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## Annual Report on Competition Policy Developments in Germany

-- 2019 --

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## Germany

### 1. Executive Summary

#### 1.1. Digital economy

1. The digital economy continued to be a key area of the Bundeskartellamt's work in 2019. The authority looked into the business models of several dominant companies in this sector: Amazon improved important aspects of its general terms of business worldwide for sellers active on its marketplaces after the Bundeskartellamt had expressed competition law concerns. The authority's abuse of dominance proceeding against Facebook resulted in a decision in February 2019, imposing far-reaching restrictions on Facebook in the processing of user data. On appeal, the Federal Court of Justice provisionally confirmed the allegation of Facebook abusing a dominant position in June 2020.<sup>1</sup> In a joint project with the French competition authority, Autorité de la concurrence, the Bundeskartellamt examined inter alia the effects of algorithms on competition.

#### 1.2. Action against anticompetitive practices

2. Cartel prosecution was another focal point of the Bundeskartellamt's work in 2019. This included uncovering cartels, dawn raids, evaluating what is now mostly electronic evidence, hearing witnesses, assessing the facts of the cases and often subsequent extensive court proceedings. Fines of around EUR 848 million were imposed by the Bundeskartellamt on 23 companies or trade associations and 12 individuals.

#### 1.3. Merger control

3. The Bundeskartellamt examined around 1,400 notified mergers in 2019. Of these, 14 were closely examined in the so-called second phase. The proceedings in four cases resulted in the prohibition of the merger projects (Miba/Zollern, Heidelberger Druckmaschinen/MBO, Remondis/DSD, Loomis/Ziemann). Projects were withdrawn by the relevant parties in five second phase proceedings. One case was cleared by the authority without conditions and obligations. By the end of 2019, second phase proceedings were still ongoing in four cases.

4. At the beginning of 2020, the Bundeskartellamt entered into extensive investigations with regard to the CRRC/Vossloh locomotives merger case and examined all the particularities associated with the acquisition of a European company by a Chinese state-owned company.<sup>2</sup> The Bundeskartellamt took a closer look at the advantages CRRC enjoyed due to many forms of state subsidies. The potential for the implementation of predatory pricing and dumping strategies, the role of strategic shareholdings in other

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<sup>1</sup> Federal Court of Justice, decision of 23 June 2020 - KVR 69/19; available at: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=9185d20c44c2e97ae00ef0156bd8af3d&nr=109506&pos=0&anz=1>

<sup>2</sup> Bundeskartellamt, decision of 27 April 2020 - B4-115/19, case summary.

companies and state-backed cost advantages were taken into consideration during the assessment of the competitive landscape.

5. The case highlights that while Chinese State companies enter foreign markets with enormous economic strength, this does not automatically entail competitive concerns.<sup>3</sup>

## 2. Changes to competition laws and policies

### 2.1. Government proposals for new legislation

6. The draft for a further amendment of the German Competition Act by the Federal Ministry for Economic Affairs and Energy reached an elaborated stage in 2019 with the publication of a first working document at the end of the year.

7. The reform is spurred, inter alia, by the implementation of the ECN+ Directive. An important aim of the amendment to the German Competition Act is to foster more effective cartel enforcement. However, the future 10th amendment which is publicly also known as the “GWB Digitization Act” goes beyond this.

8. The reform is inspired by the Study “Modernising the law on abuse of market power”<sup>4</sup> and the Commission on Competition Law 4.0, set up by the Federal Government in order to develop proposals for further strengthening antitrust law to face the challenges of digital developments. The study of the Commission on Competition Law 4.0 was published in autumn 2019.<sup>5</sup>

9. A particular focus of the reform is a novel regime of abuse control for the platform economy. Among other things, a new competition tool will enable the Bundeskartellamt to impose special conduct obligations on platforms that are of paramount cross-market importance. The amendment is also expected to include adjustments aimed at speeding up proceedings, i.e. by facilitating interim measures by the Bundeskartellamt. Furthermore, some changes to provisions regarding cartel damages and the introduction of a second domestic turnover merger control threshold are being discussed.

10. The Federal Ministry for Economic Affairs and Energy has published the first official draft of the 10<sup>th</sup> Amendment of the German Competition Act on 24 January 2020.<sup>6</sup> The legislative process should be completed by the end of 2020. More details of the reform will be presented in the 2020 OECD Annual Report on Competition Policy Developments.

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<sup>3</sup> Bundeskartellamt, Annual report 2019, p. 25.

<sup>4</sup> [https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3).

<sup>5</sup> [https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3).

<sup>6</sup> Available in German at [www.bmwi.de](http://www.bmwi.de).

## 2.2. New tasks

### *2.2.1. Competition Register for Public Procurement*

11. The Bundeskartellamt is pushing ahead with the launch of the Federal Competition Register for Public Procurement. Companies which commit serious economic offences should not benefit from public 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. The electronic register is due to be operational by the end of 2020.

### *2.2.2. Public Procurement Tribunals*

12. In 2019, 104 applications for the initiation of review proceedings were filed with the Federal Public Procurement Tribunals. Around half of the cases concerned the award of contracts for public supplies and services, followed by construction contracts. Another key area of review were contracts for employment services and the award of contracts in the areas of defence and security.

## 2.3. Working Papers and Reports

### *2.3.1. New publication in the series of papers on “Competition and Consumer Protection in Digital Economy“*

13. In February 2019, the Bundeskartellamt published another paper in its series on "Competition and Consumer Protection in the Digital Economy". The paper entitled "Consumer rights and comparison websites: Need for action" summarizes the progress of the Sector Inquiry into Comparison Websites and the results of the investigation, including a brief market overview. It also contains a first legal assessment of the issues under investigation and some legal policy considerations.

### *2.3.2. Annual Report of Market Transparency Units for Fuels*

14. In April 2019, the Bundeskartellamt published its fifth annual report on the work of the Market Transparency Unit for Fuels. The authority evaluated fuel prices (E5, E10 and diesel) throughout Germany for the period from 1 January 2018 to 31 December 2018. From the observed pattern which fuel prices follow in the course of a day the authority has shown how easily motorists can save money when filling up. With the information provided by the Market Transparency Unit and a fuel prices app, consumers can take advantage of the differences in the price of petrol at different times of the day and between the various petrol stations and save money.

15. The Market Transparency Unit for Fuels collects price data from over 14,750 petrol stations in Germany. The Unit does not itself offer real-time price information to interested citizens but forwards information on notified price changes to consumer information services in a very short space of time. Motorists can call up the information from a number of information service providers, both online and via mobile apps.

