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Annual Report on Competition Policy Developments in Germany

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Germany

1. Executive Summary

1. The key topic for the Bundeskartellamt in 2018 was, as in the years before, digitalisation. The authority has to deal with new markets, new players and new business models. Due to the internal growth of digital players, the control of abusive practices gains significance. Moreover, as access to data has become one of the key factors for a company's competitive position in digital markets, the handling of user data and its accordance with legal provisions has to be considered.
2. For example, the authority conducted a proceeding against Facebook on the suspicion that it is abusing its dominant position. In February 2019 the Bundeskartellamt made its decision and imposed on Facebook far-reaching restrictions in the processing of user data. In 2018 the authority also initiated a proceeding against Amazon to examine its terms of business and practices towards sellers, launched a sector inquiry into online advertising and, together with the French competition authority, started a joint project on algorithms and their effects on competition.
3. With its new competences in the area of consumer protection the Bundeskartellamt has pushed ahead with its sector inquiries into online price comparison websites and the use of data collected by smart TVs. In December 2018 it presented a consultation paper with the first results of its sector inquiry into comparison websites.
4. Beyond these cases the Bundeskartellamt was also active in many other sectors. There are two other ongoing sector inquiries, one into the waste management sector, the other into hospitals. With these sector inquiries the Bundeskartellamt aims to gain information about market conditions and identify if there are any problems when it comes to competition issues.
5. Further important cases concerned the steel industry, the retail sector, the food retail sector, agriculture, the aviation sector, the media sector, the sports industry, the furniture industry and the construction sector.

1.1. Action against anticompetitive practices

6. Cartel prosecution remains a key area of the Bundeskartellamt's work. The sectors concerned included special steel manufacturers, potato producers, newspaper publishers and producers of rolled asphalt.

1.2. Merger control

7. The Bundeskartellamt examined approx. 1,380 notified mergers. An in-depth review was initiated in 12 cases during 2018. 8 merger proceedings were concluded after an in-depth review and 4 second phase cases were withdrawn by the parties after they had received the statement of objections.

2. Changes to competition laws and policies

2.1. Government proposals for new legislation

8. After the 9th amendment to the German Competition Act the Federal Ministry for Economic Affairs and Energy entered into the preparatory phase for a proposal for a further amendment of the German Competition Act. The Federal Ministry for Economic Affairs and Energy is currently assessing whether the digital economy calls for a further refinement of the legal antitrust toolbox.

9. Against that background, the Federal Ministry for Economic Affairs and Energy requested an external report by a group of renowned competition law experts on the topic of a possible modernisation of the law on abuse of market power.¹ The study seeks to evaluate whether market dominance as a general threshold for intervention in abuse scenarios is still appropriate and whether particular risks for the functioning of effective competition arise from novel strategies of powerful digital platforms and if they can be countered under the existing legal framework. The study was presented to Peter Altmaier, Federal Minister for Economic Affairs and Energy in Germany, on 4 September 2018 in Berlin.

2.2. New tasks

2.2.1. Consumer Protection

10. With the 9th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB) which came into force in early June 2017, the Bundeskartellamt was for the first time granted competences in the area of economic consumer protection which includes in particular the Act against Unfair Competition and the General Terms and Conditions of Business.

11. The Bundeskartellamt set up a division dedicated to this new task and started sector inquiries into online price comparison websites and the use of data collected by smart TVs. In December 2018 it presented a consultation paper with the first results of its sector inquiry into comparison websites.

12. In order to extend the Bundeskartellamt's existing competences in consumer protection, the conferment of additional decision-making competences and powers to impose punitive measures is being discussed with the aim to enhance the public enforcement of consumer protection law.

2.2.2. Competition Register

13. Another task for the Bundeskartellamt is to establish a so-called Competition Register. In summer 2017 the Act on the Establishment of a Competition Register for Public Procurement at the Bundeskartellamt entered into force. The background for this is that companies which commit serious economic offences should not benefit from public

¹Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, executive summary in English available at: https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3

contracts and concessions. The Competition Register will enable contracting authorities to check in a single nationwide electronic search whether a company has committed relevant violations of law. Therefore, the register can play an important role in combating economic crime and competition law violations. With this new transparency the Competition Register should significantly increase the preventive effect of criminal and competition law. The Act intends that the electronic register will be operational in 2020.

2.3. Working Papers and Reports

2.3.1. New series of papers on “Competition and Consumer Protection in Digital Economy“

14. Since October 2017, the Bundeskartellamt has published a new series on the topic “Competition and Consumer Protection in the Digital Economy”. It aims at giving new impetus to the debate about the interfaces between the digital transformation, competition and consumer protection. Topics in 2018 dealt with Online Advertising, Big Data and Competition, Consumer Rights and Comparison Websites.

2.3.2. Publication: 60th Anniversary of the Bundeskartellamt

15. On its 60th anniversary, the Bundeskartellamt published a paper looking back at the authority’s history and the main historical developments. It also includes contributions by Margrethe Vestager, European Commissioner for Competition, Brigitte Zypries, former Federal Minister for Economic Affairs and Energy and Andreas Mundt, President of the Bundeskartellamt.

2.3.3. Annual Report of Market Transparency Units for Fuels

16. In March 2018, the Bundeskartellamt published its fourth annual report on the work of the Market Transparency Unit for Fuels. In its report, the authority evaluated fuel prices (E5, E10 and diesel) throughout Germany for the period from 1 June 2017 to 30 November 2017. For some analyses, the whole year was taken as a basis and price data from the beginning of 2018 was also used. The report provides more detailed price analyses for the cities of Berlin, Dresden, Frankfurt am Main, Hamburg, Cologne, Leipzig, Munich and Stuttgart.

17. At the end of July 2018, the Federal Ministry for Economic Affairs and Energy submitted a report concerning the results of the achievements and experience of the market transparency unit for fuel to the German parliament. The report concludes that the market transparency unit for fuel substantially increased the transparency for consumers and recommends the unit to proceed with its tasks and is subject to further evaluation after a five-year period.

2.3.4. Joint guidance on new transaction value threshold in German and Austrian merger control

18. In July 2018 the Austrian Federal Competition Authority (AFCA) and the Bundeskartellamt published a joint guidance paper on the application of the new transaction value threshold in merger control, taking into account comments received in a public consultation. Merger control thresholds in both Germany and Austria have been supplemented with a threshold that is based on the purchase price (in Germany more than EUR 400 million – in Austria more than EUR 200 million). With this joint guidance the

AFCA and the Bundeskartellamt embarked on the path of transparency in order to create legal certainty for undertakings. The joint guidance on the transaction value threshold gives an excellent overview of the definition of the consideration and how the term "substantial domestic operations" needs to be interpreted. Last but not least the paper explains the application with some practical examples.²

2.3.5. Energy Monitoring Report 2018

19. In November 2018, the Bundesnetzagentur and the Bundeskartellamt published their joint annual monitoring report on developments in the German electricity and gas market. It informs inter alia that the market concentration in conventional electricity generation declined again and that the retail electricity and gas markets also showed a positive competitive development. Furthermore, it informs that price comparison sites, which allow customers to compare electricity and gas tariffs and act as intermediaries, have become very important.

