

Unclassified

English - Or. English

10 June 2021

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Germany

-- 2020 --

This report is submitted by Germany to the Competition Committee FOR INFORMATION.

JT03478016

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Germany

1. Executive Summary

1.1. Digital economy

1. In 2020, the Federal Ministry for Economic Affairs and Energy published a draft of a “GWB Digitalisation Act” amending the German Competition Act (GWB) for the tenth time with special respect to the challenges of digitisation. After the legislator adapted and passed the Act, it entered into force on 19 January 2021. The key purpose of the 10th amendment to the German Competition Act is to uphold effective competition in the digital economy and to counteract the trend towards monopolisation of digital platform markets. The core of the 10th amendment is Section 19a that enables the Bundeskartellamt to take preventive actions against abusive practices of undertakings of paramount significance for competition across markets. Further to this, the 10th amendment contains measures to speed up proceedings, implements the EU Directive to make national competition authorities more effective enforcers (ECN Plus Directive) in national law and focuses merger control more on cases which are of significance to competition and the economy by increasing turnover thresholds. The overall aims are to ensure that positions on digital markets remain contestable and that competition rules can be enforced more quickly and more effectively.

2. In 2020, the digital economy was once again a key area of the Bundeskartellamt’s work. The authority initiated two new proceedings against Amazon, which are still ongoing: In the first proceeding, the Bundeskartellamt is examining the possible restriction of the freedom of sellers using Amazon Marketplace to set their prices. In the second proceeding, it is examining possible disadvantages suffered by sellers on Amazon Marketplace caused by Amazon’s cooperation with brand manufacturers. Regarding Facebook, the Bundeskartellamt initiated another abuse proceeding to examine the linkage between Oculus’s virtual reality products, the social network and the Facebook platform. In its abuse of dominance proceeding already conducted in 2019, the Bundeskartellamt had imposed far-reaching restrictions on Facebook regarding the processing of user data. This case is still subject to clarification by the courts. Apart from proceedings and informal consultations, e.g. on cooperation or platform projects, the authority’s general policy work on issues regarding the digital economy was also of crucial importance in 2020. The Bundeskartellamt contributed its expertise in national and international discussions on urgent competition policy issues raised by the digital economy. The authority’s policy work focused on the 10th amendment to the German Competition Act.

1.2. Action against anticompetitive practices

3. Cartel prosecution was another focal point of the Bundeskartellamt’s work in 2020. This included uncovering cartels, carrying out dawn raids, evaluating what is now mostly electronic evidence, hearing witnesses and assessing the facts of the cases, often followed by extensive court proceedings. Fines of around EUR 349 million were imposed by the Bundeskartellamt on 18 companies or trade associations and 23 individuals.

1.3. Merger control

4. The Bundeskartellamt examined around 1,240 notified mergers. 10 mergers led to an in-depth review. This included two cases that were referred to the Bundeskartellamt by the European Commission. In three cases, (CineMaxX/Cinestar; XXXLutz/Tessner including Roller; Kaufland/Real) clearance was only granted subject to conditions. Four cases were cleared without conditions following in-depth examinations (CRRC/Vossloh Locomotives; Allianz/ControlExpert; Malteser Krankenhaus/Diakonissen Flensburg; Belron, Carglass/A.T.U.). Two notifications were withdrawn by the merging parties during the in-depth investigation. One second -phase proceeding was still ongoing by the end of 2020.

1.4. COVID-19 Pandemic

5. Responding to the COVID-19 pandemic the German federal government adopted a large package of measures to combat the economic impacts on companies, including several assistance and recovery programmes with different scopes.¹ Being a part of that package, the Economic Stabilisation Fund (Wirtschaftsstabilisierungsfonds - WSF) supports companies whose potential failure would have a substantial impact on the economy and society. The WSF aims to ward off any long-term damage by enabling fast, targeted and temporary measures for the stabilisation of companies in the real economy. Up to today, approx. 120 companies have applied for measures of the WSF and 20 applications (of 18 companies) have been approved. In line with the temporary framework of the EU Commission, certain conditions must be imposed on the beneficiaries for the duration of the measures of the WSF, in order to prevent distortions of competition. Moreover, companies receiving funding under the WSF are required to pay adequate interest rates based on market criteria.

6. The Covid-19 pandemic also had an impact on the Bundeskartellamt. In view of ongoing merger registrations and other important projects, work processes were quickly adapted after the outbreak of the pandemic. Due to urgent public health concerns the authority temporarily paused dawn raids and set up a comprehensive corona protection concept. Afterwards, the Bundeskartellamt successfully carried out the second of its two dawn raids at several locations in Germany in the late summer of 2020. The authority also handled numerous short-term requests for guidance on cooperation from companies facing the crisis. Once again, antitrust law has proven to be a flexible instrument to take account of these extraordinary circumstances. Together with other competition authorities in the ECN and the ICN, the Bundeskartellamt also published guidance on the application of competition law during the Corona crisis.

2. Changes to competition laws and policies

2.1. Amendment to the German Competition Act (GWB Digitalisation Act)

7. The 10th amendment to the German Competition Act entered into force in January 2021 as the “Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions”

¹ A comprehensive overview is available at: https://www.bmwi.de/Redaktion/EN/Downloads/P/package-of-measures-to-combat-the-impact-of-coronavirus-on-companies.pdf?__blob=publicationFile&v=36

(“GWB-Digitalisierungsgesetz” - GWB Digitalisation Act).² The amendment contained important further developments of the competition law framework. As a result, the discussions that took place in the wake of the ministerial draft and the subsequent parliamentary process shaped the national competition policy debate in 2020.