### *2.3.3. Joint study on “algorithms and competition” of the French Autorité de la concurrence and the German Bundeskartellamt*

16. In November 2019, the French Autorité de la concurrence and the Bundeskartellamt presented their joint study on algorithms and competition. Algorithms are among the most

important technological drivers of the ongoing digitalization process. They are becoming more and more important, enabling firms to be more innovative and efficient. However, debate has arisen on whether and to what extent algorithms might also have detrimental effects on the competitive functioning of markets.

17. In their joint conceptual project, the two authorities studied potential competitive risks that might be associated with algorithms. They elaborated on the concept of algorithm as well as on different types and fields of application. The study focuses in particular on pricing algorithms and collusion, but also considers potential interdependencies between algorithms and the market power of the companies using them as well as practical challenges when investigating algorithms.

#### ***2.3.4. Energy Monitoring Report 2019***

18. In November 2019, the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur) and the Bundeskartellamt published their joint annual monitoring report on developments in the German electricity and gas market. It states inter alia that there was a further decline in market concentration in conventional electricity generation. At present, no company has a dominant position in electricity generation. With an overall decline in market shares of the five largest electricity producers, the relative standings within the group have shifted. Furthermore, the report informs that conventional generation capacity is still decreasing whilst wholesale electricity prices averaged across 2018 were again considerably higher.

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

#### **3.1. Action against anticompetitive practices**

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

19. In 2019, the Bundeskartellamt imposed fines of around EUR 848 million on 23 companies or trade associations and 12 individuals. The sectors concerned included bicycle wholesale, building service providers, magazines, industrial batteries, purchase of steel for the automotive industry and steel production.

20. 16 companies informed the authority about infringements in their sector by making use of the authority's leniency programme and the authority received numerous other indications of possible infringements of competition law.

21. The Bundeskartellamt carried out five dawn raids at 32 companies.

##### ***3.1.2. Description of significant cases***

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

## *Agreements*

### Hardcore restrictions

#### Price fixing agreements between bicycle wholesaler's representatives and retailers

23. In January 2019, the Bundeskartellamt imposed fines totalling around EUR 13.4 million on the bicycle wholesaler ZEG Zweirad-Einkaufs-Genossenschaft eG (ZEG), Cologne, and its representatives. ZEG is a purchasing cooperative consisting of approx. 960 independent bicycle retailers in Europe, around 670 of which are in Germany alone. It has a strong market position in Germany both on the purchase and sale side.

24. The subject of the proceeding were price fixing agreements between ZEG representatives and 47 bicycle retailers. The agreements, some of which dated back to February 2007, ended with a dawn raid on ZEG's premises in February 2015. The proceeding was triggered by a tip-off from the trade. Whilst ZEG set the fixed resale price for retailers, adherence to the resale price was checked by ZEG's representatives who would receive complaints from retailers about other retailers undercutting the prices. The representatives would then ask retailers to strictly observe the set price. For discretionary reasons no proceedings were initiated against the retailers due to their secondary role in the matter in comparison to ZEG. They were therefore not accused of having committed a cartel offence. In setting the fine the Bundeskartellamt took into account that the ZEG had cooperated with the authority in uncovering the agreements and that a settlement could be reached. The fining decisions are already final.

#### Magazine lending service providers concluding customer allocation agreements

25. Eight magazine lending service providers were fined approx. EUR 3 million in February 2019 for having concluded illegal customer allocation agreements. Amongst the companies concerned in the proceeding is Daheim Liefer-Service GmbH, Hamburg, a company belonging to the Ganske publishing group. In contrast to other companies concerned which are only active in specific regions of Germany, Daheim Liefer-Service GmbH is active throughout the country. According to the authority's findings, bilateral agreements were concluded between Daheim Liefer-Service GmbH and the other providers. The aim of each agreement was to prevent the poaching of existing "public display" customers (doctors' practices, hairdressers, etc.) between the services. Agreements were generally underpinned by the understanding that if one of the services poached another's customer in spite of the agreement, it would hand over one of its own customers to that provider. This compensatory mechanism reduced any economic incentive to poach customers. All the companies concerned agreed to have the proceedings terminated by settlement. Two companies cooperated with the Bundeskartellamt in clarifying the facts of the case and were granted a reduction of their fines. The fines imposed are final.

#### Steel manufacturers agreed on prices of quarto plates

26. In December 2019, the Bundeskartellamt imposed fines totalling around EUR 646 million on Ilseburger Grobblech GmbH, Thyssenkrupp Steel Europe AG and Voestalpine Grobblech GmbH as well as three individuals responsible for exchanging information on and agreeing certain price supplements and surcharges for quarto plates in Germany. The illegal agreement was practised from mid-2002 until June 2016. During this period, the steel manufacturers regularly met physically and agreed on the most important price

supplements and surcharges for specific quarto plates in Germany. These price components were then calculated according to the uniform models agreed on or the companies adopted them in coordination with one another. The agreements were based on the mutual understanding and aim of the companies to negotiate with their customers on the basic prices only and not on the price supplements and surcharges. The traditional pricing system generally became less important in the relevant period.

27. Dillinger Hüttenwerke, a public limited company that also participated in the agreement, was the first company to cooperate with the Bundeskartellamt and therefore was granted full immunity from fines. When calculating the fines, the Bundeskartellamt took into account whether a company had been cooperative as well as whether the companies admitting to the accusations made by the authority agreed to a settlement.

#### Territorial agreements between independent suppliers of liquefied gas

28. In December 2019, the Bundeskartellamt imposed fines totalling approx. EUR 195,000 on the companies BHG Agrarhandelsgesellschaft mbH & Co. KG, H&H Flüssiggas GmbH, OSTSEE und MV GAS Flüssiggasvertrieb GmbH and Top Gas Flüssiggas Handel GmbH for concluding illegal territorial agreements concerning liquefied gas. The territorial agreements covered a period between November 2006 and July 2016. As the effects on the German market for liquefied gas were insignificant due to the very small market shares of the companies involved, very moderate fines were imposed by the Bundeskartellamt. The authority therefore refrained from imposing a fine on the individuals involved, i.e. individual managers of the companies. The proceedings were initiated following a leniency application filed by Dr. Ulrich Fuchs GmbH & Co. KG in April 2016 that was therefore granted immunity.

#### *Non-hardcore horizontal restrictions*

##### Car manufacturers fined for anticompetitive practices in the purchase of steel

29. In November 2019, the Bundeskartellamt imposed fines totalling around EUR 100 million on Bayerische Motoren Werke AG, Daimler AG and Volkswagen AG for anticompetitive practices in the purchase of long steel products. Between 2004 and the end of 2013 representatives of the companies regularly met twice a year with steel manufacturers, forging companies and large systems suppliers and exchanged information on uniform surcharges for the purchase of long steel products.