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

20. In 2018 the Bundeskartellamt imposed fines of around EUR 376 million on 22 companies or trade associations and 20 individuals. The sectors concerned included special steel manufacturers, potato producers, newspaper publishers and producers of rolled asphalt. The authority received 25 so-called applications for leniency and numerous other indications of possible infringements of competition law. It carried out dawn raids in nine proceedings. The amount of fines and number of cartel proceedings change from one year to the next. However, the increase compared to the year 2017 is mainly due to the fact that in the middle of 2017 a legislative loophole was finally closed. Before this, companies could escape liability for their competition law violations with clever restructuring measures.

3.1.2. Description of significant cases

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

Agreements

Hardcore restrictions

Division of orders and turnovers between harbour towage service providers

22. In December 2017 and in February 2018 the Bundeskartellamt imposed fines of approx. EUR 17.5 million on four harbour towage service providers. No fine was

² English Version of the Guidance Paper available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionssschwele.html?nn=3591568

imposed on Unterweser Reederei GmbH and its subsidiary in accordance with the Bundeskartellamt's leniency programme. For discretionary reasons no fine was imposed on another company, which had since exited the market. Between 2002 and 2013 the companies had split orders and turnover earned from several German harbours among themselves. The companies set quotas based on turnover which they used to allocate orders between them. All the major towage companies in the respective harbours had participated in the quota allocation. As Dutch companies were also involved in the cartel, the Bundeskartellamt cooperated closely with the Netherlands Authority for Consumers and Markets in this case. The customers of these services are the shipping companies that use the respective harbours, in particular the liner shipping companies.

Price-fixing agreements in the sanitary sector

23. In February 2018, the Bundeskartellamt concluded its last pending proceeding concerning price-fixing agreements in the sanitary, heating and air conditioning sector. Consequently, the total amount of fines imposed on ten wholesalers rose to EUR 23 million.

Price-fixing agreements between potato and onion packaging companies

24. In May 2018, the Bundeskartellamt imposed fines totalling EUR 13.2 million on the potato and onion packaging companies Hans-Willi Böhmer Verpackung und Vertrieb GmbH & Co. KG and Kartoffel-Kuhn GmbH. The proceeding had been initiated in May 2013 with a sector-wide dawn raid following a leniency application. The Bundeskartellamt concluded that the companies had aligned their purchase prices in their supply to the Metro group and had thus virtually eliminated any price competition between them.

Fines on automotive part manufacturers

25. In June 2018, the Bundeskartellamt imposed fines amounting to EUR 9.6 million on three manufacturers of heat shields. The companies Elring Klinger Abschirmtechnik (Schweiz) AG, Sevelen (Switzerland), Estamp S.A.U., Terrassa (Spain) and Lydall Gerhardi GmbH & Co. KG, Meinerzhagen (Germany) were accused of agreeing to pass on increased material costs to their customer VW in 2011.

Price-fixing agreements between special steel companies

26. In July 2018, the Bundeskartellamt imposed fines totalling approx. EUR 205 million on six special steel companies, a trade association and ten individuals for concluding price-fixing agreements and exchanging competitively sensitive information. The companies were: ArcelorMittal Commercial Long Deutschland GmbH, Cologne, Dörrenberg Edelstahl GmbH, Engelskirchen, Kind & Co. Edelstahlwerke GmbH & Co.KG, Wiehl, Saarstahl AG, Völklingen, Schmidt + Clemens GmbH + Co. KG, Lindlar and Zapp Precision Metals GmbH, Schwerte. The trade association concerned was Edelstahl-Vereinigung e.V.. The proceeding was initiated in November 2015 with a sector-wide dawn raid following a leniency application by voestalpine AG, Linz, Austria. In accordance with the Bundeskartellamt's leniency programme, no fines were imposed on voestalpine.

27. The companies are producers or processors and traders of special steel products. At least from 2004 until at latest the dawn raid in November 2015, the steel producers had jointly agreed on and implemented the uniform method of calculation of the scrap and

alloy surcharges for special steel products across the sector. There was also a basic agreement between the companies that the surcharges be passed on to the customers on a 1:1 basis. The investigations showed that representatives of the steel producers also exchanged information on increases in the base price, at least for engineering steel. In addition, further sensitive information was exchanged, e.g. on the current order situation, customer stock levels, capacities, production stoppages and planned price increases, which was of relevance for the companies' competitive behaviour. The trade associations, in particular Edelstahl-Vereinigung e.V., played a decisive role in the agreements. The companies were able to use the various association meetings as a platform for implementing the agreements. The association also played an active part by processing and providing the companies with data for coordinating the scrap and alloy surcharges.

Territorial agreements between newspaper publishers

28. In September 2018, the Bundeskartellamt imposed fines amounting to a total of EUR 16 million on DuMont Mediengruppe GmbH & Co. KG, an individual responsible and a lawyer. The company was accused of concluding an illegal territorial agreement with the Bonner General-Anzeiger media group. The DuMont group and Bonner General-Anzeiger group had already agreed in December 2000 that either one of the two newspaper publishers largely withdraw its distribution from each of the areas agreed in the Bonn region. This was done by noticeably thinning-out local reporting and in some cases switching newspaper door deliveries to delivery by post. In 2005 the companies safeguarded the territorial agreements which were to run up to 2016 via mutual participations and by awarding the DuMont group a pre-emption right to the Bonner General-Anzeiger group. The pre-emption right was deliberately not disclosed to the Bundeskartellamt although it was of key relevance for its examination of the mutual participations under merger control. The lawyer who was fined had advised the DuMont group during the entire period and was actively involved in the operations.

29. The illegal agreements were concluded at a notary in Switzerland to cover up the operations. With the actual withdrawal of one of the competing newspapers from each of the areas agreed the circulation areas were divided among the publishers to eliminate the competition which had previously existed between them. These type of agreements aimed at phasing out competition between publishers are also prohibited under the newly introduced antitrust exemption provision for the press sector.

Fines on asphalt producers for setting up a supplier consortia

30. In December 2018, the Bundeskartellamt imposed a fine amounting to EUR 1.43 million on Gaul GmbH, a manufacturer of asphalt mixes, for participating in a cartel agreement. Gaul has been a subsidiary of the STRABAG group since 2011. The cartel agreement involved prices, sales areas, customers and quotas for the supply of construction companies in the Rhine-Main area between 2005 and 2013. It took the form of a supplier consortium. Another company involved in the cartel agreement was Südhessische Asphalt-Mischwerke GmbH & Co. KG ("SHM"), which is a company of the Werhahn group. In 2013 SHM disclosed the agreement in a leniency application and was not punished as a result. The proceeding was also conducted against Mitteldeutsche Hartstein-Industrie AG ("MHI") and its former subsidiary Mitteldeutsche Hartstein-Industrie GmbH. The proceeding against the legal successor of this subsidiary was discontinued due to a legislative loophole, while the proceeding against MHI was discontinued for discretionary reasons. Therefore, it has not been clarified in the context of this proceeding whether the MHI group was involved in this cartel.

