joint marketing violates competition law provisions. Extensive opportunities for cooperation between the different forest owners remain unaffected by the decision.
    - *Divestitures in the rolled asphalt industry*: In July 2015 the Bundeskartellamt published a report on the state of proceedings it had initiated to break up anti-competitive company interlocks in the German rolled asphalt sector. The report provides an overview of the

objective and the course of the divestiture proceedings, as well as the criteria applied to assess the individual cases. The Bundeskartellamt initiated the proceedings on account of findings from an inquiry into the rolled asphalt sector which was concluded in 2012. The sector inquiry revealed that there was a Germany-wide closely-knit network of company interlocks in the rolled asphalt sector. Some of these interlocks were not compatible with competition law. Of the 104 divestiture proceedings initiated 96 have so far been concluded.

- *Agreement between Audible.com and Apple Computer Inc.:* In November 2015 the Bundeskartellamt initiated administrative proceedings against the Amazon subsidiary Audible.com and Apple Computer Inc. The companies have a long-term agreement on the purchase of audiobooks by Apple from Audible for sale in Apple's download shop iTunes Store. The proceedings were initiated following a complaint by the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels) which objects to various practices used by Audible, including its exclusive supply of audiobooks to Apple's iTunes Store.
- *Joint selling of Bundesliga rights:* In April 2016 the Bundeskartellamt declared commitments offered by the German League Association and the German Football League (DFL) to observe comprehensive criteria when awarding media rights for the games of the 1st and 2nd football leagues from the 2017/18 season onwards as legally binding. These commitments include a “no single buyer” rule. The Bundeskartellamt had expressed concerns that as long as there is only one holder of live rights in the market, there is the danger that innovation competition, especially from internet-based offers, will be restricted. The “no single buyer” rule ensures that in the future no single bidder will be able to acquire the rights to broadcast all the live Bundesliga matches.
- *Restriction of online payment services by German banking industry:* In July 2016 the Bundeskartellamt declared certain rules in the online banking conditions of the German Banking Industry Committee (Deutsche Kreditwirtschaft) as illegal. The Bundeskartellamt holds the view that the banks' general terms and conditions - which in essence hinder the use of PINs and TANs by non-bank payment services - restrict competition between the different providers of payment services in the Internet and violate German and European competition law.
- Vertical restraints:
  - *Unlawful restriction of online sales of ASICS running shoes:* In August 2015 the Bundeskartellamt concluded its proceeding on anti-competitive clauses in the distribution system of ASICS Deutschland. ASICS was accused of having restricted the online sales activities of small and medium-sized authorised dealers in particular. In the course of the proceedings ASICS amended the clauses objected to. ASICS, the market leader for running shoes in Germany, selects its authorized dealers according to strict quality criteria as part of its "selective distribution". In the past ASICS had prohibited its dealers e.g. from using price comparison engines for their online presence and from using ASICS brand names on the websites of third parties to guide customers to their own online shops. In the Bundeskartellamt's view, this prohibition primarily served to control price competition in both online and offline sales. Its investigations showed that small and medium-sized distributors, in particular, cannot compensate for the loss of reach resulting from this prohibition. Furthermore, the Bundeskartellamt criticized that the distributors were prohibited without exception from using online marketplaces such as eBay or Amazon. No decision had to be taken on this point in view of the other online restrictions.