30. Long steel is usually sold by the steel manufacturers or forging companies based on a certain price model. This consists of a basic price and scrap and alloy surcharges. In contrast to the basic prices, the surcharges were traditionally not negotiated but calculated according to sector-wide uniform formulas and added to the basic price as separate price components. In 2003 and 2004 the steel manufacturers unilaterally made certain changes to the surcharge calculation, in some cases under the threat of refusal to supply. As a reaction to this, the discussions between the car and steel manufacturers and forging companies were taken up under the umbrella of the German association for steel and metal processing (Wirtschaftsverband Stahl- und Metallverarbeitung). In the talks the representatives of the car manufacturers ensured one another that they would adopt the changes introduced by the steel manufacturers and continue to adhere to the established practice of uniformly calculated price surcharges. They did so at any rate until January 2016.

31. The companies acknowledged the facts as established by the Bundeskartellamt and agreed to a settlement. This was taken into account by the Bundeskartellamt when calculating the fines as well as the fact that the car manufacturers had cooperated with the authority throughout the proceeding. The investigations against three component suppliers and an industrial association were terminated for discretionary reasons.

#### *Anticompetitive practices in the sale of number plates*

32. At least from 2000 until early 2015 representatives of leading plate embossing companies restricted competition on the local markets for the sale of stamped registration plates. The companies exchanged competition-relevant information and cooperated with one another in different forms and at various levels of involvement on approx. 40% of over 700 local number plate supplier markets in Germany. A key area of cooperation are the so-called “Kostenstellenvereinbarungen” by which the companies agreed with one another on which of them would be allowed to operate a stamping shop on a certain local market and which companies would not. The total income, costs and profits of the designated stamping shop would then be pooled to rule out any entrepreneurial and competitive risk.

33. All the companies and individuals involved acknowledged the facts as established by the Bundeskartellamt and agreed to a settlement. In December 2019 the Bundeskartellamt imposed fines totalling approx. EUR 8 million on Christoph Kroschke GmbH, EHA Autoschilder GmbH, Astorga Fritz Lange GmbH & Co. Schilder und Stempelfabriken KG and Tönjes Holding AG as well as five individuals involved. Investigations against eight other companies were terminated for discretionary reasons.

#### *Abuse of a dominant position*

##### Facebook is prohibited from combining user data from different sources

34. In February 2019, the Bundeskartellamt imposed far-reaching restrictions on Facebook in the processing of user data. The extent to which Facebook collects, merges and uses data in user accounts constitutes an abuse of a dominant position. According to Facebook's terms and conditions, users have so far only been able to use the social network under the precondition that Facebook can collect user data also outside of the Facebook website in the internet or on smartphone apps and assign these data to the user's Facebook account. All data collected on the Facebook website, by Facebook-owned services such as e.g. WhatsApp and Instagram and on third party websites can be combined and assigned to the Facebook user account. As a dominant company in the market for social networks Facebook is subject to special obligations under competition law. In the operation of its business model the company must take into account that Facebook users practically cannot switch to other social networks. In view of Facebook's superior market power, an obligatory tick on the box to agree to the company's terms of use is not an adequate basis for such intensive data processing. The only choice the user has is either to accept the comprehensive combination of data or to refrain from using the social network. In such a difficult situation the user's choice cannot be referred to as voluntary consent.

35. The authority's decision covers different data sources:

1. Facebook-owned services like WhatsApp and Instagram can continue to collect data. However, assigning the data to Facebook user accounts will only be possible subject to the user's voluntary consent. Where consent is not given, the data must remain with the respective service and cannot be processed in combination with Facebook data.

2. Collecting data from third party websites and assigning them to a Facebook user account will also only be possible if users give their voluntary consent.

36. If consent is not given for data from Facebook-owned services and third party websites, Facebook will have to substantially restrict its collection and combining of data. Facebook is to develop proposals for solutions to this effect. The Bundeskartellamt's decision is not about how the processing of data generated by using Facebook's own website is to be assessed under competition law. As these data are allocated to a specific service, users know that they will be collected and used to a certain extent. This is an essential component of a social network and its data-based business model.

37. Further, Facebook's terms of service and the manner and extent to which it collects and uses data are in violation of the European data protection rules to the detriment of users. The Bundeskartellamt closely cooperated with leading data protection authorities in clarifying the data protection issues involved. In the authority's assessment, Facebook's conduct represents above all a so-called exploitative abuse. Dominant companies may not use exploitative practices to the detriment of the opposite side of the market, i.e. in this case the consumers who use Facebook. This applies above all if the exploitative practice also impedes competitors that are not able to amass such a treasure trove of data. This approach based on competition law is not a new one but corresponds to the case-law of the Federal Court of Justice under which not only excessive prices, but also inappropriate contractual terms and conditions constitute exploitative abuse (so-called exploitative business terms). On appeal, the Federal Court of Justice provisionally confirmed the Bundeskartellamt's decision in June 2020.<sup>7</sup>

#### German Athletes and their sponsors obtain further advertising opportunities during the Olympic Games

38. German athletes and their sponsors will have considerably enhanced advertising opportunities during the Olympic Games in future. In February 2019, the German Olympic Sports Confederation (Deutscher Olympischer Sportbund, DOSB) and the International Olympic Committee (IOC) committed to the Bundeskartellamt to ease the advertising restrictions pursuant to Rule 40 No. 3 of the Olympic Charter.

39. In 2017, the Bundeskartellamt initiated administrative proceedings for the suspected abuse of a dominant position against the DOSB and the IOC. As a result, both organisations made initial improvements to the advertising guidelines in December 2017 prior to the Olympic Games in Pyeongchang.

40. Whilst these changed guidelines were preliminarily accepted, a survey conducted among a large number of athletes and sponsors in Germany early in 2018 showed that the initial adjustments did not eliminate the advertising restrictions to a sufficient extent. For this reason, the Bundeskartellamt initiated further investigations in April 2018 and negotiated with the IOC and the DOSB on how to improve and specify its commitments.

41. According to the Bundeskartellamt's preliminary assessment, the DOSB and the IOC have a dominant position on the market for organising and marketing the Olympic Games. Pursuant to the case-law of the European Court of Justice the guidelines of a sports association are subject to competition law insofar as they refer to economic activities.