31. For years the supplier consortia for larger orders of asphalt mixes have been formed, although in most cases one company could have met the demand alone. The supplier consortia thus mostly served to steady the market, i.e. to avoid competition for prices and bids among the participating undertakings. Arrangements were also made to eliminate competition by allocating sales areas and customers and agreeing on price lists for small orders. The arrangements were to the detriment of road construction companies buying the asphalt mixes, and ultimately the state which commissions road construction work. Asphalt mixes are produced from aggregates and binding agents like bitumen. The direct buyers of asphalt mixes are road construction companies. Gaul had its own asphalt mixing plants in Büttelborn, Ludwigshafen, Spremlingen and Wiesbaden. Already since the late 1990s the asphalt producers involved agreed on orders and formed supplier consortia which, as far as capacities were concerned, were either not necessary or it was not proved that they were actually needed. In the period since 2005, which was under review, there were more than 100 bilateral and trilateral supplier consortia which were based on the agreements.

Non-hardcore horizontal restrictions

No objections to launch a digital platform for steel products

32. The Bundeskartellamt examined plans by Klöckner & Co SE, Duisburg to set up the business-to-business online trading platform XOM Metals for the sale of steel products and had no objections. Both steel manufacturers and traders are to operate as suppliers on this platform, which is intended to simplify order transactions and order management for existing and new customers. In accordance with indications given by the Bundeskartellamt, Klöckner has designed the platform in such a way that no anti-competitive exchange of information on prices or product availability will take place on the platform.

Supply structure in the furniture sector

33. In October 2018, the Bundeskartellamt initiated administrative proceedings against Germany's largest furniture purchasing cooperation, VME Union GmbH. Most furniture retailers in Germany have joined purchasing cooperations. Such cooperations are not generally prohibited under competition law. Particularly smaller furniture retailers can potentially benefit from improved purchasing conditions. The Bundeskartellamt has been monitoring the increasing concentration of purchasing cooperations for some time. The purpose of the proceedings is to review whether VME Union raises competition law concerns, both in its current form and after Möbel Krieger has carried out its plans to join the cooperation.

Champions League broadcasting in Germany

34. In October 2018, the Bundeskartellamt started examining the conformity with competition law of the cooperation between Sky Deutschland and Perform (operator of the DAZN streaming service) for broadcasting the Champions League in Germany. In a tender conducted by UEFA in 2017, Sky acquired the broadcasting rights for all matches in the period between 2018 and 2021. Sky and DAZN subsequently divided the broadcasting rights amongst themselves. The Champions League has thus solely been broadcasted by Sky and DAZN since the beginning of the ongoing season 2018/2019.

35. Sky and DAZN are two major premium sports content providers in subscription television. The Bundeskartellamt is examining when and in what form the cooperation between the two companies was established and whether the cooperation promotes competition in the interest of consumers or restricts it. As Germany's leading pay television provider, Sky is potentially subject to particular restrictions under competition law when cooperating with competitors. The agreement between Sky Deutschland and Perform could contribute to further consolidation of Sky's market position. Moreover, several matches of German and other clubs are now exclusively available online (OTT), and there is no more free TV broadcasting of Champions League live matches in Germany. Against that background, it has to be examined whether the cooperation restricts competition by object or by effect.

Vertical restraints

Bundeskartellamt discontinues its proceeding against DMK dairy

36. In January 2018, the Bundeskartellamt discontinued its proceeding on the conditions of supply for raw milk which was conducted against Germany's largest dairy, Deutsche Milchkontor eG. In its 2017 interim report on its administrative proceeding concerning conditions of supply for raw milk, the authority had criticised the long duration and periods of notice of the supply contracts between milk producers and dairies as well as exclusive supply obligations. Afterwards significantly more farmers switched to another dairy, new types of contracts were discussed and DMK changed its own supply conditions and reduced its period of notice. Consequently, a volume of more than 20% of the quantity of raw milk which is processed by DMK has been cancelled. These developments represent a significant change over the market conditions which the authority established for the years 2013 to 2015 (only 1.0% switching rate in 2015). The Bundeskartellamt decided to observe to what extent these developments will stimulate competition.

XXXLutz abandons its demand for retroactive adjustment of purchase conditions

37. In January 2018, after the Bundeskartellamt's intervention, the furniture chain XXXLutz abandoned its plans to ask its suppliers to retroactively adjust their purchase conditions, after its recently cleared merger with Möbel Buhl GmbH & Co. KG. The conditions granted to XXXLutz will thus not be applied retrospectively to sales effected by the Möbel Buhl furniture stores.

Abuse of a dominant position

Bundeskartellamt prohibits Facebook from combining user data from different sources

38. In February 2019, the Bundeskartellamt imposed on Facebook far-reaching restrictions in the processing of user data. The Bundeskartellamt published a case summary on its Facebook proceeding (English)³ and the decision (German)⁴ and will report in the 2019 OECD Annual Report on Competition Policy Developments.

³ Case summary on Facebook available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/15_02_2019_Fallbericht_Facebook.html

Lufthansa's price increase

39. In March 2018, the Bundeskartellamt decided not to open formal proceedings against Lufthansa after receiving numerous complaints about Lufthansa's price increases. In the aftermath of the insolvency of Air Berlin, Lufthansa's tickets on domestic routes were on average 25-30% more expensive than in the previous year, and in some cases even much more expensive than that. The authority observed that following the insolvency, Lufthansa had held a monopoly position on some German domestic routes. However, the application of strict merger control had enabled EasyJet, who had acquired a large part of Air Berlin, to enter the market quickly. Subsequently prices on the respective routes had immediately fallen again. Furthermore, the strong capacity reduction after Air Berlin's insolvency would have resulted in rising prices even in an intact competition situation, according to the Bundeskartellamt.

Abuse proceeding against Amazon

40. In November 2018, the Bundeskartellamt initiated an abuse proceeding against Amazon to examine its terms of business and practices towards sellers on its German marketplace amazon.de. The terms of business and related practices which might be considered abusive are liability provisions to the disadvantage of sellers, in combination with choice of law and jurisdiction clauses, rules on product reviews, the non-transparent termination and blocking of sellers' accounts, withholding or delaying payment, clauses assigning rights to use the information material which a seller has to provide with regard to the products offered and terms of business on pan-European despatch. A criterion for the relevance of this conduct under competition law is that Amazon holds a dominant position or that the sellers are dependent on Amazon. There are indications of both, in particular on a possible market for marketplace services for online sales to consumers. This will be examined in closer detail by the Bundeskartellamt. The proceeding was triggered by numerous complaints from sellers about Amazon's business practice which the Bundeskartellamt received in the recent past.