- *Resale price maintenance by mattress manufacturers*: In October 2015 the Bundeskartellamt fined Tempur Deutschland GmbH, Steinhagen, EUR 15.5 million for imposing resale price maintenance on retailers selling its products.
- *Narrow “best price” clauses of Booking*: In December 2015 the Bundeskartellamt prohibited Booking (Booking.com Deutschland GmbH, Berlin, and Booking.com B.V., Amsterdam) from continuing to apply its “best price” clauses and ordered the hotel booking portal to completely delete the clauses from its contracts and general terms and conditions by 31 January 2016 as far as they affect hotels in Germany. Under the “best price” clauses the hotels were obliged to always offer the hotel booking portal their lowest room prices, maximum room capacity and most favourable booking and cancellation conditions available on all online and offline booking channels (wide best price clause). During the proceedings the company had offered to introduce a modified ‘best price’ clause. Under this clause Booking allows the hotels to offer their rooms cheaper on other hotel booking portals but still prescribes that the prices which they display on their own websites may not be lower than on Booking’s hotel portal (narrow best price clause). Booking implemented this amended form of “best price” clauses in Germany in July 2015. In January 2015 the Düsseldorf Higher Regional Court had confirmed the Bundeskartellamt’s decision that the “best price” clauses of Booking’s competitor HRS are illegal.<sup>6</sup> Nevertheless, Booking initially maintained its “best price” clauses. At the end of March 2015 the Bundeskartellamt had already made it clear to Booking in a statement of objections that its offer to reduce the scope of its ‘best price’ clauses was insufficient to allay competition concerns. In May 2016 Booking.com failed before the Düsseldorf Higher Regional Court with its application for interim relief against the immediate enforceability of the Bundeskartellamt’s prohibition of “best price” clauses.
- *Internet standards for internet-based new car portals*: In December 2015 the Bundeskartellamt discontinued proceedings against the automobile manufacturers Ford, Opel and PSA Peugeot Citroën after the companies had revised their marketing rules. Ford, Opel and Peugeot Citroën had implemented so-called “internet standards” for the introduction of end customers to brand retailers via so-called internet-based new car portals. If the retailers infringed the internet standards, they risked losing a substantial part of their bonuses or sales support. The Bundeskartellamt had initiated proceedings against the car manufacturers accusing them of infringing competition law by restricting cooperation between brand retailers and independent customer agencies, finding that the mediation of new cars via internet portals has a positive effect on competition between the retailers and leads to greater transparency for the consumer.
- *Resale price maintenance by LEGO*: In January 2016 the Bundeskartellamt imposed a fine of EUR 130,000 on LEGO GmbH for enforcing vertical resale price maintenance in the sale of its so-called “highlight articles”. Those affected were retailers in northern and eastern Germany who in 2012 and 2013 were forced by sales representatives of LEGO GmbH to raise their retail prices.
- *Assessment of dairies’ conditions of supply*: In April 2016 the Bundeskartellamt initiated an administrative proceeding to examine the conditions which dairies set farmers for the supply of raw milk. In a test case it will examine first of all the conditions of supply set by the large north German dairy DMK Deutsches Milchkontor GmbH and its parent company, Deutsches Milchkontor eG.

<sup>6</sup>

See also Annual Report on Competition Policy Developments in Germany 2014.



- *Resale price maintenance in food retail sector*: In May 2016 the Bundeskartellamt concluded further cartel proceedings and imposed new fines on retailers of EUR 90.5 million in its vertical case in the food retail sector. This time the investigations focussed on agreements between the brewery Anheuser Busch InBev Germany Holding GmbH, Bremen (AB InBev) and retailers on shop prices for beer, in particular the brands "Beck's", "Franziskaner" and "Hasseröder".

### 3.1.2.2 *Abuse of a dominant position*

- Abuse of dominance proceedings against Deutsche Post AG

In July 2015 the Bundeskartellamt concluded its abuse proceedings against Deutsche Post AG (DPAG). The Bundeskartellamt ascertained that DPAG had agreed on letter prices and loyalty discounts with its large customers which were impossible for other postal service providers to compete against.

With a market share of well above 80%, DPAG continues to hold a dominant position in the market for licensed postal services, despite the liberalisation of the postal markets. As a dominant postal service provider DPAG is obliged to grant competitors access to its network for the provision of parts of their services (partial service access). If a competitor wishes to make use of this right, he collects the letters at his customers, prepares them for mailing (i.e. franks, numbers and presorts them) and delivers them to one of DPAG's mailing centres from where they are onward delivered by DPAG. DPAG charges a fee for this service.

Although DPAG had discontinued the abusive practices during the proceedings, a declaratory decision by the Bundeskartellamt was necessary to prevent a recurrence of the practices in the future. The company had remained of the opinion that the objected practices were admissible during the proceedings. The decision has been confirmed by the Düsseldorf Higher Regional Court (see also No. 59)

- Ancillary copyright dispute between VG Media and Google

In September 2015 the Bundeskartellamt decided not to open formal proceedings against Google regarding its conduct in connection with the introduction of an ancillary copyright for publishers. The Bundeskartellamt had started investigations after it received a complaint by the copyright collecting society VG Media.

The newly introduced ancillary copyright allows publishers to prohibit search engines and similar services from using their articles or other work products, with the exception of words or tiny text segments (snippets). In the summer of 2014 VG media took civil action against Google. As a consequence, Google announced that in the future it would show search results relating to the websites of press publishers that were represented by VG Media in the legal dispute only in a reduced form if the publishers did not agree to a free-of-charge use of their work. Google justified this by claiming that otherwise it ran the risk of being sued for breaching the ancillary copyright. The Bundeskartellamt considered this to be an objective justification for Google's conduct, finding that even a dominant company cannot be compelled under competition law to take on a considerable risk of damages where the legal situation is unclear.

- District heating prices in Leipzig

In October 2015 the Bundeskartellamt agreed with the Leipzig municipal utility, Stadtwerke Leipzig GmbH (SW Leipzig), that the latter lower its district heating prices by a volume of approximately EUR 8 million per year over a period of five years.