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<sup>7</sup>Press release of the Federal Court of Justice of 23 June 2020, available at: <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html>; Courtesy translation provided by the Bundeskartellamt on its website [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

Restraints of competition may be justified by legitimate aims provided that the restraints required to achieve the aims are proportionate. As a legitimate aim for the advertising restrictions the Bundeskartellamt basically acknowledged the regular event of the Olympic Games by preventing illegal forms of advertising.

42. However, the authority's preliminary assessment was that the restrictions of advertising opportunities arising from the current application of Rule 40 of the Olympic Charter are too far-reaching and thus constitute abusive conduct. In that respect especially the case-law of the Federal Court of Justice regarding the German "Olympiaschutzgesetz" (Act on the Protection of the Olympic Emblem and the Olympic Names) was taken into account.

43. After the authority had expressed these concerns, in February 2019 the DOSB and the IOC undertook to considerably enhance advertising opportunities for German athletes and their sponsors, i.e. the administrative proceedings could be concluded with a commitment agreement.

### *3.1.3. Activities of the courts*

#### *Antitrust*

#### Prohibition of exclusivity agreements of platform operator CTS Eventim upheld in first instance

44. In April 2019, the Düsseldorf Higher Regional Court confirmed a decision by which the Bundeskartellamt had prohibited exclusivity agreements in contracts between platform operator CTS Eventim and a number of event organizers and advance booking offices on the basis of Art. 102, 101 TFEU and their equivalents in national law. CTS Eventim is a vertically integrated group best known for its online ticket shop eventim.de. The company also provides ticketing services for event organizers and advance booking offices, owns and operates its own venues and organizes events itself, especially rock/pop tours and festivals.

#### Authority overruled by Düsseldorf Higher Regional Court on MFN clauses for hotel booking platforms

45. In June 2019, contrary to a prior preliminary ruling, the Düsseldorf Higher Regional Court annulled a decision by which the authority had required hotel booking platform Booking.com to refrain from the use of "narrow" MFN clauses in their terms of business towards hotels listed on the platform.

46. Under those clauses hotels must not undercut prices shown on Booking.com in their direct online and offline sales. Booking.com is the leading hotel platform in Germany with market shares way above 30% so the clauses could not be exempted under the Vertical Block Exemption Regulation (VBER). Yet- the court held that the clauses did not infringe Art. 101 (1) TFEU, invoking an ancillary restraint exemption for these kind of clauses. The court stressed that Booking.com earned a commission only in the event of a successful booking and was thus required by contract to fulfil its platform marketing services in advance. Correspondingly, the court held Booking.com to be entitled to prevent freeriding by the hotels on those services "in bad faith" by installing the MFN clauses. The authority is now seeking leave to appeal from the Federal Court of Justice.

### Düsseldorf Higher Regional Court grants injunction in the “Facebook” case / Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position

47. In August 2019, in a preliminary ruling the Düsseldorf Higher Regional Court suspended the above-mentioned decision by which the Bundeskartellamt had prohibited Facebook from using terms and conditions by which the platform entitles itself to gather data from numerous sources outside Facebook.com without users’ freely given consent, to join them with data gathered on Facebook.com and to use this joint pool of data, especially for the creation of individual user profiles for personalized content and advertisement.

48. The Düsseldorf Higher Regional Court stated that under a vertical angle a mere violation of users’ rights under the GDPR did not constitute a competitive concern falling within the scope of Section 19 GWB. Furthermore, the court found that the causal link between the dominant market position of Facebook.com and the specific infringement in the light of strong information asymmetries was insufficient. Under a horizontal angle the court held that the decision had failed to substantiate the effects originating from the conduct. The national case law invoked by the authority led to no different result. The Düsseldorf Higher Regional Court granted leave to appeal the decision.

49. In June 2020, the Federal Court of Justice annulled the decision of the Düsseldorf Higher Regional Court, provisionally confirmed the allegation of Facebook abusing its dominant position and decided that the Bundeskartellamt’s prohibition can be enforced even during the still pending main proceedings. The Federal Court of Justice stated that there are no serious doubts as to Facebook’s dominant position in the German market for social networks nor can it be seriously doubted that Facebook is abusing this dominant position by using the terms of service prohibited by the Bundeskartellamt.<sup>8</sup>

### *Cartel prosecution*

#### First instance fining decisions reviewed by Federal Court of Justice

50. In August 2019, the Federal Court of Justice backed a decision of the Düsseldorf Higher Regional Court imposing a fine on one member of the “Wallpapers” cartel; the other members of the cartel had chosen not to appeal the decision.

51. In July 2019, the Federal Court of Justice annulled a decision by which the Düsseldorf Higher Regional Court had imposed fines on four sweets manufacturers for exchanging commercially sensitive information on the state of their negotiations with large retail chains. The decision was not based on a different assessment of the merits of the case but on an insufficient presentation of the parties’ objections in the written reasoning of the Düsseldorf Higher Regional Court’s decision. Likewise, the Federal Court of Justice annulled another decision of the Düsseldorf Higher Regional Court on formal grounds by which the latter had imposed a fine on a retail chain for its part in an RPM mechanism concerning the sale of coffee. The abovementioned cases were referred back to the Düsseldorf Higher Regional Court.

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<sup>8</sup> Press release of the Federal Court of Justice of 23 June 2020.

## 3.2. Mergers and acquisitions

### 3.2.1. Statistics

52. In 2019, 1,433 mergers were notified to the Bundeskartellamt. In respect of the second-phase proceedings concluded in 2019, a prohibition of a merger was issued in 4 cases. One merger was cleared without remedies. In five cases, the notifications were withdrawn by the parties during the second phase proceeding. At the end of 2019, four second-phase proceedings were still ongoing.

### 3.2.2. Summary of significant cases

53. The list of cases described below does not represent an exhaustive list of merger proceedings conducted by the Bundeskartellamt in the period covered by this report, but rather focuses on cases that were subject to an in-depth investigation in second-phase proceedings.

#### *Withdrawals in second phase proceedings*

##### Re-Purchase of “National Geographic” licence

54. At the end of January 2019, the publishing house Gruner + Jahr withdrew its notification of the purchase of the licence to publish the German-language edition of the “National Geographic” magazine. Gruner + Jahr is by far the largest publisher of popular science magazines in Germany and publishes the “GEO” magazine, which in terms of distribution and turnover is the largest science magazine on the German market. The German-language edition of the “National Geographic” magazine of the National Geographic Society is a documentary and science magazine which covers nature and geographic topics and also contains articles on history, ethnology and other popular science topics. Gruner + Jahr has already held the licence for the German language edition of the “National Geographic” for several years. However, the current licence was time-limited and had to be re-awarded on expiry of the licence period.