3.1.3. Activities of the courts

Federal Court of Justice confirms key points of Bundeskartellamt's decision concerning unfair trading practices

41. In January 2018, the Federal Court of Justice confirmed the Bundeskartellamt's decision in its abuse proceedings against the retailer EDEKA ("wedding rebates"). In its decision, the Bundeskartellamt had stated that after its takeover of the "Plus" stores in 2008, EDEKA had demanded unjustified benefits from suppliers, and prohibited some of these demands. Concerning three key points ("alignment of conditions", "adjustment of payment terms" and a "partnership reimbursement") the Bundeskartellamt had appealed the decision of the Düsseldorf Higher Regional Court, which had completely reversed the authority's decision. With its decision, the Federal Court of Justice sided with the authority and consequently declared the practice of powerful retailers to shift an excessive amount of their entrepreneurial risk to manufacturers illegal.

⁴ Report on Facebook available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568>

Düsseldorf Higher Regional Court confirms and even increases the Bundeskartellamt's fines against drugstore chain Rossmann

42. In March 2018, the Düsseldorf Higher Regional Court imposed a fine of EUR 30 million against Dirk Rossmann GmbH. With its decision the Court significantly raised the fine of EUR 5.25 million imposed by the Bundeskartellamt in 2015 concerning vertical price-fixing agreements for roasted coffee between Melitta Kaffee GmbH and its retailers.

Federal Court of Justice annuls the Bundeskartellamt's injunction against the State of Baden-Württemberg for formal reasons

43. In June 2018, the Federal Court of Justice annulled an injunction of the Bundeskartellamt in which it had stated that the joint marketing of round timber in Baden-Württemberg had violated competition law provisions. In March 2017, the injunction had been confirmed by the Düsseldorf Higher Regional Court but on the appeal of the state of Baden-Württemberg the Federal Court of Justice annulled the decision for formal reasons. However, the Federal Court of Justice did not state on the violation of competition law, so civil proceedings, e.g. compensation claims, remain possible.

Düsseldorf Higher Regional Court upheld the interdiction of the planned acquisition by CTS Eventim

44. The Düsseldorf Higher Regional Court (OLG) upheld the interdiction of the planned acquisition by CTS Eventim of the majority of shares in the companies belonging to the Four Artists Group. CTS Eventim is a vertically integrated group known for its online ticketshop eventim.de. The company also provides ticketing system services for event organisers and advance booking offices, owns and operates its own venues and organises events itself, especially rock/pop tours and festivals. The Four Artists Group is an event organiser which holds several popular rock/pop events. The court shared the Bundeskartellamt's view that this vertical merger would strengthen CTS's already dominant position on the domestic market for ticketing services. It confirmed this platform market to be a two-sided market. Yet it focused its analysis on the relations between the platform and event organisers and found that the acquisition of event organizer Four Artists further strengthened CTS's dominant position. The court based its decision inter alia on a new provision in the law on the assessment of the market power of platforms. In a preliminary ruling the OLG also refused to suspend a decision by which the Bundeskartellamt had prohibited exclusivity agreements in contracts between CTS and a number of event organisers and advance booking offices on the basis of Art. 102, 101 TFEU and their equivalents in national law. The OLG's final ruling on the case is expected in 2019.

Düsseldorf Higher Regional Court confirms the Bundeskartellamt's decision against the standardized terms of trade in German retail banking

45. In January 2019 the OLG upheld a decision by which the Bundeskartellamt had declared unlawful a provision of the standardized terms of trade in most of German retail banking. The decision had been directed at a group of professional associations which draft and recommend the terms of trade inter alia for online banking. The OLG sided with the Bundeskartellamt in finding a breach of Art. 101 TFEU in a recommended provision which effectively banned the banks' customers from using their data for online access to

their accounts on third party websites. The OLG backed the Bundeskartellamt's view that the relevant provision could not be justified by security concerns and was deliberately designed to impede the growth of the German fintech "Sofortueberweisung".

The Federal Court of Justice confirms decision of the OLG against non-competitive agreements between liquid gas companies

46. The BGH confirmed a series of decisions by which the OLG had found that several liquid gas companies had concluded and adhered to a long-term non-compete agreement. However, the BGH sent the cases back to the OLG to reassess the amount of the fines. The cases fall under previous law which requires the amount of the fine to be assessed on the basis of the illegal gains incurred by the cartel. The BGH found insufficient reasoning for the OLG's method of calculating those gains. One case was referred back in whole due to a procedural error in the previous court proceeding.

3.2. Mergers and acquisitions

3.2.1. Statistics

47. In 2018, around 1,380 mergers were notified to the Bundeskartellamt. In respect of the second-phase proceedings concluded in 2018, there was no prohibition of a merger. One merger was cleared subject to remedies and three others were cleared without remedies. In four cases, notifications were withdrawn by the parties during the second phase. At the end of 2018, six second-phase proceedings were still ongoing.

3.2.2. Summary of significant cases

Withdrawals in second phase proceedings

Raiffeisen Gartenbau

48. In February 2018, Raiffeisen Waren-Zentrale Rhein-Main eG ("RWZ") and Landgard Blumen & Pflanzen GmbH & Co. KG ("Landgard") abandoned their plans to set up a joint venture under the name Raiffeisen Gartenbau GmbH & Co. KG ("Raiffeisen Gartenbau"). Under the project Landgard was to acquire 25 per cent of the shares in Raiffeisen Gartenbau and in return bring its horticultural supply centers into the joint venture. RWZ was to hold 75 per cent of the shares. The companies notified the project to the Bundeskartellamt on 26 October 2017. After conducting extensive enquiries among manufacturers, competitors and customers, the Bundeskartellamt came to the preliminary conclusion that the joint venture would create a dominant position on the relevant market. On 31 January 2018 the Bundeskartellamt therefore issued a statement of objections regarding the planned merger. The companies subsequently withdrew their notification on 19 February 2018 after the deadline for comments had expired.

49. The market which the Bundeskartellamt examined in this case was a regional market for plant pots and packaging used in the horticultural industry, which was limited to North Rhine Westphalia, and a regional market for the entire range of horticultural supplies. The joint venture would have achieved a market share of 45-50 per cent on the regional market for plant pots and packaging and a 50 per cent market share on the regional full-range horticultural supplies market with a clear lead over the next closest competitor. The market assessment also included the direct sales of manufacturers of pots and trays from within Germany and abroad. There were also high barriers to entry on this

market. The surveys conducted among the market participants showed that purely online dealers were no plausible alternative channel of supply for the horticultural businesses in coming years. In its customer enquiries the Bundeskartellamt based its findings on a representative random sample of the horticultural businesses affected in the Lower Rhine region. The RWZ is a central cooperative active in the agricultural wholesale sector. Its area of business covers around 100 locations across large parts of North Rhine-Westphalia, Hesse, Thuringia and Saxony, the whole of Rhineland-Palatinate and Saarland. The Landgard group is a cooperative which is primarily active as a distributor of flowers and plants as well as vegetables and fruit on behalf of the producers. It operates locations in Germany and nine other European countries.