2.1.1. Important changes regarding the protection of competition in the digital economy

8. A key element of the amendment was the modernisation of abuse control. Due to Section 19a the Bundeskartellamt is now able to intervene at an early stage in cases where competition is threatened by certain large digital companies. As a preventive measure the Bundeskartellamt can also prohibit certain types of conduct by companies which, due to their strategic position and their resources, are of paramount significance for competition across markets. Such conduct includes, e.g., the self-preferencing of a group’s own services or impeding third companies from entering the market by processing data relevant for competition.³

9. To reinforce effectiveness, appeals against decisions issued by the authority on the basis of Section 19a are now directly brought before the Federal Court of Justice, by-passing the Düsseldorf Higher Regional Court.

10. The lawmaker also specified in more detail provisions regarding the traditional control of abusive conduct and added internet-specific criteria. As to the assessment of market power, the German Competition Act now stipulates that access to data relevant for competition, and the issue of whether a platform has what is called power of intermediation, must also be considered. Such a key position in the provision of intermediary services can result in dependence relevant under competition law.

11. As to the rules for companies with relative or superior market power, the protective scope of the Act is no longer limited to small and medium-sized companies. Another important new feature introduced by the amendment is the Bundeskartellamt’s competence to order companies under certain preconditions to grant dependent companies access to data in return for adequate compensation. The Act also afforded the authority special competences to intervene in cases where a platform market threatens to ‘tip’ towards a large supplier (‘market tipping’).

2.1.2. Changes in merger control

12. Focussing on the most relevant cases, according to the amendment, mergers are now subject to merger control only if, among other conditions, one of the companies concerned achieves an annual turnover in Germany of at least 50 million euros (previously 25 million euros) and if another company participating in the merger achieves an annual

² German Competition Act: <https://www.gesetze-im-internet.de/gwb/index.html> (German); https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=7 (English).

³ In May 2021, the Bundeskartellamt initiated proceedings against Amazon and Google based on the new rules for large digital companies. Bundeskartellamt, press release of 18 Mai 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html;jsessionid=A679686D9D283D2F673543474B017B67.2_cid378?nn=3591568 and press release of 25 May 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html?nn=3591568

turnover in Germany amounting to at least 17.5 million euros (previously five million euros).

13. Furthermore, the Bundeskartellamt is now able to oblige companies active in certain economic sectors to notify mergers even if they do not reach the turnover thresholds. This is subject to specific conditions being fulfilled, including, e.g., reaching certain threshold values and the Bundeskartellamt previously having conducted a sector inquiry into one of the economic sectors concerned.

2.1.3. Implementation of the ECN Plus Directive

14. The implementation of the ECN Plus Directive was intended to strengthen the effectiveness of cartel prosecution. In line with the system in place at EU level, companies and their employees are now required to cooperate to a certain extent in establishing the facts of a case.

15. Another important aspect introduced by the amendment is the strengthening of the competition authorities' position in judicial proceedings concerning administrative fines. Even after an objection has been filed against a fining decision, the Bundeskartellamt will remain the competent enforcement authority and will have the same rights in these proceedings as the public prosecutor's office.

16. In addition, the leniency programme has now been enshrined in law.

2.1.4. Changes regarding administrative proceedings

17. The amendment lowered the requirements for ordering interim measures to improve the Bundeskartellamt's ability to take faster and more efficient action in vulnerable markets.

18. The lawmaker also implemented provisions regarding access to files. While oral hearings are now possible in cartel administrative proceedings, the more detailed provisions on granting parties to the proceedings and third parties access to files are intended to bring about more legal clarity.

19. Lastly, the established practice of providing companies with informal advice in the form of a letter by the Chair of a Decision Division has been embodied in law.

2.2. New tasks

2.2.1. Competition Register for Public Procurement

20. The Bundeskartellamt pushed ahead with the launch of the Competition Register for Public Procurement, which is intended to help fight economic crime and competition law infringements. The register will in future enable contracting authorities to check in a single electronic search whether a company has committed relevant violations of the law. The gradual launch is scheduled for spring 2021, starting with the registration of the authorities submitting data and the contracting authorities on the online platform.

2.3. Working Papers and Reports

2.3.1. New publications in the series of papers on “Competition and Consumer Protection in the Digital Economy”⁴

21. In January 2020, the Bundeskartellamt published a paper entitled “Algorithms and Competition” based on a joint study conducted by the Autorité de la Concurrence and the Bundeskartellamt. This paper 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.

22. Another paper was dedicated to “The effects of narrow price parity clauses on online sales - Investigation results from the Bundeskartellamt’s Booking⁵ proceeding”. The findings provide invaluable insight into the quantitative significance of potential “free-riding effects”, which are often used as a justification for such clauses.

23. In autumn, the Bundeskartellamt published a third paper in the same series on “Consumer rights and online user reviews: Need for action”. The paper summarizes the results of the sector inquiry into online user reviews.

24. In December 2020, the Bundeskartellamt issued another paper on the sector inquiry into smart TVs, summarizing the results of this inquiry with regard to consumer law problems.

Annual Report of Market Transparency Unit for Fuels

25. In May 2020, the Bundeskartellamt published its sixth annual report on the work of the Market Transparency Unit for Fuels. The authority evaluated fuel prices (E5, E10 and diesel) throughout Germany for 2019 and the first months of 2020.⁶

Energy Monitoring Report 2020

26. In January 2021, 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 in 2020. It stated, inter alia, that there was a further decline in market concentration in conventional electricity generation. Furthermore, the report informs that conventional generation capacity is still decreasing whilst average electricity and gas prices declined.⁷

⁴ Bundeskartellamt, papers on “Competition and Consumer Protection in the Digital Economy“ can be found here: https://www.bundeskartellamt.de/EN/AboutUs/Publications/Schriftenreihe_Digitales/Schriftenreihe_node.html;jsessionid=54F1E562351379F9AA11BB104EFE042C.1_cid381.