55. The Bundeskartellamt’s concerns were based on extensive market investigations among various magazine publishers, TV companies and providers of digital information offers. According to the authority’s preliminary assessment, the renewed purchase of the licence by Gruner + Jahr would have significantly impeded competition between science magazines. National Geographic and GEO are the leading magazines and closest competitors in this market in Germany. Gruner + Jahr’s dominant position in print publications is not sufficiently controlled by competition from alternative internet or TV offers. Like other print media, the classical science magazines have for years experienced a decline in circulation due to a general change in media use behaviour. However, investigations have shown that internet offers are not a direct substitute for readers of classical magazines. In spite of the decline in circulation, publishers were able to continually raise the price of their magazines for the remaining readers. If Gruner + Jahr had re-purchased the licence for the “National Geographic” magazine, the possibilities for interested readers to switch to the product of another publisher in future would have still been very limited.

### Merger between hospital operators in two cases

56. In two separate merger control proceedings in the hospital sector the operators concerned each withdrew their notifications in second phase proceedings after the Bundeskartellamt had expressed preliminary concerns.

57. 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. The planned hospital mergers both in Schleswig-Holstein and Cologne would have greatly limited choice for local patients. The assessment of each of the two merger projects was based on 14 million patient case data.

58. In the first merger case, all 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) if the merger had been implemented. 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.

59. In the second merger case, the merger would have created by far the largest hospital group in the City of Cologne. Intensive investigations also showed 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.

### Petrol station operator to purchase further stations

60. In April 2019, Total Deutschland GmbH, Berlin, withdrew its notification of the acquisition of eleven petrol stations owned by Autohof Görden GmbH & Co. KG, Trier, after the Bundeskartellamt had expressed its competition concerns about the merger project. Along with BP (“Aral” brand), Shell, Jet and the “Esso” brand petrol stations, Total is one of the leading petrol station operators in Germany. Görden currently operates eleven petrol stations in Rhineland-Palatinate and Saarland. Six of these are concentrated in the Trier market area. The petrol stations are currently operated by Görden under the “Total” brand. The reason for this are time-limited contracts, especially for the use of the “Total” brand.

61. However, the planned merger would have permanently and completely integrated Görden’s petrol stations into Total’s petrol station network. With its six petrol stations Görden is currently one of the leading suppliers in the Trier market area. The “Aral”, “Shell” and “Esso” brands also have strong, varyingly high market shares in the Trier

market area; Jet's presence is limited. The joint market share of the leading suppliers would reach over 80% in Trier post-merger.

62. According to the Bundeskartellamt's preliminary assessment, the acquisition would have strengthened the joint dominant position of the leading fuel suppliers in Trier. The investigations based on the data collected by the Market Transparency Unit for Fuels showed that widespread parallel price setting is practised by the leading suppliers in the Trier market area, just as across Germany. Furthermore, the price level in Trier is clearly above the national average.

63. In assessing the effects of the merger in the Trier market area the Bundeskartellamt also took Trier's proximity to Luxembourg into account. Due to price regulation by the state and differences in taxation, fuel prices in Luxembourg are much lower with the result that many motorists drive there to fill up with petrol. However, using Luxembourg as an alternative source of supply is not an economically viable alternative to satisfy a considerable share of demand in Trier for various reasons. Another factor which had to be considered was that most of the operators of the relevant petrol stations beyond the border to Luxembourg are the same suppliers as in the Trier market area.

#### IBM and T-Systems

64. In June 2019, IBM Deutschland GmbH, Ehningen, withdrew its notification of plans to acquire essential hard and software as well as personnel from the mainframe service business of T-Systems International GmbH, Frankfurt am Main. The mainframes in this case are proprietary systems which IBM has produced and sold since 1964. However, many companies no longer carry out mainframe services themselves but outsource them to providers such as IBM and T-Systems.

65. The acquisition was to have included T-Systems' key hard and software as well as several hundred specialist personnel to operate these high-performance computers but not the takeover of T-Systems' existing end customer contracts. The parties had also planned to enter into a long-term cooperation agreement by which IBM was to provide its mainframe services to T-Systems' end customers as a subcontractor. The proposed acquisition would have affected the Europe-wide market for mainframe services. IBM is also active on this market and, according to the Bundeskartellamt's investigations, is by far the market leader ahead of its competitors such as T-Systems, Atos, DXC, Finanz Informatik, Fiducia & GAD IT, among others.

66. IBM's strong market position in mainframe services is also strengthened by the fact that all its competitors in this area of activity depend on its services because the company is in fact the only manufacturer of the mainframes concerned. Another aspect which had to be considered was that any possibility for customers to switch to other data center systems or cloud solutions involves very high investment.

67. According to the Bundeskartellamt's preliminary assessment the proposed concentration, in particular the staff transfer (mainframe infrastructure specialists are rare and much sought-after) and the planned outsourcing cooperation, would have strengthened IBM's dominant position. The cooperation would also have improved IBM's access to sales markets. Due to the transaction T-Systems would no longer have been independent and would not have been active to the same extent on the market as previously, which would have benefited IBM in particular. The remaining smaller competitors in the market were not expected to compensate for this effect.

### *Prohibition of mergers*

#### Miba and Zollern

68. In January 2019, the Bundeskartellamt prohibited the launch of a joint venture between Miba AG, Laakirchen (Austria), and Zollern GmbH & Co. KG, Sigmaringen. The companies had planned to pool their hydrodynamic plain bearing production activities in a joint venture in which Miba was to hold 74.9% and Zollern 25.1% of the shares. Plain bearings are used in any situation in which machine parts have to perform movements in a stable and flexible way and with as little friction loss as possible. Hydrodynamic plain bearings are suitable e.g. for wear-free continuous operation and for particularly high loads and speeds. They are mainly used in the construction of large-scale and heavy-duty machinery where heavy and large drive shafts are mounted. They can also be used in ultra-high rotating components. The merger would have led to overlaps in the supply of plain bearings which are used in large bore engines. These bearings are fitted e.g. in the propulsion systems of ships and locomotives or in power generators. The products concerned are special, in some cases individually customised products which are sold internationally.

69. The investigations showed that the two companies are the major competitors in a market which is already highly concentrated. They have outstanding development expertise and supply a prominent range of plain bearings primarily affected by the merger. It is already complex and costly for customers to switch to one of the few alternative suppliers because any plain bearing from a new supplier has to undergo intensive and lengthy performance tests. The merger would have exacerbated the situation because Miba and Zollern, two very close competitors from the customers' perspective, would have joined forces. The Bundeskartellamt also had to consider that no new companies are likely to enter the market for the production of the special bearings because this would require extensive knowledge of technological development and manufacturing processes and a high level of investment.