Bunkering service provider

50. In June 2018, the companies Reinplus VanWoerden Bunker GmbH, Mannheim and Nord- und Westdeutsche Bunker GmbH, Hamburg, withdrew their merger notification after the Bundeskartellamt had written to them expressing its competition concerns about the proposed merger. Reinplus and NWB provide so-called bunkering services. The term "bunkering services" is used in the shipping industry to describe the refuelling (or bunkering) of shipping vessels with fuel for their own propulsion. The proposed merger concerned in particular the supply of inland waterway vessels with diesel fuel. Due to the location of the inland waterway bunker stations or bunker boats of the two companies, there were overlaps in supply, especially in the German part of the Rhine, which accounts for a large part of the traffic and freight volume on the German inland waterways.

51. After the proposed merger was notified, the Bundeskartellamt carried out extensive market investigations among the parties to the merger, their competitors and customers in the cargo shipping, passenger shipping and tourist navigation sectors. The authority found that the merger would have led to the creation of by far the leading supplier of diesel fuel for inland waterway vessels on the German part of the Rhine with only one remaining major competitor. In contrast to this competitor, Reinplus, as a company of the VARO group, is also vertically integrated in the upstream fuel trading markets. Only little competitive pressure was exerted by other bunkering service providers located on the Netherlands part of the Rhine due to the inefficiency of detours. With the merger, NWB as an important competitive force in the relevant region would have disappeared from the market. Providers which supply inland waterway vessels onshore by means of tank trucks only offered an alternative for a limited customer group and not for every location.

Horizon/Westfalia and Brink

52. On 18 June 2018 Horizon Global Corporation, USA, and Brink International B.V., Netherlands, withdrew their merger notification. Horizon is an American manufacturer of towbars and other equipment for cars and light utility vehicles. In Europe the company is mainly active via its subsidiary Westfalia-Automotive GmbH. Brink also produces and sells towbars for cars and light utility vehicles. The buyers of towbars are motor vehicle manufacturers, wholesalers of automotive components and auto-repair chains. The proposed merger was notified to the Bundeskartellamt on 8 January 2018. During the proceeding the Bundeskartellamt carried out extensive market surveys among customers and competitors of the companies involved. The authority found that after its merger with Brink, Horizon/Westfalia would have gained a scope of action which would not be sufficiently controlled by competition. The indicators which supported this

assessment were, inter alia, market shares on the markets affected of more than 50 %, few alternatives of supply and a clear technological lead of the merged party, in particular over smaller competitors. Furthermore, the merger would have eliminated Brink as a close competitor of Horizon/Westfalia. On 17 May 2018 the Bundeskartellamt therefore issued a statement of objections. The companies ultimately withdrew their notification on 18 June 2018 as they do not intend to pursue the merger project further. During the proceeding the Bundeskartellamt maintained close contact with the British competition authority - the Competition and Markets Authority (CMA) – which also examined the merger project and expressed its concerns.

Hospital operators in Cologne

53. In two separate merger control proceedings in the hospital sector the operators concerned have each withdrawn their notifications in second phase proceedings after the Bundeskartellamt had expressed preliminary concerns. In the one case Ameos Psychiatrie Holding GmbH, Kiel (“Ameos”), had notified the authority of its plans to acquire the majority of shares in Sana Kliniken Ostholstein GmbH, Eutin (“Sana Kliniken”). In the other case the hospital operator “Stiftung der Cellitinnen zur heiligen Maria” (“Cellitinnen Nord”) in Cologne had planned to merge with the hospital operator “Stiftung der Cellitinnen gemeinnütziger eingetragener Verein” (“Cellitinnen Süd”), also based in Cologne. Both operators belong to different religious communities of the Roman Catholic Church.

54. On 18 March 2019 Ameos withdrew its notification after the Bundeskartellamt had informed the company of its competition concerns. If the merger had been implemented, all the somatic hospitals in the north German Ostholstein market would have been controlled by the Carlyle Group, a private equity company based in Washington, D.C. (USA). The acquiring company Ameos and the main competitor of Sana Kliniken, namely Schön Klinik SE, Prien, are portfolio companies of two different investment funds. Both funds are operated and controlled by the Carlyle Group. With a market share in Ostholstein of over 50% of the cases in the acute inpatient sector and a very large lead over other hospitals outside the market area, Ameos, the Schön Klinik Neustadt which is associated with Ameos via the Carlyle Group, and the Sana Kliniken would have held a dominant position.

55. In the second merger case both hospital operators in Cologne already withdrew their notification on 17 December 2018. The merger would have created by far the largest hospital group in the City of Cologne. Intensive investigations have also shown that the operator "Cellitinnen Nord" already had a dominant position in the “Cologne north - left Rhine bank” market area even before the planned merger. In 2017 they treated over 50% of the patients in the market area in their four hospitals. The two hospital operators are close competitors especially on the left Rhine bank of Cologne, in particular in the north of the city. This was also confirmed by a survey among physicians in Cologne and Hürth. By merging with the "Cellitinnen Süd", the operator "Cellitinnen Nord" would have significantly expanded its leading position in the market area with a total of seven general hospitals.

56. The assessment of each of the two merger projects was based on 14 million patient case data. The notifications of these mergers were withdrawn after the Bundeskartellamt had informed the parties in writing of its preliminary competition concerns about the projects (statement of objections)..

Clearance of mergers

57. 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 focuses on cases that were subject to an in-depth investigation (first and second phase).

Takeover of Mediengruppe Frankfurt by the Ippen Group

58. In March 2018, the Bundeskartellamt cleared plans by the Ippen Group to acquire the Mediengruppe Frankfurt media group from the FAZIT foundation. Among the newspapers of Mediengruppe Frankfurt are the “Frankfurter Neue Presse” and “Frankfurter Rundschau”. Although the merger affected a large number of regional advertising markets they could not be considered because they constitute so-called minor markets. Overlaps on some regional reader markets did also not prevent the project from being cleared because the improvements on the reader market in the City of Frankfurt were significantly more important than any potential regional disadvantage.

Takeover of the newspaper General-Anzeiger by Rheinische Post

59. In May 2018, the Bundeskartellamt cleared the acquisition of all assets of H. Neusser Besitz- und Verwaltungs-GmbH & Co. KG (Neusser KG) by Rheinisch-Bergische Verlagsgesellschaft mbH (RBVG). The Bundeskartellamt concluded that the distribution areas of the newspapers “Rheinische Post” and “General-Anzeiger” did not overlap. For the same reason the authority did not expect any competition restraints on the advertising und radio broadcasting markets either.

Takeover of mail-order pharmacy apo-rot by DocMorris

60. In July 2018, the Bundeskartellamt cleared plans for the acquisition of assets of apo-rot mail order pharmacy pertaining to Apotheke am Rothenbaum Birgit Dumke e.K. in Hamburg by DocMorris Holding GmbH in Berlin. The participating companies operated mail-order pharmacies selling prescription and non-prescription drugs via the Internet in Germany. While DocMorris, which took over apo-rot, is Germany's largest mail-order pharmacy, the nationwide market shares of both companies combined were under 1 % of the turnover achieved with prescription drugs and under 5 % of that achieved with non-prescription drugs. Even in postal code areas with just one stationary pharmacy, the combined market position of the two companies involved in the takeover was unproblematic under competition law, as consumers can procure pharmaceuticals from many other mail-order pharmacies and stationary pharmacies in neighbouring regions.