⁵ More on the Booking proceeding can be found in point 38 of this report.

⁶ Bundeskartellamt, press release of 22 April 2021.

⁷ Bundeskartellamt, press release of 27 January 2021.

3. Enforcement of competition laws and policies

3.1. Action against anticompetitive practices

3.1.1. Statistics and summary of activities

27. In 2020, the Bundeskartellamt imposed fines amounting to around 349 million euros on altogether 18 companies and 23 individuals. The sectors concerned included plant protection products, vehicle registration plates and aluminium forging companies.

28. 13 companies informed the Bundeskartellamt about infringements in their sector by making use of the authority's leniency programme; further tip-offs were also received from other sources.

29. The Bundeskartellamt carried out two dawn raids in three different cases. During the beginning of the Covid-19 pandemic, the Bundeskartellamt temporarily paused dawn raids due to urgent public health concerns and set up a comprehensive corona protection concept. After establishing sufficient safety measures, the Bundeskartellamt successfully carried out the second of its two dawn raids at several locations in Germany in the late summer of 2020.

3.1.2. Description of significant cases

Agreements

Price fixing agreements between wholesalers of plant protection products

30. The Bundeskartellamt imposed fines totalling 154.6 million euros on seven wholesalers of plant protection products and their responsible employees for agreeing on price lists, discounts and some individual sales prices to retailers and end customers in Germany. The companies fined were AGRAVIS Raiffeisen AG, Hanover/Münster, AGRO Agrargroßhandel GmbH & Co. KG, Holdorf, BayWa AG, Munich, BSL Betriebsmittel Service Logistik GmbH & Co. KG, Kiel, Getreide AG, Hamburg, Raiffeisen Waren GmbH, Kassel and ZG Raiffeisen eG, Karlsruhe. Ulm-based Beiselen GmbH was the first company to cooperate with the Bundeskartellamt and thus exempted from a fine in line with the Bundeskartellamt's leniency programme.

31. All the wholesalers concerned cooperated with the Bundeskartellamt during the proceeding and contributed to the clarification of the matter by applying for leniency. Six of the companies specified above and the individual employees fined 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.

Anti-competitive agreement between aluminium forging companies

32. The Bundeskartellamt imposed fines totalling approximately 175 million euros on five aluminium forging companies and ten employees responsible for engaging in illegal anti-competitive agreements. The fines were imposed on OTTO FUCHS Beteiligungen KG, Leiber Group GmbH & Co KG, Emmingen-Liptingen, Strojmetal Aluminium Forging GmbH, Singen (Hohentwiel), Presswerk Krefeld GmbH & Co. KG, Krefeld, and Bharat Forge Aluminiumtechnik GmbH, Brand-Erbisdorf.

33. The Bundeskartellamt's investigations were triggered by a leniency application filed by the aluminium forging company Hirschvogel Aluminium GmbH based in

Gerstungen. In accordance with the authority's leniency programme no fine was imposed on this company.

34. In setting the fine the Bundeskartellamt took into account in favour of Bharat Forge Aluminiumtechnik GmbH and Presswerk Krefeld GmbH & Co. KG that the leniency applications filed by these companies had substantially helped to prove the alleged offence and that they had cooperated with the authority in uncovering the infringements. Just as Strojmetal Aluminium Forging GmbH, these two companies acknowledged the alleged offence and agreed to a settlement. Their fines have become final. Otto Fuchs Beteiligungen KG and Leiber Group GmbH & Co KG appealed to the Düsseldorf Higher Regional Court. The proceedings are still ongoing.

Abuse of a dominant position

Competition law concerns with regard to Facebook integrating Oculus's virtual reality products into the social network Facebook

35. In December 2020, the Bundeskartellamt initiated abuse proceedings against Facebook due to the linkage between Oculus and the Facebook network. Facebook has begun to integrate its virtual reality (VR) activities into the social network Facebook.com. The Oculus platform, which has previously been operated separately from Facebook.com, will be offered as an additional function on Facebook's social network, under the name "Facebook Reality Labs". The use of the latest "Quest 2" VR glasses will require registration using a Facebook.com account. Existing Oculus accounts can no longer be used for registration and the new hardware. Distribution of the new VR glasses outside Germany has already begun. VR glasses are necessary for the use of VR technology. Further hardware is also required, usually a PC, a gaming console or a smartphone. In some VR glasses, including Facebook's Oculus "Quest 2" VR glasses, the necessary hardware is already integrated, allowing them to function as "stand alone" devices. Finally, VR software, i.e. digital platforms – such as (up to now) the Oculus platform – which offer VR content, is necessary to access and use VR content. Currently, VR applications are mainly used in the gaming and video sector. However, their use is not limited to these areas. The number of users and turnover generated with such applications are constantly increasing.

36. Due to the amendment of the German Competition Act in January 2021 and its changes with regard to digital companies, the Bundeskartellamt extended the scope of its proceedings, also examining whether Facebook is subject to Section 19a applying to undertakings of paramount significance for competition across markets and whether linking the services is to be assessed on this basis.