In March 2013 the Bundeskartellamt had initiated abuse proceedings against several district heating suppliers, including SW Leipzig after the authority's Sector Inquiry into District Heating had provided indications of excessive prices.

- Water prices Wuppertal

On account of the excessive water prices charged by the Wuppertal municipal utility, the Bundeskartellamt agreed a settlement with WSW Energie und Wasser AG in October 2015, by which the latter was to refund EUR 15 million to its water customers.

Since the initiation of the Bundeskartellamt's examination proceedings the city of Wuppertal has remunicipalised its water supply services. The charges for water are now levied by a municipal undertaking operated by the city itself. As abuse control under competition law does not extend to charges/fees for services provided by an entity under public law, the Bundeskartellamt was unable to order price reductions for the future.

- Prices for electricity for heating purposes

In November 2015 the Bundeskartellamt concluded by settlement its proceeding against ENTEGA Energie GmbH, Darmstadt. The proceeding had been initiated against the company on account of the high level of prices it charged for electricity for heating purposes.

- Proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules

In March 2016 the Bundeskartellamt initiated a proceeding against Facebook Inc., USA, the Irish subsidiary of the company and Facebook Germany GmbH, Hamburg. The authority is investigating suspicions that with its specific terms of service on the use of user data, Facebook has abused its possibly dominant position in the market for social networks.

There is an initial suspicion that Facebook's conditions of use are in violation of data protection provisions. Not every law infringement on the part of a dominant company is also relevant under competition law. However, in the case in question Facebook's use of unlawful terms and conditions could represent an abusive imposition of unfair conditions on users. The Bundeskartellamt will examine, among other issues, to what extent a connection exists between the possibly dominant position of the company and the use of such clauses.

Subject to the result of further market investigations, the Bundeskartellamt has indications that Facebook has a dominant market position in a separate market for social networks. Facebook collects a large amount of personal user data from various sources. By creating user profiles the company enables its advertising customers to better target their advertising activities. In order to access the social network, users must first agree to the company's collection and use of their data by accepting the terms of service. It is difficult for users to understand and assess the scope of the agreement accepted by them. There is considerable doubt as to the admissibility of this procedure, in particular under applicable national data protection law. If there is a connection between such an infringement and market dominance, this could also constitute an abusive practice under competition law.

The Bundeskartellamt is conducting the proceeding in close contact with the competent data protection officers, consumer protection associations as well as the European Commission and the competition authorities of the other EU Member States.

- Ticket sales in Germany for the European Football Championship 2016

In March 2016 the Bundeskartellamt confirmed that it had initiated administrative proceedings to examine the sale of tickets for the games of the German national team in the European Football Championship in 2016 by the German Football Association (DFB). For the national ticket quota following the group draw the DFB had made the purchase of tickets conditional on the proof of a paid membership of the national team's fan club. 19 of the 24 participating countries, on the other hand, made the purchase of tickets for games of their respective national team only conditional on citizenship or residency criteria.

- Sale of rail passenger tickets by Deutsche Bahn AG

In May 2016, on account of commitments undertaken by the company, the Bundeskartellamt terminated its abuse of dominance proceedings against Deutsche Bahn AG which the authority had initiated in order to end the company's obstructive practices in impeding its competitors' ticket sales. The commitments will make it much easier for Deutsche Bahn's competitors to sell tickets.

The commitments include inter alia the standardization and reduction of commission charges paid by Deutsche Bahn AG and its competitors for the reciprocal sale of passenger tickets and easier access to possibilities to sell passenger tickets in railway shops.

### 3.1.3 *Activities of the courts*

- Federal Court of Justice confirms prohibition of a distribution agreement between Merck and VWR International Europe for Merck's laboratory chemicals

In January 2016 the German Federal Court of Justice rejected an appeal on points of law filed by the German company Merck KGaA (Merck) after the Düsseldorf Higher Regional Court had confirmed the Bundeskartellamt's prohibition of a distribution agreement between Merck and VWR International Europe for Merck's laboratory chemicals.

- Federal Court of Justice rejects complaint filed by municipality of Titisee-Neustadt

In January 2016 the German Federal Court of Justice rejected a complaint filed by the German municipality of Titisee-Neustadt against a judgment handed down by Düsseldorf Higher Regional Court in which it had confirmed a decision of the Bundeskartellamt. The Bundeskartellamt had found that the municipality of Titisee-Neustadt had abused its dominant position by awarding rights of way for electricity and gas networks in a discriminatory selection procedure.