Acquisition of shares in Deutsche Gießdraht by Aurubis

61. After a merger control decision by the Bundeskartellamt taken in July 2018, Aurubis AG, Hamburg, could acquire a further 40 % of the shares in and therefore the sole control of Deutsche Gießdraht GmbH, Emmerich am Rhein. Deutsche Gießdraht was a joint venture between Aurubis and Codelco Kupferhandel GmbH, Düsseldorf and produced continuous cast copper rod exclusively for its two parent companies. Aurubis and Codelco sold the continuous cast copper rod in competition with one another. Their customers were industrial processors and several traders. Continuous cast copper rod is the basic product used in the cable and wire industry and is mainly processed into power cables, magnet coils and products used in telecommunications and data technology.

62. Deutsche Gießdraht was one of the leading producers of continuous cast copper rod in Europe. Aurubis, which up to 2009 traded under the name "Norddeutsche Affinerie Aktiengesellschaft", is an integrated copper producer and even before the merger was by far the leading copper producer in Europe. Apart from its shareholding in Deutsche Gießdraht, it operates other production sites in Europe. As a result of the acquisition, Codelco, a close competitor of Aurubis, disappeared from the market. Customers, however, still had the possibility to switch to alternative suppliers after the merger. Several domestic and foreign producers in Europe supplied continuous cast copper rod of comparable quality. The authority's investigations showed that customers were also in a position to easily switch to another producer of continuous cast copper rod and have in some cases also done so in the past. Aurubis's argument that its competitors also had sufficient capacity to actually supply any customers wishing to change supplier, could not be disproved in the investigations.

7TV expansion by Maxdome and Eurosport

63. In July 2018 the Bundeskartellamt cleared plans by ProSiebenSat.1 Media SE and Discovery Communications to expand their joint video platform 7TV, in particular with their video streaming services "Maxdome" and "Eurosport-Player". Already in 2017, 7TV was set up by ProSiebenSat.1 and Discovery and the Bundeskartellamt cleared the project. The platform offered video on demand services and live streams of TV programmes broadcast by its two parent companies. Both offers were financed through advertising. With its added business areas "Maxdome", which was offered by Pro7, and "Eurosport-Player", which was offered by Discovery, the joint venture was not expected to gain a dominant market position. While Maxdome was well-known for offering a wide range of videos and Eurosport-Player has become known for offering Bundesliga matches, the market for paid video on demand services continues to be a fast-expanding one, with powerful competitors like Amazon, Netflix, iTunes, Sky and public broadcasting services. The parties' merger application exclusively involved the expansion of their services as mentioned above. The Bundeskartellamt examined the project and issued a merger control clearance under these aspects only. Should 7TV wish to add further content or cooperation partners in future, such a project will have to be examined again, taking account of the current market situation and the specific cooperation structure.

Acquisition of Parfümerie Akzente by Douglas

64. In July 2018, the Bundeskartellamt cleared the merger between Douglas and Parfümerie Akzente. Douglas is part of the CVC group and operates 456 perfumery stores in Germany as well as an online shop under the same name. Parfümerie Akzente operates 27 stores and the online shop parfumdreams. Whilst Douglas was the leading perfumery company in Germany, Akzente held a prominent market position in online sales. The merger project mainly affected the market for the sale of prestige perfumery products. These high-priced products with their distinguishable product presentation are normally available for sale in perfumery stores or the perfumery sections of department stores. Manufacturers mainly sell products of their prestige product line using selective distribution systems (via so-called "selective distribution contracts" with authorised dealers). According to the authority's investigations, however, non-authorised retailers could also buy original products in large quantities, especially on the so-called "grey market".

Take-over of TTS ASA's Marine Cargo Handling business by Cargotec Oyj

65. After conducting an in-depth examination the Bundeskartellamt cleared the acquisition of the marine cargo handling business of TTS Group ASA, Norway, by Cargotec Oyj (MacGregor), Finland, in November 2018. The activities of the two companies overlapped in the sale, repair and maintenance of ship cranes, hatch covers, winches and technical equipment for cruise liners and roll-on/roll-off ships. The Bundeskartellamt had to clear the merger in spite of the parties' strong market positions. Demand for ship supplies on the relevant markets in Germany was not strong enough in the recent past to exceed the limit of the "minor markets". According to the "minor market clause" of the German Competition Act, a merger cannot be prohibited if the turnover achieved on the domestic market affected in the last calendar year was less than EUR15 million.

66. In order to build a new ship or series of ships, shipyards generally require all or most of the following components: ship cranes, hatch covers, winches as well as ramps, outer doors, stern and bow doors, mooring platforms etc. The shipyards negotiate prices and conditions with the ship suppliers. No larger merchant ships such as e.g. container ships or bulkers have been built in Germany for some time. Shipyards in Germany primarily build passenger ships such as e.g. cruise liners and ferries as well as yachts and naval vessels. Demand for the technical ship supplies described above is therefore weak. Both parties were also active on the international after sales service market for ship cranes, i.e. they repair and maintain ship cranes. In addition to the ship crane manufacturers, a number of other independent service providers were available to the ship owners which were not tied to a specific manufacturer. The strong market position of the two companies ultimately did not per se justify a prohibition of the merger.

Merger between Karstadt and Kaufhof

67. In November 2018, the Bundeskartellamt cleared the merger between Karstadt Warenhaus and Galeria Kaufhof. The parent companies were SIGNA Retail and Hudson Bay Company (HBC) respectively. The combined turnover of Karstadt and Kaufhof was approx. EUR 5 billion. In its investigation the Bundeskartellamt questioned about 100 retail companies and suppliers, including the largest online and offline retailers in Germany. The authority closely examined the product categories "bags" (suitcases/bags), "underwear", "sports/outdoor", "games/toys", "household textiles" and "office products and stationery" because Kaufhof's and Karstadt's market positions are strongest in these product categories.

68. The results of the investigation showed that even in an analysis exclusively limited to brick-and-mortar sales, the merger did not raise any competition concerns which would justify prohibiting it. Kaufhof's and Karstadt's scope of action was controlled in all product categories and regions by various other brick-and-mortar competitors. The joint market shares of the companies only exceeded 25% in a few relevant product categories and regions. In addition, strong competitive pressure was exerted by online sales. The share of online sales as a proportion of total turnover differed in the different product categories in Germany but was subject to very high growth rates in all segments, on average 10% per year. Karstadt and Kaufhof together have a strong market position on the procurement markets, i.e. in the relationship between the store operators and their suppliers, especially in the product categories "underwear", "household textiles" and "bags". However, manufacturers have sufficient sales alternatives in the form of specialist retailers, both online and offline. Some

manufacturers have expressed the concern that the two companies will have greater buying power in future and could therefore also demand better conditions. The Bundeskartellamt will closely observe this within the meaning of the Federal Court of Justice ruling on the so-called “Anzapfverbot” (i.e. the prohibition to demand unjustified benefits from suppliers). In the “Sports/Outdoor” category Karstadt is a member of the purchasing cooperation Intersport, to which Kaufhof’s purchase volume was added. The Bundeskartellamt reserved the right to examine this purchasing cooperation in more detail as a follow-up to the merger proceeding. The real estate markets affected by the merger were unproblematic from a competition viewpoint.