DFL obliged to observe comprehensive criteria when awarding media rights

37. DFL Deutsche Fußball Liga (DFL) has undertaken towards the Bundeskartellamt to observe comprehensive criteria when awarding media rights for the matches of the Bundesliga and Bundesliga 2 from the 2021/22 season onwards. DFL offered various self-commitments, in particular a so-called 'no single buyer' rule, to dispel the authority's competition law concerns. The Bundeskartellamt declared the commitments offered to be legally binding.

Competition law concerns regarding XXXLutz's demands for special rebates

38. At the Bundeskartellamt's insistence the furniture retailer XXXLutz KG, based in Wels, Austria ("XXXLutz"), abandoned its sweeping demands for a 7.5 percent "anniversary rebate" from its suppliers. The company instead negotiated the rebate, which

originally was to be applicable for six months in 2020, with each of its suppliers and agreed on services to be provided in return. In view of this, the Bundeskartellamt decided not to examine the facts of the case any further.

3.1.3. *Activities of the courts*

Antitrust

Federal Court of Justice provisionally confirmed allegation of Facebook abusing dominant position

39. In the authority's 'Facebook' case the Federal Court of Justice held in a preliminary ruling that there were no serious doubts about the legality of the authority's decision. Facebook was therefore required to refrain from using terms and conditions allowing the platform to gather data from numerous sources outside Facebook.com without the users' freely given consent to join them with data gathered on Facebook.com and from using this joint pool of data especially for the creation of individual user profiles for personalised content and advertisement. Contrary to last year's preliminary ruling by the Düsseldorf Higher Regional Court, the Federal Court of Justice sided with the authority's view that the relevant terms and conditions constitute an abuse of dominance under Section 19 (1) GWB. The Federal Court of Justice backed the approach to base the finding of an abuse on a combined assessment of the vertical and horizontal effects of the conduct. Horizontally, the ensuing access to a vast amount of additional competitively relevant data had detrimental effects, further raising the barriers to entry and adding to strong direct and indirect network effects. Vertically, the Federal Court of Justice concluded that substantial user preferences towards a reduction in gathering sensitive personal data justified the expectation that, absent the lock-in of users by strong direct network effects, competing services would offer alternatives for users on better terms.⁸ The main proceedings are still pending before the Düsseldorf Higher Regional Court. In April 2021, the court referred the case to the European Court of Justice with regard to the interpretation of the General Data Protection Regulation.⁹

Federal Court of Justice overturned Booking.com best price clause

40. In May 2021, the Federal Court of Justice upheld a decision of the Bundeskartellamt by which the authority had required the hotel booking platform Booking.com to refrain from the use of "narrow" MFN clauses in its terms of business applicable to hotels listed on the platform.¹⁰ Those clauses prohibit hotels from undercutting 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 VBER.

⁸ Federal Court of Justice, press release 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.

⁹ Düsseldorf Higher Regional Court, decision of 24 March 2021, available at: https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html (in German only).

¹⁰ Federal Court of Justice, press release of 18 May 2021, available at: <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021099.html> (in German only).

Federal Court of Justice refused appeal with regard to fintechs

41. The Federal Court of Justice did not grant leave to appeal a Düsseldorf Higher Regional Court ruling upholding a decision by which the authority had asserted an infringement of Article 101 TFEU by German banking associations. Coordinated recommendations of general terms and conditions issued by the associations had contained clauses impeding the business models of fintechs, such as the clauses on ‘Sofortüberweisung’.

No appeal regarding exclusivity agreements of ticket platform

42. Likewise, the Federal Court of Justice refused to grant leave to appeal a decision by which the Düsseldorf Higher Regional Court had upheld the authority’s prohibition of exclusivity agreements in contracts between the ticket platform operator CTS Eventim and a number of event organisers and advance booking offices on the basis of Articles 102, 101 TFEU and their equivalents in national law.

Cartel prosecution

Federal Court of Justice backed authority’s judgment in ‘Sausage’ cartel

43. The Federal Court of Justice backed a decision of the Düsseldorf Higher Regional Court imposing a fine on a member of the ‘Sausage’ cartel; the other members of the cartel had chosen not to appeal the decision.

Federal Court of Justice overturned judgments of the Düsseldorf Higher Regional Court due to expiry of limitation periods for proceedings

44. The Federal Court of Justice annulled two decisions concluding proceedings before the Düsseldorf Higher Regional Court due to the expiry of limitation periods. One case concerned a member of the cartel in the technical building equipment sector, the other case a member of the beer cartel. Both cases were referred back to the Düsseldorf Higher Regional Court.

Undertaking evaded stricter punishment by failing to appear at new hearing

45. In another case referred back to the appellate court by the Federal Court of Justice the undertaking concerned avoided an imminent increase of the fine by failing to appear at the new hearing before the Düsseldorf Higher Regional Court. As a consequence, the court threw out the appeal thus concluding the case and imposing the fines set by the authority. An appeal against the closure of the case was lodged by the prosecutor’s office with the Federal Court of Justice. The case is pending.

Federal Court of Justice on miscalculation of fines

46. Another case referred back to the appellate court by the Federal Court of Justice for miscalculation of fines was settled in a new hearing before the Düsseldorf Higher Regional Court. The case concerned an agreement among mortar producers to demand a fee for deliveries to construction sites.

Federal Court of Justice delivered first ruling on the Trucks cartel

47. In a decision of 23 September 2020, the Federal Court of Justice rejected a follow-on damage claim filed against Daimler in relation to the European Commission’s Trucks decision.