- Düsseldorf Higher Regional Court confirms unlawfulness of Deutsche Post's price setting

In April 2016 the Düsseldorf Higher Regional Court confirmed the decision by the Bundeskartellamt in which it held that Deutsche Post's former setting of prices - which included granting loyalty rebates - for individual large-volume mailers constituted an abuse of a dominance.<sup>7</sup>

---

<sup>7</sup>

See case summary No. 40 to 42.

## 3.2 *Mergers and acquisitions*

### 3.2.1 *Statistics*

16. In 2015 1,219 mergers were notified to the Bundeskartellamt. In-depth investigations were conducted in 13 cases. The Bundeskartellamt prohibited one merger and cleared seven, one of them subject to conditions and obligations. Two cases were withdrawn during the second phase proceedings. Three in-depth investigations were still ongoing at the end of 2015.

### 3.2.2 *Summary of significant cases- Demerger proceedings*

17. *Demerger of organic dairies Andechser and Söbbeke and fine proceedings against Bongrain Europe SE:* In October 2015 the Bundeskartellamt terminated divestiture proceedings against Savencia/Bongrain and Söbbeke, after Savencia offered to give up its participation in Andechser and to sell its shares. In 1999 the French dairy Savencia SA. Savencia, known until recently under the name of Bongrain, acquired shares in Andechser Molkerei Scheitz GmbH and between 2011 and 2013 also acquired Molkerei Söbbeke GmbH. Savencia only succeeded in having the merger cleared in merger control proceedings in 2011 by submitting incorrect information. Once it realized that the company had given false information the Bundeskartellamt initiated divestiture proceedings and carried out extensive investigations at the companies concerned and at all the organic dairies in Germany. Concerning the acquisition of the majority of the shares in the dairy Söbbeke GmbH in 2011, the Bundeskartellamt imposed a fine of EUR 90,000 on Bongrain for providing incorrect information in a merger notification.

#### 3.2.2.2 *Prohibition of mergers*

18. In March 2016, the German Minister for Economic Affairs and Energy overruled a merger prohibition decision by the Bundeskartellamt<sup>8</sup> regarding the proposed acquisition of 451 Kaiser's Tengelmann outlets by EDEKA by way of ministerial authorisation. The ministerial authorisation was based on the public interest grounds 'job preservation' and 'maintenance of workers rights'. The merger had not been implemented by the end of the reporting period. Other companies in the food retail sector (REWE, Norma and Markant) have appealed against the Minister's decision.

#### 3.2.2.3 *Clearance of mergers*

19. The list of cases described below does not represent an exhaustive list of mergers cleared by the Bundeskartellamt in the period covered by this report, but rather focusses on cases that were subject to an in-depth investigation (first and second phase).

- Participation of German Red Cross (DRK) in Charité blood donation service

In July 2015, after an intensive examination, the Bundeskartellamt cleared the acquisition of the blood donor service of Charité – Universitätsmedizin Berlin by Zentrum für Transfusionsmedizin und Zelltherapie Berlin gemeinnützige GmbH, a joint venture of Charité and the blood donation service DRK-Blutspendedienst Nord-Ost gGmbH.

- Merger of wholesalers of automotive spare parts cleared subject to conditions precedent

In August 2015 the Bundeskartellamt cleared the acquisition of Trost Auto Service Technik SE, Stuttgart, by Wessels & Müller SE, Osnabrück, after an in-depth examination subject to conditions. Both companies sell product ranges comprising so-called 'independent' automotive spare parts through their branch networks.

---

<sup>8</sup> For further details on the prohibition decision see Annual Report on Competition Policy Developments in Germany 2014.

- Merger of French and German tank manufacturers

In August 2015 the Bundeskartellamt cleared the merger between Wegmann & Co. GmbH and the French GIAT Industries S.A. The companies plan to pool the business activities of their subsidiaries Krauss-Maffei Wegmann GmbH & Co. KG and Nexter Systems S.A. in a new 50:50 joint venture. The project affects several sectors of the armaments industry.

- Mergers between manufacturers of locking systems

In August 2015 the Bundeskartellamt cleared two mergers between manufacturers of locking systems. The merger plans of the companies DORMA Holding GmbH + Co. KGaA, Ennepetal, and Kaba Holding AG, Rümmlang (Switzerland), as well as the merger plans of Allegion Luxemburg Holding & Financing S.à.r.l., Luxemburg (Luxemburg), and SimonsVoss Technologies GmbH, Unterföhring, were notified to the Bundeskartellamt separately but examined simultaneously by the authority.

- Acquisition of Kreisklinik Bad Neustadt a. d. Saale by Rhön-Klinikum AG

In September 2015, after conducting intensive investigations in the first phase of merger control, the Bundeskartellamt cleared plans by the hospital group Rhön-Klinikum AG to acquire Kreisklinik Bad Neustadt a. d. Saale from the Rhön-Grabfeld administrative district.