70. On 19 August 2019 the Federal Economic Affairs Minister, Peter Altmaier, granted a ministerial authorisation for the joint venture subject to conditions precedent and subsequent. In addition, the parties appealed the Bundeskartellamt's prohibition decision to the Düsseldorf Higher Regional Court.

#### Heidelberger Druckmaschinen and MBO group

71. In May 2019, the Bundeskartellamt prohibited the proposed acquisition of all the shares in HB Vermögensverwaltungsgesellschaft mbH & Co. KG by Heidelberger Druckmaschinen AG. HB Vermögensverwaltungsgesellschaft is the sole shareholder of the folding machine manufacturer MBO Maschinenbau Oppenweiler Binder GmbH (MBO group). The merger affected the market for special machines for the manufacture of sheet folding machines for industrial printing processes. On the basis of its extensive market investigations the Bundeskartellamt established that industrial sheet folding machines form a single product market and that mailing systems, inline finishing systems and combined finishing machines belong to separate markets. However, a further division of the market for industrial sheet folding machines according to the different formats and performance levels was not justified because from the customers' perspective the different machines are substitutable and can be flexibly deployed.

72. Heidelberger Druckmaschinen AG's major product area is the manufacture of sheet-fed offset printing machines. It is the global leader in this market. Apart from printing

machines the company also produces machines used in print finishing such as the sheet folding machines concerned and machines for print plate imaging (pre-print stage). The MBO group specialises in sheet folding machines for industrial applications and folding machines with peak performance or speed levels. The group also offers further products for print finishing.

73. Heidelberg Druckmaschinen is already the market leader on the European market for sheet folding machines. With the merger the parties would have achieved joint market shares far exceeding 50%. Also, the European market for sheet folding machines for industrial applications is highly concentrated. From the perspective of the customers questioned by the Bundeskartellamt (predominantly printing houses, book binders and other specialised companies in this area) the only companies other than the parties to the merger which could be considered as competitors are German GUK-Falzmaschinen Griesser & Kunzmann GmbH & Co. KG and the European subsidiary of the Japanese company Horizon.

74. Furthermore, Heidelberg Druckmaschinen and the MBO group are the two closest competitors in the differentiated product market. Apart from Horizon, no non-European competitors are active in Europe. Although the German and European manufacturers are active worldwide, American and Asian manufacturers of sheet folding machines only export an insignificant volume of machines to Europe and are mainly unknown to the customers questioned. The investigations also showed that market entry seems difficult due to the high costs and time involved, the high level of customer loyalty and the customers' requirements for prompt service and spare parts supply. In fact no market entries were witnessed in the last 20 years.

#### Remondis and DSD

75. In July 2019, the Bundeskartellamt prohibited the proposed acquisition by REMONDIS SE & Co. KG of all the shares in the dual system DSD - Duales System Holding GmbH & Co. KG. Remondis is by far Germany's largest waste management company and is active on nearly all waste management markets. These include the collection, sorting and reprocessing of sales packaging and its subsequent marketing or recycling. DSD is the largest dual system for packaging recycling in Germany. The dual systems organise the recycling of packaging waste on behalf of the manufacturers, importers and retailers who, as distributors, were originally responsible for the recycling. This service is provided by the dual systems against payment of a fee by the distributors (so-called licence fees). Dual systems such as DSD then commission the actual waste management companies like e.g. Remondis with the collection, sorting and reprocessing of the packaging waste.

76. The proposed concentration mainly concerned the disposal of household packaging waste and the distribution of recycled hollow glass cullet (e.g. drink bottles or food jars) to glassworks. Moreover, DSD would have been able to use its significant demand volume to squeeze Remondis' competitors out of the market. Due to its high market share, DSD has high-level access to quantities of sales packaging placed on the market by the manufacturers, importers and retailers for sorting, reprocessing and recycling. The merged company Remondis/DSD could have diverted these waste quantities to Remondis' plants for further processing and strategically subcontract remaining quantities for reprocessing to competitors. Furthermore, both companies are active in the marketing of recycled hollow glass cullet. A merger would have created a dominant position on this market. Here the two companies would have achieved joint market shares of 40 to 60%.

77. In mid-April 2019, the Bundeskartellamt informed the parties that it took a critical view of the proposed merger. Reacting to the Bundeskartellamt's competition concerns, Remondis and DSD offered commitments including the sale of two glass recycling plants as well as further commitments concerning the company's future conduct. However, an overall assessment showed that these commitments were neither suitable nor sufficient to eliminate the Bundeskartellamt's competition concerns. Moreover, some of the commitments concerning the companies' future conduct would have required the agreement of other dual systems.

#### Cash handling services Ziemann and Loomis

78. In December 2019, the Bundeskartellamt prohibited the acquisition of all shares of Germany's second-largest cash handling service, Schallstadt-based Ziemann Sicherheit Holding GmbH, by Loomis AB, an internationally active Swedish cash handling service. The stock-exchange listed Loomis Group is headquartered in Sweden and active in the areas of cash handling, valuables logistics and trade in precious metals and foreign notes and coins. The group has more than 400 subsidiaries in over 20 countries. Loomis entered the German market only in 2018 when it acquired the cash handling services division of security services provider Kötter. The company offers cash handling services in the west and north of Germany and is one of the three leading providers in these regions. Ziemann ranks second after market leader Prosegur in cash handling services in Germany. The company is active in the north, west and south of Germany and in Berlin.

79. The merger project mostly affected the provision of cash for businesses and banks. It included the transport of coins and banknotes to and from customers, cash processing in a Cash Center and the refilling and maintenance of ATMs, which is commissioned by banks. Prosegur is basically the only other company active on the regional markets for cash handling services affected by the merger in Cologne, Bochum, Bielefeld/Münster, Bremen and Koblenz. The parties to the merger and Prosegur together have a market share of approximately 80% in the affected regions. After the merger the market leaders would have had stronger incentives to increase prices or change other terms and conditions of their offer, e.g. their service, for the worse without a significant alternative being available to their customers. The other competitors are regionally active small or medium-sized companies with comparatively low market shares.

80. The Bundeskartellamt's investigations showed that the competitive potential of the remaining competitors would not be sufficient to limit the scope of action of the merged company Loomis/Ziemann and Prosegur.