BayWa's official liability suit against the Bundeskartellamt failed

48. A member of the pesticides cartel sued the Bundeskartellamt claiming damages for alleged procedural misconduct in the initial phase of the proceedings. The undertaking had accepted the authority's findings on the cartel and ended the cartel proceedings with a settlement. The following suit for damages, aiming at the reimbursement of the fine and defence costs, was thrown out in the first instance by the Regional Court of Bonn.

3.2. Mergers and acquisitions

3.2.1. Statistics

49. In 2020, around 1,240 mergers were notified to the Bundeskartellamt. Ten of these mergers were closely examined in second-phase proceedings. Four cases were cleared without conditions following in-depth examinations. In three cases, clearance was only granted subject to conditions. In two cases, the notifications were withdrawn by the parties during the second-phase proceeding. In one case, the second-phase proceeding is still ongoing.

3.2.2. Summary of significant cases

50. 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.

Clearance of mergers

Clearance of locomotive merger

51. As already presented in last year's Annual Report¹¹, the Bundeskartellamt cleared the acquisition of Vossloh Locomotives GmbH by the Chinese company CRRC Zhuzhou Locomotives Co in April 2020 since the merger was not expected to significantly impede effective competition.¹²

52. Vossloh Locomotives is the market leader for the manufacture of diesel-powered shunters in the European Economic Area and in Switzerland. CRRC is a subsidiary of China Railway Rolling Stock Corporation, Ltd. and the world's largest manufacturer of rolling stock. Its activities have focused on China so far.

53. The Bundeskartellamt very thoroughly examined all the relevant competitive factors that are associated with CRRC, a Chinese state-owned company, acquiring Vossloh, a key manufacturer of shunters in Europe. The authority considered possible state subsidies, the availability of technical and financial means and strategic advantages from other shareholdings in the competitive assessment of the merger. The Bundeskartellamt also looked into the threat of low-price and dumping strategies and the cost advantages resulting

¹¹ DAF/COMP/AR(2020)11, p. 20.

¹² Bundeskartellamt, case summary of 27 April 2020 can be found here: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2020/B4-115-19.html?nn=3591568>.

from CRRC's state-subsidised activities in many other markets as CRRC plays an important role in China's industrial strategies.

Merger between vehicle glass businesses cleared

54. After closer examination the Bundeskartellamt decided that the Belron Group, Carglass GmbH's parent company, can acquire ATU's vehicle glass business. Carglass operates around 350 service centres in Germany. Since its acquisition in 2015, the Junited Autoglas network, which includes around 300 partner companies, also belongs to Carglass. ATU's network covers around 500 outlets.

55. The authority found that the merger resulted in only small market share additions for Carglass in the insurance and large customer business (in particular fleets and car rental). Since the merger was not expected to significantly impede effective competition, the proposed acquisition could be cleared. The clearance of the acquisition did not cover a cooperation between the parties in the end customer/retail business which was originally planned in the longer-term. The Bundeskartellamt examined this cooperation agreement under the prohibition of restrictive agreements based on Article 101 TFEU and Section 1 of the German Competition Act (*GWB*). After the parties substantially limited the extent of the cooperation during the proceeding both in terms of content as well as duration, the proceeding was discontinued.

Clearance of hospital merger

56. The Bundeskartellamt cleared the concentration of St. Franziskus-Hospital operated by the Malteser group in Flensburg and the somatic division of Diakonissenkrankenhaus, Flensburg, under joint management. Both facilities are to be replaced by a new building in the city of Flensburg. The two hospitals have worked together for many years and by establishing the medical clinic association Medizinischer Klinik-Verbund Flensburg they have widely divided medical work since 2006.

57. Based on the investigations it could be expected that the patients from the relevant market area will, after appropriate consultation provided by medical doctors established in the region, primarily turn to hospitals run by other operators for inpatient treatment if services and their quality deteriorate. According to the information provided by the physicians established in the region, patients seeking treatment elsewhere cannot be taken in by one of the other hospitals run by the operator due to capacity limitations. But these patients will be able to receive treatment in hospitals of competitors which have sufficient free capacities. In this way, continued quality competition between the hospitals in the region is ensured.

Merger between insurance companies cleared

58. The Bundeskartellamt cleared plans by Allianz Strategic Investments. S.à.r.l., Luxembourg, (Allianz) to acquire ControlExpert Holding B.V. Amsterdam (ControlExpert). Allianz belongs to the Allianz Group, an insurance company providing damage, accident, life and health insurance as well as financial services in 70 countries. ControlExpert is the holding company of the ControlExpert Group which provides vehicle insurance providers, leasing companies and fleet operators with automated IT-based services to settle motor vehicle claims.

59. The Bundeskartellamt found that the merger will not lead to direct market share additions. In view of ControlExpert's strong market position, the authority nevertheless had to carefully examine whether its range of services would become indispensable for other vehicle insurance providers as a result of the merger with well-resourced Allianz and

whether, as a consequence, ControlExpert's competitors would have to expect a significant loss of customers.

Clearance with remedies

CinemaxX and Cinestar

60. The Bundeskartellamt cleared the merger between the cinema chains CinemaxX and Cinestar subject to the condition that the cinema operators divest cinemas at six different locations to other operators before implementing the merger.

61. Due to the overlaps in the catchment areas of the individual CinemaxX and Cinestar cinemas, the Bundeskartellamt closely examined the market conditions in local cinema viewer markets in altogether nine regions. The results of this assessment showed that the acquisition would have led to high joint market shares and a significant impediment to effective competition in six regions - Augsburg, Bielefeld/Gütersloh, Bremen, Magdeburg, Wuppertal/Reimscheid and in the western part of the Ruhr region. The CinemaxX and Cinestar cinemas had significant joint market shares in the regions of Berlin, Frankfurt/Offenbach and Hannover as well. However, due to the presence of strong rival cinemas in these regions, competition was not expected to be significantly restricted.