Takeover of the waste management company Helene Müntefering-Gockeln by Remondis

69. In December 2018 the Bundeskartellamt cleared the acquisition of the waste management company Helene Müntefering-Gockeln GmbH & Co. KG by Remondis GmbH & Co. KG. Remondis is part of the Rethmann group and is Germany’s largest waste management company with a large number of operations at several levels of the value-added chain. Müntefering-Gockeln operated a large container service in the Ruhr area, a commercial waste sorting facility and a large plant for recycling waste wood. Container services collect waste materials from building sites and, in particular, from commercial and industrial customers. In the Ruhr area Remondis had a very strong market position in the collection of non-hazardous commercial waste (container services) with high market shares. Furthermore, due to its existing participations and contracts, Remondis had access to a large share of the freely disposable waste incineration capacities whereas the company’s competitors often had difficulties in finding waste incineration plants in the region to burn their waste. Remondis’ strong position in the collection of non-hazardous commercial waste and its access to the waste incineration plants gave it considerable advantages over its competitors. The investigations showed, however, that a large number of smaller container services were still operating in the highly industrial Ruhr area. The proposed acquisition could thus be cleared on the basis of these special regional circumstances.

70. The Bundeskartellamt also examined whether the new obligation to sort mixed commercial waste could lead to market foreclosure. As Remondis had already acquired another company in the region that also owned a sorting facility (like the one owned by Müntefering-Gockeln), many market players expressed their concern that they could be foreclosed from access to sorting facilities. It has, however, become clear from the investigations that the competitors already had capacities for sorting mixed commercial waste or plans to build such facilities that are large enough to prevent Remondis from foreclosing competitors from sorting services, even after its acquisition of Müntefering-Gockeln. According to the investigations, sufficient capacities for pre-sorting mixed commercial waste could be expected to become available over the following two years. As a result of the concentration Remondis also gained a strong market position in the area of waste wood recycling. This did not lead to a prohibition of the proposed acquisition either as other important players were also active in the market.

Clearance with remedies

Merger of rail wagon leasing companies

71. In March 2018, the Bundeskartellamt cleared the acquisition of CIT Holdings (Europe) S.A.S. by VTG Rail Assets GmbH subject to a condition precedent. VTG and

CIT, which is known under the brand name “Nacco”, are active Europe-wide in the lease of rail freight cars. Considering that VTG was already the largest supplier on the markets affected in Europe, it was expected that the complete acquisition of its close competitor Nacco would have created a dominant position for VTG. The Bundeskartellamt cleared the merger subject to the condition that a substantial share of Nacco’s business be sold to an independent third company. Consequently, the merging parties have undertaken to hive off the entire business of Nacco’s German and Luxemburg subsidiaries and a certain number of freight cars before implementing the merger. A purchaser independent of the parties had to be found.

3.2.3. Activities of the court

Federal Court of Justice confirms preliminary injunction to prevent gun jumping measures

72. On the appeal of the Bundeskartellamt, the Federal Court of Justice (BGH) confirmed the lawfulness of a preliminary injunction issued by the Bundeskartellamt to prevent gun jumping measures in the “EDEKA/Tengelmann” retail merger case. In the course of agreeing on the merger, the parties had also agreed inter alia on a joint buying agreement which would have become effective long before the end of the merger control proceeding. The BGH (deviating from the reasoning of a recent CJ judgment on the EU merger regulation) and the Düsseldorf Higher Regional Court (OLG) had sided with the Bundeskartellamt that this constituted a violation of the waiting period. Nonetheless, the OLG had required the Bundeskartellamt to show a specific urgency for passing a preliminary injunction. Contrary to this the BGH stated that the violation of the waiting period itself justified interim measures.

3.3. Sector inquiries

3.3.1. Sector inquiry into online comparison websites

73. In December 2018, the Bundeskartellamt presented the results of its sector inquiry into online comparison websites. The inquiry into a large number of comparison websites from the areas of travel, energy, insurance, telecommunications and financial services has in some areas confirmed the suspicions of consumer rights violations.

74. Many comparison websites provide reliable information, making it easier for consumers to make a buying decision. However, the Bundeskartellamt has information to suggest that portals also act in a way that can mislead consumers: (i) The fees or commissions many suppliers pay often influence the list of results provided by the portal. Depending on the industry, offers may be pre-selected, some offers can be positioned on top of the actual ranking or the suppliers’ payments may be taken into account in the ranking as such. (ii) The market coverage of comparison websites is poor in some industries. In some cases, it corresponds to less than 50 per cent of all offers available in the market. (iii) Many comparison websites claim that their offers are limited or emphasise benefits which can hardly be obtained in practice. Some also promote allegedly exclusive offers. (iv) Many websites merely reproduce the data and/or calculations of other portals rather than making their own comparison.

75. Consumers are often not sufficiently informed about the comparison websites’ practices. If this is the case, this may mislead consumers or constitute a case of hidden

advertising, which is a violation of the consumer rights regulations of the German Act Against Unfair Competition (UWG).

3.3.2. Sector inquiry into smart TVs

76. On the same legal basis, the Bundeskartellamt launched a sector inquiry into smart TVs in December 2017 in order to shed some light on how producers of smart TVs collect, pass and commercially use personal data, and whether the persons concerned are being appropriately informed of this. In May 2018, following preliminary talks with TV manufacturers, a data protection authority, a consumer protection authority and around 30 suppliers were questioned in a first inquiry. The aim of the first inquiry was to find out who supplies and places smart TVs on the German market, what proportion of the devices have smart functions and who develops software and apps for the smart TVs. In the next stage of the inquiry the Bundeskartellamt will take a close look at the conduct of the largest suppliers in an extensive questionnaire.

3.3.3. Sector inquiry into market conditions in the online advertising sector

77. In February 2018, the Bundeskartellamt launched a sector inquiry into market conditions in the online advertising sector. It will examine whether, as some market players claim, large providers like Google or Facebook have set up closed systems, so-called “walled gardens”. Furthermore, the authority will focus on the effects of technical developments on the market structure and the market opportunities of the various players.

4. Cooperation in international fora

4.1. International Competition Network (ICN)

78. The ICN is the most important network of competition authorities worldwide. It comprises more than 135 competition agencies from more than 120 jurisdictions. Andreas Mundt, President of the Bundeskartellamt, has been the ICN Steering Group Chair since September 2013.