#### *Clearance of mergers*

##### Merger between paper wholesalers cleared

81. The acquisition of Papyrus Deutschland by Papier Union's mother company, Inapa Group, was cleared in July 2019. The wholesalers in paper, Papier Union and Papyrus Deutschland, are active throughout Germany. Papyrus Deutschland, based in Ettlingen, is a German subsidiary of OptiGroup AB, Sweden. It is active on several paper wholesale markets in Germany and primarily sells commercial printing and office paper. Papier Union in Cologne is a subsidiary of the Portuguese company Inapa Investimentos Participações e Gestão S.A. and also operates in Germany as a paper wholesaler with a wide range of products.

82. The merger between Papier Union and Papyrus will create a company that will close the gap to the market leader, the Igepa Group, Hamburg, in the sale of commercial printing paper both throughout Germany and in individual regions in Germany. Post-merger, both the Igepa Group and the merged companies will each hold market shares of approx. 40 to 45%. During the merger proceeding the Bundeskartellamt consulted more than 100 printing houses, all the paper wholesalers active in Germany and the major manufacturers of commercial printing paper.

#### Clearance of locomotives merger

83. In early 2020, the Bundeskartellamt cleared the proposed acquisition of the German shunter manufacturer Vossloh Locomotives GmbH by the Chinese rolling stock manufacturer CRRC Zhuzhou Locomotives Co., Ltd. without remedies in second phase proceedings. Several particularities had to be considered when examining the merger project. Vossloh's strong market position on the one hand and CRRC's still very weak position on the European market on the other hand made it difficult to assess the participation of Chinese state-owned companies in the context of merger control. CRRC's vast technological resources were also considered in the assessment. European competitors expected the merger to distort competition, as a survey conducted by the Bundeskartellamt has shown. The planned acquisition was cleared in the end. Vossloh Locomotives' competitiveness had suffered considerably over the preceding years. Its parent company Vossloh AG decided to sell the company already back in 2014. Since then, established rail technology manufacturers like Alstom, Stadler, and Toshiba entered the European market with innovative traction technologies and extended their offer to shunters. The market for rolling stock technology was at a transitory stage towards hybrid traction systems and dual mode locomotives which can be powered by both diesel engine and electricity from overhead wires. The target company Vossloh Locomotives currently did not offer such locomotives and lost competitive strength as a result. CRRC only had limited success to enter the market in Europe and did not qualify as a close competitor of Vossloh in Europe.<sup>9</sup> Overall, the Bundeskartellamt was able to exclude a considerable impairment of competition on the European shunter market as a result of the merger.

#### 3.2.3. *Activities of the court*

##### *Düsseldorf Higher Regional Court on standing of target to appeal a decision clearing a hostile takeover*

84. In July 2019, the Düsseldorf Higher Regional Court refused the target in a hostile takeover of a minority share standing to appeal the Bundeskartellamt's decision clearing the acquisition of that minority share. With the contested acquisition of a further 5-10% share, the threshold of 25% had been passed, triggering merger control under the German Competition Act. The court held that the German merger control regime only intended to safeguard the public interest and the interest of market participants separate from the parties to the acquisition. Thus, the target was not entitled to appeal the clearance issued by the authority.

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<sup>9</sup> Bundeskartellamt, press release of 27 April 2020, p.2.

### *First SIEC merger prohibition not to be heard by Federal Court of Justice*

85. In December 2018, the Federal Court of Justice refused to grant the right to appeal a decision of the Düsseldorf Higher Regional Court, which had confirmed the prohibition of the merger between German retail groups “EDEKA” and “Tengelmann”. In this case the Bundeskartellamt had, for the first time ever, based a prohibition decision on the new SIEC test which had been incorporated into German merger control law in 2013. The Düsseldorf Higher Regional Court however upheld the decision on the basis of the traditional dominance test, stating the merger would at least create a dominant position of the merging parties in parts of Berlin, which had not been addressed by the commitments offered by the parties. With the lower court’s decision based on that reasoning, the Federal Court of Justice also saw no reason to judge on the lawfulness of the application of the SIEC test by the authority.

## **3.3. Sector inquiries**

### *3.3.1. Sector inquiry into online comparison websites concluded*

86. The Bundeskartellamt published the final report on its sector inquiry – as already presented with further details in last year’s Annual Report<sup>10</sup> – into online comparison websites in April 2019. 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 and uncovered several consumer-unfriendly practices.

### *3.3.2. Sector inquiry into smart TVs*

87. A sector inquiry into smart TVs launched in December 2017 aims at shedding some light on how producers of smart TVs collect, pass on and commercially use personal data, and whether the consumers 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. The Bundeskartellamt also took a close look at the conduct of the largest suppliers based on an extensive questionnaire.<sup>11</sup>

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

88. In February 2018, the Bundeskartellamt launched a sector inquiry into market conditions in the online advertising sector. It is examining 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.

<sup>10</sup> OECD Annual Report on Competition Policy Developments in Germany (2018), p. 22-23

<sup>11</sup> The Bundeskartellamt published the final report on its sector inquiry into smart TVs on 1 July 2020 and will report on its results and recommendations in the 2020 OECD Annual Report.

### 3.3.4. Sector inquiry into user reviews

89. In May 2019, the Bundeskartellamt launched a sector inquiry into online user reviews. Investigations and media reports often show that in many cases online user reviews are not authentic, e. g. because they are computer-generated or because the user writing the review receives compensation without this being made transparent to consumers. If reviews which are not authentic lead consumers to make the wrong business decisions, this could constitute a violation of consumer law. The primary aim of the sector inquiry is therefore to find out which review systems are particularly prone to manipulation and to what extent there might be violations of consumer law.<sup>12</sup>

## 4. Cooperation in international fora

### 4.1. International Competition Network (ICN)

90. 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.

91. The Bundeskartellamt played an active role in all ICN Working Groups and took part in several virtual seminars and workshops. In the ICN year 2019/2020, ICN working groups organized a Cartels Workshop in Brazil, a Merger Workshop in Australia, and a Unilateral Conduct Workshop in Mexico. Furthermore, the Bundeskartellamt actively participated in the 18th Annual ICN Conference held in Cartagena, Colombia, from 15 May to 17 May 2019. The ICN provides one of the most important forums for the exchange of experience and an informal venue for maintaining regular contact to address practical competition concerns. The Annual Conference provides an opportunity for members and other stakeholders to have in-depth discussions about existing work products and future topics. Nearly 500 participants from more than 80 jurisdictions, including representatives and stakeholders such as the business community, legal and economic professionals, international organizations and academics attended the conference in 2019.