62. The acquisition also raised no competition concerns on the procurement market, i.e. in the relationship between the cinema operators and film distributors.

XXXLutz and Tessner group

63. Following an in-depth examination, the Bundeskartellamt cleared the acquisition by Mann Mobilia Beteiligungs GmbH, based in Würzburg (part of the Austrian XXXLutz Group), of 50 percent of the shares in tejo Möbel Management Holding GmbH & Co. KG, Goslar, and Roller GmbH & Co. KG, Gelsenkirchen (Tessner group), subject to the condition that 22 of the Tessner outlets could not be acquired and one XXXLutz outlet must be sold. Clearance was granted with regard to the sales side of the planned merger (relationship between furniture retailers and end customers).

64. As an exception, this merger project was not examined by one single competition authority, but by the Bundeskartellamt in Germany (with regard to its effects on the sales side) and the European Commission as the European competition authority (with regard to the procurement markets). Due to the turnovers of the participating companies which amount to a total of more than five billion euros, the overall merger project would have had to be notified to the European Commission. As the concentration mainly affected Germany, the parties to the merger filed an application with the European Commission to have the case examined by the Bundeskartellamt (request for referral). However, since the procurement markets could be expected to cover an area beyond Germany's borders, as e.g. furniture can also be purchased by the parties outside Germany, the European Commission's referral of the merger control case to the Bundeskartellamt in late January 2020 only concerned the retail markets affected (relationship between furniture retailers and end customers). The European Commission cleared the merger without conditions.

Real and Kaufland

65. The Bundeskartellamt cleared the acquisition of up to 92 Real stores by Kaufland, which is part of the Schwarz Group, from SCP Retail S.à.r.l., subject to conditions. At the same time, the authority cleared the acquisition from SCP of up to 24 Real stores by the Globus Group.

66. Kaufland is part of the Schwarz Group to which the Lidl food retail chain also belongs. With a turnover of around 113 billion euros worldwide the Schwarz Group is by far the largest food retailer in Europe. Its turnover in Germany amounts to approx. 39 billion euros. Kaufland operates approx. 670 self-service department stores and superstores. With its 39 regional companies Lidl operates a distribution network of approx. 3,200 stores and is the largest discounter worldwide with altogether 10,800 outlets in 32 countries. SCP, which is controlled by the Russian investment company Sistema, acquired all of the previously 276 Real stores from Metro. In 2018/2019 the Real stores achieved a turnover of approx. seven billion euros. Globus operates 47 self-service department stores in Germany and achieves a turnover of 4.5 billion euros in Germany (in total 6.8 billion euros worldwide). The acquisition of food retail businesses always affects two different sides of the market: The sales side, where retailers serve consumers, and the procurement side, where suppliers serve retailers.

67. With regard to the sales side, the Bundeskartellamt allowed Kaufland to acquire only up to 92 Real stores instead of 101 notified by the company.

68. On the procurement side, the conditional clearance of the acquisition was possible because in return SCP undertook to sell Real stores with a total purchase volume of at least 200 million euros to medium-sized food retailers.

69. In addition to Kaufland's and Globus's proposed acquisitions, plans by Edeka to acquire up to 72 Real stores were also notified for examination. In March 2021, Edeka's acquisition of Real stores was only partly cleared allowing Edeka to acquire only 45 stores without conditions.

Withdrawals in second-phase proceedings

Withdrawal of notification of the RWZ/Raiwa merger

70. The proposed merger between Raiffeisen Waren-Zentrale Rhein-Main eG, Cologne (RWZ), and Raiffeisen Waren GmbH, Kassel (Raiwa) affected the agricultural trade. The parties withdrew their notification after the Bundeskartellamt had initiated a second-phase proceeding.

Edgewell Personal Care Company withdrew notification of its acquisition of Harry's Inc.

71. Following competition concerns expressed by the Bundeskartellamt and a preliminary critical assessment of the planned merger by the US Federal Trade Commission, the parties withdrew the notification of the merger on the wet shave razor market.

3.2.3. Activities of the court

CTS Eventim

72. CTS Eventim was granted leave to appeal a Düsseldorf Higher Regional Court decision upholding the authority's vetoing of the acquisition of event organiser Four Artists. The Federal Court of Justice saw the need to clarify whether a strengthening of a dominant position required a 'substantial' degradation of competitive restraints under the new German SIEC test. In January 2021, the Federal Court of Justice upheld the preceding decisions rendered by the Düsseldorf Higher Regional Court and the Bundeskartellamt.

Remondis/DSD

73. The Düsseldorf Higher Regional Court confirmed the prohibition of the merger between the waste management companies Remondis and DSD. The authority's prohibition decision was upheld based on a 'conservative' theory of harm concerning a regional market whereas the 'raising rivals' cost' theory was left undiscussed by the court.

Eon/Innogy

74. In another decision, the Düsseldorf Higher Regional Court held that even a phase-one clearance after a prolonged pre-notification phase could not be contested by a third party. The plaintiff is seeking leave to appeal the decision from the Federal Court of Justice.

3.3. Sector inquiries**3.3.1. Sector inquiry into smart TVs**

75. The Bundeskartellamt published the final report on its sector inquiry – as already presented with further details in last year's Annual Report¹³ – into smart TVs in July 2020.