- Merger between Carglass and jünited AUTOGLAS

In September 2015 the Bundeskartellamt cleared the acquisition of the "jünited AUTOGLAS" network and three individual garages that offer vehicle glass repair services by Belron GmbH, Cologne, the parent company of Carglass GmbH. The proposed merger affects the business area "repair and replacement of vehicle glass".

- Acquisition of Nokia's HERE mapping service by BMW, Daimler and Audi

In October 2015 the Bundeskartellamt cleared the acquisition of the HERE mapping service, which until now has belonged to the Finnish Nokia Corporation, by a consortium of the German car manufacturers BMW, Daimler and Audi. High definition digital maps are considered an essential element for connected and autonomous driving in the future.

- Merger of major online dating platforms

In October 2015 the Bundeskartellamt cleared in second phase proceedings the planned acquisition of all the shares in EliteMedianet GmbH, Hamburg, by an investment fund of Oakley Capital Limited, London. The merger affects the market for online dating platforms, on which EliteMedianet is active with the dating platforms [www.elitepartner.de](http://www.elitepartner.de) and [www.academicpartner.de](http://www.academicpartner.de). Parship GmbH with the platform [www.parship.de](http://www.parship.de) already belongs to the portfolio of Oakley Capital Limited.

In its assessment of the online dating market the Bundeskartellamt inter alia relied upon the concepts developed by the "Internet Platforms Think Tank" which was launched in 2015.

- Acquisition of Cortek Group by Remondis

In November 2015 the Bundeskartellamt cleared in second phase proceedings the acquisition of the Cortek group by REMONDIS GmbH & Co. KG, Kloster Lehnin. The companies acquired mainly provide services for the collection of commercial waste in southern Saxony-Anhalt and in the bordering regions of Thuringia and Saxony.

- Takeover of online marketing company OMS by Ströer

In December 2015 the Bundeskartellamt cleared plans by Ströer SE, Cologne, to acquire all the shares in OMS-Vermarktungs GmbH & Co. KG, Düsseldorf. The merger project affects the online advertising sector.

- Possible takeover of Deutsche Wohnen by Vonovia

In December 2015 the Bundeskartellamt cleared plans by Vonovia SE, Düsseldorf, to acquire all the shares in Deutsche Wohnen AG, Frankfurt am Main, by way of a public takeover bid. The project affected a number of local or regional markets for rental of residential property throughout Germany but ultimately failed because Vonovia could not secure shareholder support for its hostile bid for Deutsche Wohnen.

- Merger of the two central banks in the German cooperative banking sector

In March 2016 the Bundeskartellamt cleared the merger of the two central banks in the German cooperative banking sector, DZ BANK AG (Frankfurt) and WGZ BANK AG (Düsseldorf). The cooperative banks are shareholders of the central bank to which they have affiliated themselves.

- Merger of NOZ Mediengruppe and medien:holding:nord-Gruppe

In April 2016 the Bundeskartellamt cleared the merger between the publishing groups NOZ Mediengruppe, Osnabrück, and medien:holding:nord-Gruppe (mhn), Flensburg. With a daily circulation of all its newspapers amounting to over 450,000 copies in total, the merger makes NOZ Mediengruppe one of the ten largest newspaper publishers in Germany. However, irrespective of the economic significance and the high circulation of the newspapers concerned, there were no overlaps between the activities of the two publishing groups and the merger did not raise any competition concerns.

- Merger of producers of equipment for semiconductor manufacture

In 2016 the Bundeskartellamt cleared the planned merger between KLA-Tencor Corporation, Milpitas, USA, and Lam Research Corporation, Fremont, USA. Both parties to the merger are internationally active producers of equipment for the manufacture of semiconductors (chips).

- Joint Venture between Gruner + Jahr and Landwirtschaftsverlag Münster

In June 2016 the Bundeskartellamt cleared the creation of the joint venture Deutsche Medien-Manufaktur GmbH & Co. KG by Gruner + Jahr and Landwirtschaftsverlag Münster. The two publishing houses will pool six magazine titles in the segments Living, Food and Country Life in the joint venture.

### 3.2.3 *Activities of the court*

#### 3.2.3.1 *Düsseldorf Higher Regional Court upholds decision to prohibit Tönnies from acquiring Tummel*

20. In July 2015 the Düsseldorf Higher Regional Court rejected an appeal against the Bundeskartellamt's decision to prohibit a merger between Tönnies and Tummel. The Bundeskartellamt did not clear the merger as it would have further strengthened Tönnies' dominant position on the markets for the procurement of live sows for slaughter in Germany and for the sale of sow meat in Germany.