92. At the Conference, the new ICN Framework on Competition Agency Procedures (ICN CAP) was presented in a plenary session and came into effect. The ICN CAP is an opt-in framework, open to all agencies including those that are not ICN members. It builds on fundamental principles of fair and effective agency procedures fully consistent with the extensive work of the ICN in this field, reflecting the broad consensus within the global competition community. The starting point was the MFP project brought forward by the US DOJ in June 2018 which was developed into the ICN CAP as an ICN Steering Group project.

93. The plenary sessions of the Annual Conference dealt inter alia with the question of how agencies can uncover and punish cartels in the digital era, the assessment of dominance in digital and high tech sectors and agency restructuring to meet the challenges of digitalization. A session limited to agency heads also focused on digital issues. Also, the

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<sup>12</sup> The Bundeskartellamt published the preliminary results of its sector inquiry into online user reviews on 18 June 2020.

2018/19 work products were approved at the Annual Conference, including guiding ICN Recommended Practices on Investigative Process.

#### **4.2. European Competition Network (ECN)/European Competition Authorities (ECA)**

94. In 2019, the competition authorities of the EU continued their successful cooperation within the European Competition Network (ECN).

95. By March 2020, a total of 2,697 cases were posted on the competition authorities' joint intranet; 231 of these were Bundeskartellamt cases. The competition authorities also made use of the opportunities for information exchange and assistance in investigations within the ECN. The Bundeskartellamt exchanged confidential information with other competition authorities in accordance with Article 12 of Regulation 1/2003 in 12 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 Italian Autorità Garante della Concorrenza e del Mercato (AGCM) in executing a dawn raid. In 2019, the European Commission was informed about 119 new proceedings initiated by the national competition authorities (NCAs) under Article 11(3) of Regulation 1/2003, 4 of which were Bundeskartellamt cases.

96. 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, Digital Investigation and Artificial Intelligence, and Merger Working Group). The Working Group on Vertical Issues has been discussing the review of the Vertical Block Exemption Regulation (EU) No 330/2010 ("VBER") and the related Guidelines on Vertical Restraints. The VBER and the related Guidelines are due to lapse in 2022, therefore an assessment and subsequent review have become necessary. In this context, the National Competition Authorities shared their experience in applying the VBER within the Working Group.

97. Furthermore, the Bundeskartellamt plays an active role in all ECN sectoral subgroups, where an exchange of practical experience takes place. In 2019, the Bundeskartellamt's representatives attended meetings of the subgroups Banking, Food, Energy, Telecoms, Pharma & Health, and Financial Services. A particular focus has been on the work of the subgroup Banking & Payments. Since the deadline for the implementation of certain mechanisms provided for by the PSD II Directive / the Delegated Reg. (EU) 2018/389 was supposed to end in early autumn 2019, the implementation process played an important role within the group. The Bundeskartellamt reported in particular on competition issues raised in connection with the implementation of dedicated interfaces.

98. 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.

99. In 2019, the Annual Directors General meeting of the ECA forum (European Competition Authorities) took place in The Hague, Netherlands. The issues discussed at the meeting included buyer cartels, the impact of restrictions of competition on consumer and general welfare and the issue of tacit coordination.

#### *4.2.1. Annual Meeting of the Working Group on Competition Law*

100. On 10 October 2019, the Working Group on Competition Law met in Bonn at the invitation of the Bundeskartellamt. At the meeting, more than 120 competition law experts discussed and exchanged views on the theme "Quo vadis Vertical BER – Time for adaptation to the digital economy?". 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 Prof. Dr. Konrad Ost, Vice President of the Bundeskartellamt. Marieke Scholz, Directorate-General for Competition of the European Commission, opened the discussions by reporting on the consultation procedure on the Vertical Block Exemption Regulation (VBER) at the European Commission. The panel discussion was held by Prof. Dr. Christian Wey of Düsseldorf University, Prof. Dr. Stefan Thomas of Tübingen University, Prof. Dr. Petra Pohlmann of Münster University and Arno Rasek, Chief Economist at the Bundeskartellamt.

101. They discussed theories of harm and efficiencies in competition restraints originating from manufacturers or platforms. Subjects of particularly intensive discussions were resale price maintenance and its assessment as well as the handling of parity clauses. The far-reaching prohibition of dual pricing systems also gave rise to lively discussions. Various approaches to platforms and intermediaries in the context of the VBER were also considered. The participants agreed that the current regulatory framework does not sufficiently consider these more recent actors. Finally, it was discussed whether the VBER's legal framework still meets the requirements of today in view of its rigid market share thresholds and hardcore restrictions. Some of the participants supported an increased flexibility of the VBER instruments to achieve a better balance between legal security and justice in individual cases.

#### *4.2.2. Working Group on Competition Economics*

102. The Working Group on Competition Economics, launched in October 2017 by the Bundeskartellamt, initiated a new series of events in 2019. The objective of the Working Group is to discuss future concepts and methods used in the authority's case practice as well as to exchange views and experience with academics specialising in industrial economics and competition policy.

103. The Working Group on Competition Economics' third meeting was held in February 2019 in Bonn where Bundeskartellamt staff and economic researchers discussed topical competition economics issues. The agenda of the meeting included the impact of the Market Transparency Unit for Fuels, the application of competition law to minority shareholdings and the discussion on modernising abuse control as a possible response to the growing market power of large digital platforms.

104. The agenda of the fourth meeting in December 2019 included the following topics: mergers between companies active on different levels of the supply chain, which can result in increased costs for competitors (raising rivals' costs), the joint study issued by the Bundeskartellamt and the French Autorité de la concurrence on algorithms and competition as well as the categorization of the overly extensive collection and use of data under competition law.

## 5. Resources of the Bundeskartellamt

### 5.1. Annual budget

**Table 1.**

Budget 2019	Change over 2018
EUR 40.3 million	+ 7.2 million

### 5.2. Number of employees

**Table 2.**

	2019*	Change over 2018
Economists	48	0
Lawyers	96	+9
Other experts	17	+3
Support staff	174	+8
<b>Total</b>	<b>335</b>	<b>+20</b>

Updated: 30 June 2019.

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

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

Table 3.

Brune, Markus; Vollmer, Christof	Der Zeugenbeistand im Kartellordnungswidrigkeitenverfahren In: <i>Wistra</i> , 38 (2019) issue 5, p. 175-184
Engelsing, Felix; Jakobs, Moritz	Nachhaltigkeit und Wettbewerb In: <i>Wirtschaft und Wettbewerb</i> , 69 (2019) issue 1, p. 16-22
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