76. The Bundeskartellamt established that almost all smart TV manufacturers active on the German market use privacy policies that have serious shortcomings in terms of transparency and thus violate the General Data Protection Regulation (GDPR). After past reports of shortcomings, the sector inquiry has also shown that the manufacturers' efforts to ensure a high level of data security vary. As a result, the Bundeskartellamt demands better information for consumers on the data processed by smart TVs. Also, liability issues arising from the interaction of various players in the IoT business should be clarified through corresponding legal regulations and consumers should have a clearly defined legal claim to software updates, also towards the manufacturer.¹⁴

3.3.2. Sector inquiry into online user reviews

77. The Bundeskartellamt published the results of its sector inquiry into online user reviews – as already presented with further details in last year's Annual Report¹⁵ – in October 2020. In its final report, the Bundeskartellamt explained the background to fake reviews and developed practicable approaches to solving this problem.¹⁶

3.3.3. Sector inquiry into publicly accessible charging infrastructure for electric vehicles

78. In July 2020, the Bundeskartellamt initiated a sector inquiry into the provision and marketing of publicly accessible charging infrastructure for electric vehicles.¹⁷ According

¹³ OECD Annual Report on Competition Policy Developments in Germany (2019), p. 21.

¹⁴ Bundeskartellamt, paper on conclusion and recommendation for action of 17 July 2020 can be found https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Sector_inquiry_smart_TV_s_conclusion.pdf?__blob=publicationFile&v=2 here:

¹⁵ OECD Annual Report on Competition Policy Developments in Germany (2019), p. 22.

¹⁶ Bundeskartellamt, press release of 6 October 2020; Bundeskartellamt, final report of 6 October 2020 (in German only).

¹⁷ Bundeskartellamt, press release of 9 July 2020.

to the plans of the German federal government, a nationwide charging infrastructure in Germany is to be established by 2030. The process of setting up and operating charging stations is not subject to the comprehensive regulation of electricity networks. To ensure effective competition, non-discriminatory access to potential locations for charging stations as well as the specific terms and conditions applying at the charging stations are of key importance. The investigation is intended to also cover the various approaches of cities and municipalities to providing suitable locations and the effects of these approaches on competition between the operators of charging stations. The Bundeskartellamt will also look at the competitive framework conditions for installing charging stations on motorways.

3.3.4. Sector inquiry into messenger services

79. In November 2020, the Bundeskartellamt launched a sector inquiry into messenger services under consumer protection law to gain insights as to whether improvements in this area can result in an increased use of more privacy-friendly services.¹⁸

4. Cooperation in international fora and conferences

4.1. International Competition Network (ICN)

80. The ICN is the most important network of competition authorities worldwide. It comprises more than 140 competition agencies from more than 129 jurisdictions. Andreas Mundt, President of the Bundeskartellamt, has been the ICN Steering Group Chair since September 2013.

81. The Bundeskartellamt played an active role in all ICN Working Groups and took part in several virtual seminars and workshops. Furthermore, the Bundeskartellamt actively participated in the 19th Annual ICN Conference held from 14 to 17 September 2020. The conference was the ICN's first virtual conference. Originally planned as an in-person conference in Los Angeles in May, the conference transitioned to a virtual format as a result of the COVID-19 pandemic. For the same reason, the Workshops of all ICN Working Groups were postponed. 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. Over 2500 delegates from around the world, including representatives and stakeholders such as the business community, legal and economic professionals, international organisations and academics attended the virtual conference in 2020.

82. Andreas Mundt opened the conference and spoke on a panel on remedies in unilateral conduct cases involving digital markets. Other sessions dealt with competition enforcement in the digital economy, big data and cartelisation, competition advocacy in the digital age, merger investigations in the digital sector, and competition agencies' strategies to address the challenges of the digital economy. Additional sessions were dedicated to younger agencies as well as ICN Non-Governmental Advisors and economists.

83. The ICN also announced plans for a full self-evaluation of the network to shape the ICN's third decade in 2021, the "Third Decade Review".

¹⁸ Bundeskartellamt, press release of 12 November 2020.

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

84. In 2020, the competition authorities of the EU continued their successful cooperation within the ECN.

85. By the end of 2020, a total of 2,800 cases were posted on the competition authorities' joint intranet; 241 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 9 cases. In 2020, the European Commission was informed about 139 new proceedings initiated by the national competition authorities (NCAs) under Article 11(3) of Regulation 1/2003, 10 of which were Bundeskartellamt cases.

86. 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 Horizontals has been dealing with all substantive issues in horizontal agreements and abuse cases. The Working Group met virtually on two occasions in 2020 discussing in depth the amendment of the Guidelines for the assessment of horizontal cooperation agreements as well as the horizontal Block Exemption Regulations (research and development agreements and specialisation agreements). A second point of discussion were sustainability initiatives. In order to discuss the question on how to deal with sustainability initiatives with regard to the existing framework a new working group has been established.

87. Furthermore, the Bundeskartellamt plays an active role in all ECN sectoral subgroups, where an exchange of practical experience takes place. In 2020, the Bundeskartellamt's representatives attended meetings of the subgroups Food, Telecoms, Pharma & Health, and Financial Services. Most of them were held virtually due the pandemic. The work of the ECN Subgroup Food was particularly relevant in the past year, since aside from the upcoming modernisation of the Common Agricultural Policy and the transposition of the so-called UTP Directive (Directive 2019/633), the Subgroup also particularly discussed the possibility of crisis cartels in the agricultural sector in times of a global pandemic. Furthermore, while no meeting of the ECN SG Transports was held, a workshop between National Competition Authorities and National Regulators took place in 2020 in order to discuss current competition issues in the railway sector.

88. 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.