#### 3.2.3.2 *Federal Court of Justice rejects claim for damages after merger prohibition*

21. In October 2015 the German Federal Court of Justice rejected a complaint filed by the Danish company GN Store against a judgment handed down by the Düsseldorf Higher Regional Court in which it

had rejected the company's claim for damages totalling more than EUR 1.1 billion against Germany following the prohibition of a proposed merger between GN Store and Phonak Holding AG.

22. GN Store had planned to sell its hearing aid and audiological diagnostic devices manufacturing and global sales division to Phonak Holding AG. The Bundeskartellamt did not clear the merger because it believed it would create a dominant oligopoly, a view which was shared by the independent Monopolies Commission and was confirmed by the Düsseldorf Higher Regional Court. In 2010 the Federal Court of Justice then reversed the Bundeskartellamt's decision, as it held there was substantial internal competition between the remaining competitors.

23. In the subsequent proceedings on the claim for damages, the Düsseldorf Higher Regional Court confirmed both that the Bundeskartellamt had investigated the factual and legal aspects of the case with particular care and that the legal opinion it had reached was reasonable. The court therefore held that the members of the competent decision division had not been at fault. This decision is now final.

### **3.3 Sector inquiries**

24. In July 2015 the Bundeskartellamt launched a sector inquiry into the metering and billing of heating and water costs. Submetering services cover the consumption-based metering and billing of heating and water costs in buildings as well as the provision of the necessary metering equipment such as heating costs distributors or water and heat meters.

## **4. Cooperation in international fora**

### **4.1 International Competition Network (ICN)**

25. The ICN is the most important network of competition authorities worldwide. It comprises of more than 130 competition agencies from approx. 120 jurisdictions. Andreas Mundt, President of the German Bundeskartellamt, has been the ICN Steering Group Chair since September 2013 and was re-elected by the Steering Group for a second term in May 2015.

26. The Bundeskartellamt played an active role in all ICN Working Groups and took part in several workshops, e.g. the Merger Workshop in Brussels, Belgium from 24-25 September 2015, the Cartel Workshop in Cartagena, Columbia from 18-21 October 2015, the Unilateral Conduct Workshop in Istanbul, Turkey from 11-13 November 2015 and the Agency Effectiveness Workshop in Gaborone, Botswana from 10-11 March 2016. Furthermore, the Bundeskartellamt actively participated in the Annual ICN Conference that was held in Singapore from 26 April to 29 April 2016. Over 500 participants from more than 70 jurisdictions, including other representatives and stakeholders such as the business community, legal and economic professionals, international organisations and academics attended the conference. At the Annual Conference, the past year's work products were approved, including a guidance document on merger remedies, a catalogue of agency investigative powers and a framework for sharing non-confidential information, an update of the ICN's market studies good practices handbook, work products on agency assessment and performance measurement, competition agency ethics programmes, and advocacy to the business community.

### **4.2 ECN/ECA**

27. In 2015 the competition authorities of the EU continued their successful cooperation within the European Competition Network (ECN).

28. By the end of September 2016 a total of 2,156 cases were posted on the competition authorities' joint intranet; 212 of these were Bundeskartellamt cases. The competition authorities also made use of the

opportunities for information exchange and assistance in investigations within the ECN. In several cases the Bundeskartellamt exchanged confidential information with other competition authorities in accordance with Article 12 of Regulation 1/2003. Within the framework of official assistance under Article 22 of Regulation 1/2003 the Bundeskartellamt assisted other competition authorities with investigatory measures. For example, the Bundeskartellamt assisted the Luxembourg competition authority with requests for information to online car agents in a case concerning possible restrictions of cross border car sales between Germany and Luxembourg. In the period July 2015 to June 2016, under Article 11(3) of Regulation 1/2003, the European Commission was informed about 98 new proceedings initiated by the national competition authorities (NCAs), seven of which were Bundeskartellamt cases.

29. The Bundeskartellamt is among those competition authorities which participate regularly and actively in the Advisory Committees on competition law proceedings and merger control cases of the Commission in Brussels. An essential part of the ECN's joint work takes place in the various ECN Working Groups (Cooperation Issues, Cartels, Fines, Vertical Issues, Competition Chief Economists, Forensic IT, Advocacy and Merger Working Group). The Working Group on Cooperation Issues and Due Process, which Germany has been co-chairing since the inception of the ECN in 2004, has been instrumental in providing the Commission with the information needed for the launch of its ECN Plus initiative in 2015, which aims at making competition enforcement in Member States more effective by harmonising key features of competition procedures throughout the EU.