79. The Bundeskartellamt played an active role in all ICN Working Groups in 2018 and took part in several virtual seminars and workshops. In the ICN year 2018/2019 ICN working groups organized an Advocacy Workshop in Ukraine, a Cartels Workshop in Israel, a Merger Workshop in Japan, a Unilateral Conduct Workshop in South Africa, and together with the OECD a Competition Economics Workshop for Chief Economists in Korea. Furthermore, the Bundeskartellamt actively participated in the 17th Annual ICN Conference held in New Delhi, India, from 21 March to 23 March 2018. Nearly 500 participants from more than 70 jurisdictions, including representatives and stakeholders such as the business community, legal and economic professionals, international organisations and academics attended this year's conference. At the Annual Conference, last year's work products were approved, including guiding principles on procedural fairness and a new annotated guidance document on investigative process, updated and expanded recommended practices on cooperation in merger control, timing of notifications and review periods and an interim report on key elements for efficient and effective leniency programmes. The ICN work also covered vertical mergers, market studies and advocacy strategies.

4.2. ECN/ECA

80. In 2018, the competition authorities of the EU continued their successful cooperation within the European Competition Network (ECN).

81. By the end of 2018 a total of 2525 cases were posted on the competition authorities' joint intranet; 232 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 in two cases. 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 Austrian Bundeswettbewerbsbehörde in executing a dawn raid. In 2018, the European Commission was informed about 165 new proceedings initiated by the national competition authorities (NCAs) under Article 11(3) of Regulation 1/2003, 5 of which were Bundeskartellamt cases.

82. The Bundeskartellamt participates regularly and actively in the Advisory Committees on competition law proceedings and merger control cases of the European Commission in Brussels. An essential part of the ECN's joint work takes place in the various ECN Working Groups (Cooperation Issues, Cartels, Vertical Issues, Horizontals and Abuse, Competition Chief Economists, Forensic IT, and Merger Working Group). The Working Group on Vertical Issues has been discussing the implications of the recent case law of the European Court of Justice and the German Federal Supreme Court (i.e.: Coty, Asics) in vertical issues and more specifically regarding selective distribution systems. This jurisprudence is of particular relevance for the future approach by the European Commission and the NCAs regarding vertical restrictions such as platform bans. The Bundeskartellamt also was involved in setting up a workshop within the new ECN Working Group Digital Issues in order to discuss specific issues in a more informal setting.

83. Furthermore, the Bundeskartellamt plays an active role in all ECN sectoral subgroups, where an exchange of practical experience takes place. In 2018, the Bundeskartellamt's representatives attended meetings of the subgroups Banking, Food, Energy, Telecoms and Pharma & Health. A particular focus has been on the work of the subgroup Pharma & Health, where the Commission and the NCAs have had intensive discussions about abuse of dominance proceedings and also prepared the ECN Pharma Report "Competition enforcement in the pharmaceutical sector (2009-2017)".

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

85. In 2018, the Annual Directors General meeting of the ECA forum (European Competition Authorities) took place in Copenhagen, Denmark. The issues discussed at the meeting included rebate schemes, competition issues in the pharmaceutical sector and the challenges of digitalisation for the enforcement of competition rules.

4.2.1. Annual Meeting of the Working Group on Competition Law

86. On 4 October 2018, the Working Group on Competition Law met in Bonn at the invitation of the Bundeskartellamt. At the meeting over 120 competition law experts

discussed and exchanged views on the theme "What is the scope and purpose of abuse control under competition law?". The Working Group on Competition Law is made up of a large number of university professors from law and economics faculties, high-ranking representatives of national and European competition authorities and ministries, as well as judges from the antitrust divisions of the Düsseldorf Higher Regional Court and the Federal Court of Justice. For more than 50 years, the group has met annually to discuss fundamental issues of competition policy. This year's conference was chaired by Bundeskartellamt's Vice President Professor Dr Ost. Prof. Dr Florian Bien, University of Würzburg, Prof. Dr Ulrich Schwalbe, University of Hohenheim, Prof. Dr Justus Haucap, Heinrich-Heine University of Düsseldorf, Prof. Dr Achim Wambach, Centre for European Economic Research in Mannheim and Chairman of the Monopolies Commission, Gunnar Wolf, DG COMP, European Commission, and Birgit Krueger, Head of the Bundeskartellamt's General Policy Division, gave short introductory presentations and participated in the panel discussions.

87. Among the issues discussed was an expert opinion commissioned by the German Federal Ministry for Economic Affairs and Energy on the modernisation of abuse control, which was published recently. While the participants mostly agreed on the issues the experts identified, there was a controversial debate about the need for new regulations and their implementation in practice. On a general note, the overall objectives of abuse control were discussed in this context. There was a broad consensus that abusive conduct should not be assessed solely on the grounds of short-term price effects. Many participants emphasised other objectives of abuse proceedings, especially in the digital economy, e.g. keeping markets open for competitors for a longer time or protecting innovations. A further aspect of the discussions were considerations on how competition authorities can accelerate abuse proceedings in view of the rapid developments in the digital economy without excessively limiting the companies' legal security and the level of legal protection. In this context, current developments in case law were discussed, e.g. what consequences the European Court of Justice's decision in the Intel case (exclusive rebates) will have for requirements of proof for abusive conduct in general.

4.2.2. Working Group on Competition Economics

88. In October 2017, with the launch of the Working Group on Competition Economics the Bundeskartellamt initiated a new series of events. The objective is to discuss future concepts and methods used in the authority's case practice as well as cross-case with academics specialising in industrial economics and competition policy. The agenda of the second meeting in May 2018 included the planned guidance paper by the Bundeskartellamt and the Bundesnetzagentur on the control of the abuse of a dominant position in electricity generation, data-driven market definition as demonstrated in the example of cement markets and exclusivity agreements in the ticketing platforms sector.

4.2.3. 60th Anniversary of the Bundeskartellamt

89. In February 2018, the Bundeskartellamt celebrated its 60th Anniversary with a festive ceremony held in Bonn. On 1 January 1958, the German Act against Restraints of Competition (GWB) came into force and the Bundeskartellamt took up the prosecution of cartels and abuse of market power. Around 500 guests, among them representatives from politics, international competition authorities, courts, business sector and academia, participated in the ceremony. The speakers at the event were Brigitte Zypries, then Federal Minister for Economic Affairs and Energy, Bettina Limperg, President of the German Federal Court of Justice, and Professor Dieter Kempf, President of the

Federation of German Industries (BDI). In a double interview with the Director-General for Competition of the European Commission, Johannes Laitenberger, and the President of the Bundeskartellamt, Andreas Mundt, and the publisher of the German daily FAZ, Holger Steltzner, discussed the topic: “Competition, consumers, jobs – Who or what do competition authorities protect?” This was followed by a panel discussion moderated by the Vice President of the Bundeskartellamt, Prof. Dr. Konrad Ost, on the topic: “Competition policy in a globalized and digitalized world – Challenges of today and tomorrow”.

5. Resources of the Bundeskartellamt

5.1. Annual budget

Table 1.

Budget 2018	Change over 2017
EUR 33.1 million	+ 0.2 million

5.2. Number of employees

Table 2.

	2018*	Change over 2017
Economists	48	-1
Lawyers	87	0
Other experts	14	0
Support staff	166	+6
Total	315	+5

Note: * Full-time equivalent, actually active, i.e. excluding seconded employees, unfilled vacancies etc.
Updated: 02 August 2018

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

Table 3.

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