4.3. Annual Meeting of the Working Group on Competition Law

89. The Working Group on Competition Law was held in virtual format on 1 October 2020. More than 130 competition law experts were invited to discuss about "Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice." Martijn Snoep, Chairman of the Netherlands Authority for Consumers and Markets (ACM) presented the ACM's revised draft guidelines on dealing with sustainability initiatives. Professor Dr Thomas Ackermann, Professor Achim Wambach and Professor Dr Heike Schweitzer discussed the guidelines as well as the extent to which

competition authorities should find a balance between opposing competition goals and public interest objectives and enforce such goals in the context of business cooperation; the role the legislator was also discussed.

4.4. Working Group on Competition Economics

90. The Working Group on Competition Economics held its fifth meeting by video conference. Bundeskartellamt staff and economic researchers discussed topical issues relating to competition economics. The agenda of the meeting included discussions about cooperations in fibre deployment and merger control in the hospital sector.

4.5. European Competition Day Conference

91. The Federal Republic of Germany has held the Presidency of the Council of the EU in the second half of 2020. Within the German Presidency, the Federal Ministry for Economic Affairs and Energy hosted the European Competition Day, which was the central conference on competition policy in the year 2020 in Germany. It was geared towards leading representatives from government, academia, ministries, competition authorities, industry and the legal profession.

92. The Federal Minister for Economic Affairs and Energy, Peter Altmaier, opened the conference, followed by a keynote speech of Executive Vice-President of the European Commission, Margrethe Vestager. The European Competition Day conference featured also sessions on measures counteracting distortive foreign subsidies, on competition policy in the digital age and on challenges for competition policy during international crises, such as COVID-19.

4.6. International Conference on Competition

93. Due to the pandemic, the International Conference on Competition was held in a virtual and also more compact format in the afternoon of 4 March 2021 hosting around 1000 participants. The event focused on the role of competition policy in dealing with Big Tech and on public interest objectives as a challenge for competition law practice.

94. The conference started with an interview with Peter Altmaier, the German Federal Minister for Economic Affairs and Energy, and Margrethe Vestager, Executive Vice-President and European Commissioner for Competition, who discussed the role of government and business in shaping the economy. In addition, Christian Klein, Chief Executive Officer of SAP SE, shared the business perspective in a keynote speech.

5. 5. Resources of the Bundeskartellamt

5.1. Annual budget

Budget 2020	Change over 2019
EUR 34.4 million	- 5.9 million

5.2. Number of employees

	2020*	Change over 2019
Economists	51	+3
Lawyers	99	+3
Other experts	19	+2
Support staff	178	+4
Total	347	+12

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

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

Becker, Carsten	Entscheidungshilfe Nutzerbewertung - Lösungsvorschläge zum Schutz vor Fake-Bewertungen In: Wettbewerb in Recht und Praxis, 66 (2020), pp. 1513-1649
Bernhöft, Isabel	Tagungsprotokoll des Arbeitskreises Kartellrecht In: Wirtschaft und Wettbewerb, 70 (2020), pp. 80-82
Engelsing, Felix	Nachhaltigkeit und Wettbewerbsrecht - Kartellrechtliche Beurteilung von Nachhaltigkeitsinitiativen In: Der Betrieb, 73 (2020), issue 10, pp. M4-M5
Engelsing, Felix; Buhl Monika	Ist Dabeisein wirklich alles? Vermarktungsverbote für Teilnehmer Olympischer Spiele In: Zeitschrift für Wettbewerb, 18 (2020) issue 1, pp. 107-130
Hossenfelder, Silke	Wer bestimmt die Verfahrensdauer in Fusionsfällen? In: Neue Zeitschrift für Kartellrecht, 8 (2020), pp. 283-284
Mundt, Andreas	Das internationale Netzwerk der Wettbewerbsbehörden - Fünf Gründe für den Erfolg des International Competition Network (ICN) In: Festschrift für Gerhard Wiedemann zum 70. Geburtstag, Das Unternehmen in der Wettbewerbsordnung, 2020, pp. 44-45
	Algorithms and Competition in a Digitalized World In: CPI Antitrust Chronicle, published in July 2020
	Germany: Federal Cartel Office In: Europe, Middle East and Africa – Antitrust Review 2021, published by Global Competition Review, first published in July 2020, United Kingdom, pp. 140-144
	The Bundeskartellamt in times of COVID-19 - Adaption of workflows and implications for our enforcement practice In: Journal of Antitrust Enforcement, 8 (2020), pp. 253-255
Ost, Konrad	Kartellrecht - Verbraucherrechtvollzug mit kartellrechtlichen Mitteln? In: Brönneke, Tobias, Verbraucherrechtvollzug: Zugang der Verbraucher zum Recht – Baden-Baden, 2020, pp. 249-262
Ost, Konrad; Rauber, Markus	Verfassungsrechtliches Gleichheitsgebot und die Inanspruchnahme der kartellrechtlichen Kronzeugenprogramme In: Wirtschaft und Wettbewerb, 70 (2020), pp. 302-308
Topel, Julia	Unentgeltliche Marktleistungen nach § 18 Abs. 2a GWB In: Festschrift für Gerhard Wiedemann zum 70. Geburtstag, Das Unternehmen in der Wettbewerbsordnung, 2020, pp. 57-67
Wagemann, Markus	Die Stellschraube der zweiten Inlandsumsatzschwelle in der Fusionskontrolle In: Festschrift für Gerhard Wiedemann zum 70. Geburtstag, Das Unternehmen in der Wettbewerbsordnung, 2020, pp. 564-576