30. Furthermore, the Bundeskartellamt plays an active role in all ECN sectoral subgroups in which an exchange of practical experience takes place. Between July 2015 and June 2016, Bundeskartellamt representatives attended meetings of the subgroups Food, Energy, Insurance, Professional Services, Sports, Telecom, Pharma & Health Services, and Banking & Payments. A particular focus has been on the work of the subgroup Food, where the Commission and the national competition authorities have inter alia discussed the implementation of the emergency measures regarding the European milk markets adopted under the Common Agricultural Policy.

31. The Bundeskartellamt continued to contribute to the ECN Brief, the official ECN newsletter published since 2010, informing the interested public (e.g. lawyers and companies) about the ECN's activities and decisions made by the NCAs.

32. This year the Annual Directors General meeting of the ECA forum (European Competition Authorities) took place in Leuven, Belgium. The issues discussed at the meeting included interim measures in competition cases, the sharing economy, and the protection of complainants in competition cases.

#### **4.3 Annual Meeting of the Working Group on Competition Law**

33. On 1 October 2015 the Working Group on Competition Law met in Bonn at the invitation of the Bundeskartellamt. At the meeting over 100 competition law experts discussed and exchanged views on the theme "Internet platforms in the digital economy: competition law, privacy and consumer protection." Chaired by the Bundeskartellamt's Vice President, Prof. Dr. Konrad Ost, the meeting featured introductory statements by and a panel discussion with Julia Topel, Chair of the 6th Decision Division of the Bundeskartellamt, who presented the authority's "Internet Platforms Think Tank", Prof. Dr. Torsten Körber, Georg August University, Göttingen, Thomas Kramler, Head of the Digital Single Market Task Force of the Directorate-General for Competition at the European Commission, Prof. Dr. Boris Paal, Albert Ludwigs University, Freiburg, and Prof. Dr. Markus Reisinger, Frankfurt School of Finance & Management.<sup>9</sup>

---

<sup>9</sup> The Working Paper of the meeting and the individual statements of the conference participants are available (in German) on the Bundeskartellamt's website:



## 5. Resources of the Bundeskartellamt

### 5.1 Annual budget

Budget 2016	Change over 2015
EUR 32 million	+0.5 million
USD <sup>10</sup> 35.9 million	+ 0.56 million

### 5.2 Number of employees

	2016*	Change over 2015
Economists	47	-3
Lawyers	88	+1
Other experts	11	-2
Support staff	152	-7
<b>Total</b>	<b>298</b>	<b>-11</b>

Updated: 30 June 2016

\*Full-time equivalent, actually active, i.e. excluding seconded employees, unfilled vacancies etc.

## 6. References to new reports and studies on competition policy issues

Autorité de la concurrence Bundeskartellamt	Competition Law and Data, 2016.
Bardong, Andreas	Foreign-to-foreign mergers: The German guidance, a blue-print for a European reform? In: Journal of Competition Law & Practice; advance access publ., 2015.
Becker, Carsten Vollmer, Christof	Rechtsnachfolge in die Kartellbußgeldhaftung im Lichte des effet utile: Die deutsche Rechtslage nach "Silostellgebühren" auf dem europarechtlichen Prüfstand In: Kölner Schrift zum Wirtschaftsrecht, 2015; p. 235-242.
Bundeskartellamt	Das 2. Jahr Markttransparenzstelle für Kraftstoffe, 2015.
Engelsing, Felix	Entflechtung von Gemeinschaftsunternehmen im Bereich Walzasphalt: Bericht zu den Verfahren B 1-100/12 nach der Sektoruntersuchung Walzasphalt, 2015.
	Wettbewerb und Handlungsfreiheit versus Regulierung im Energiesektor In: Handlungsfreiheit und Haftungsverantwortung in den regulierten Bereichen des Energiesektors, 2015; p. 155-169.
Gleave, Sandro	Fixed fee licensing for cost-reducing technology – should innovators reveal their private information? In: Review of Managerial Science, 2016; p. 781-799.
Feess, Eberhard	Patent licensing and the optimal degree of information revelation (Discussion paper series in economics and management No. 09-01), 2008.
Hartog, Johanna	Kartellrechtsaufsicht im Kontext der Regulierung: Aktuelle Entscheidungspraxis des Bundeskartellamtes. In: EnWZ, 2015; p. 536-540.
Hossenfelder, Silke	Horizontal effects of parity clauses implemented by online travel agents in contracts with hotel partners – The German 'HRS'-Decision confirmed by the Higher Regional Court In: Competition Law & Policy Debate, 2015; p. 83-86.
Judith, Daniel Stegemann, Ulrike	Der Staat als Unternehmer (Re-)Kommunalisierung im wettbewerbsrechtlichen Kontext: Tagungsbericht des Arbeitskreises Kartellrecht vom 02.10.2014 in Bonn In: Wirtschaft und Wettbewerb, 2015; p. 736-740.

[http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions\\_Hintergrundpapier/AK\\_Kartellrecht\\_2015\\_Digitale\\_Oekonomie.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2015_Digitale_Oekonomie.html?nn=3591568).

<sup>10</sup>

European Central Bank: Exchange rate as of 30 September 2016: 1 EUR = 1.1221 USD  
<http://www.ecb.int/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html>

Kirchhoff, Wolfgang	Offenlegung von Dokumenten und Mehrfachinanspruchnahme : Offene Fragen bei der Abwälzung des Preisaufschlags nach der Schadensersatzrichtlinie 2014/104/EU In: Wirtschaft und Wettbewerb, 2015; p. 952-958.
Kretschmer, Jürgen-Peter	Tagungsprotokoll des Arbeitskreises Kartellrecht vom 01.10.2015 in Bonn In: Wirtschaft und Wettbewerb, 2016; p. 171-174.
Monopolkommission	Bahn 2015: Wettbewerbspolitik aus der Spur?: Sondergutachten der Monopolkommission gemäß § 36 AEG, 2015. Strafrechtliche Sanktionen bei Kartellverstößen: Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, 2015. Wettbewerbspolitik: Herausforderung Digitale Märkte. Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB, 2015. Zusammenschlussvorhaben der Edeka Zentrale AG & Co. KG mit der Kaiser's Tengelmann GmbH: Sondergutachten der Monopolkommission gemäß § 42 Abs. 4 Satz 2 GWB, 2015. Außerwettbewerbliche Aspekte bei Fusionskontrollentscheidungen nach dem GWB und der europäischen FKVO In: Politischer Einfluss auf Wettbewerbsentscheidungen, 2015; p. 39-42. Divergent decisions in national merger control: How can co-operation between national competition authorities be facilitated? In: New frontiers of antitrust, 2014; p. 108-112. Mehr Markt wagen. In: Wettbewerbsbeschränkungen auf staatlich gelenkten Märkten, 2015; p. 67-71.
Mundt, Andreas	"Kartellrecht 4.0" – Das Bundeskartellamt und die Digitalisierung. In: Wirtschaft und Wettbewerb, 2016; p. 269. Vertical restraints and the Internet economy In: William E. Kovacic, an antitrust tribute. Liber amicorum. Volume II, 2014; p. 383-393. Was bedeutet der more economic approach im Wettbewerb für den Unionsrichter?: Thesenpapier. In: 6. Luxemburger Expertenforum zur Entwicklung des Unionsrechts. Aktuelle Herausforderungen für den Unionsrichter, 2013; p. 49-52. Zur Öffentlichkeitsarbeit des Bundeskartellamtes In: Neue Zeitschrift für Kartellrecht, 2016; p. 145-147.
Ost, Konrad Kallfaß, Gunnar Roesen, Katrin	Einführung einer Unternehmensverantwortlichkeit im deutschen Kartellrecht - Anmerkungen zum Entwurf der 9. GWB-Novelle In: Neue Zeitschrift für Kartellrecht ; 2016; p. 447-458
Schepp, Nils-Peter Wambach, Achim	On big data and its relevance for market power assessment In: Journal of European competition law & practice, 2016; p. 120-124.
Stockmann, Kurt	Stellungnahme zum Zwischenbericht des Bundeskartellamtes zum Expertenkreis Kartellsanktionsrecht In: Zeitschrift für Wettbewerbsrecht, 2015; p. 189-209. Fusionskontrolle in der digitalen Welt. In: Neue Zeitschrift für Kartellrecht, 2015; p. 290-295.
Weck, Thomas	Staatliche Unternehmen und die Daseinsvorsorge nach Marktregeln: zugleich eine Klarstellung des Prüfungsmaßstabs der Monopolkommission zum sparkassenrechtlichen Regionalprinzip In: Die öffentliche Verwaltung, 2015; p. 500-508.
Weck, Thomas Richter, Daniel	Politik im Neuland des Internet. In: Wirtschaftsdienst, 2016; p. 249-252.
Wismer, Sebastian	A note on price-parity clauses in platform markets. In: Competition on the Internet, 2015; p. 41-52. Reicht das geltende Wettbewerbsrecht aus oder bedarf es sektorspezifischer Regulierungen?
Zimmer, Daniel	In: Wirtschaftsdienst, 2016; p. 239-242. The Emancipation of antitrust from market-share-based approaches In: The Antitrust Bulletin, 2016; p. 133-154.