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Annual Report on Competition Policy Developments in Germany

-- 2022 --

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Germany

Executive summary

1. Competition policy and enforcement in 2022 was influenced by the multiple ongoing crises and disruptions affecting the economy, in particular the remaining effects of the pandemic, increasing inflation, the current energy crisis and rising demands for sustainability. Against this background, the Federal Ministry for Economic Affairs and Climate Action published a draft of the 11th revision of the German Competition Act (Act against restraints of competition – GWB) that was later adopted by the federal cabinet. With regard to the price-reducing effect of effective competition and in order to promote innovation, the draft aims to strengthen competition especially in oligopolistic markets with little dynamism. The Bundeskartellamt examined several crisis-induced economic cooperation agreements, for example to prevent gas shortages in the sugar industry, and issued guidance for companies. As inflation especially affects energy prices, the authority intensively looked at the mineral oil sector.¹ Regarding several sustainability initiatives the Bundeskartellamt sent a clear signal that cooperation for more sustainable production is possible in many ways while clarifying the limits for agreements which are not acceptable under competition law.²

1.1. Digital economy

2. The digital economy remains at the top of the Bundeskartellamt’s agenda. The application of the new extended abuse control of digital companies is effective (Section 19a of the German Competition Act, GWB). Last year, the authority concluded designation proceedings against Meta (formerly Facebook), Amazon and Google and achieved first tangible improvements for competition and consumers.³ The designation proceeding against Apple was concluded on 3 April 2023; a Section 19a-proceeding against Microsoft was initiated in March 2023.⁴

3. Besides abuse control proceedings, the Bundeskartellamt applied its powers in the digital sector to carry out sector inquiries. A report for public discussion on the inquiry into non-search online advertising was published last year.⁵

4. In the area of merger control, the Bundeskartellamt assessed various acquisitions, including Meta/Kustomer and Microsoft/Xandr. With a view to platforms and cooperation, the authority provided informal guidance on several projects. In this context, it gave the green light for establishing Catena-X, a data network for collaboration in the automotive industry. Cases like Catena-X and the ongoing proceedings against Deutsche Bahn, where the Bundeskartellamt issued a statement of objections due to a possible hindrance of

¹ See section 1.2 and 2.3 for more detailed information.

² See for example press release of 10 January 2022, available [here](#).

³ See section 2.1.2 for a more detailed description of the respective cases.

⁴ A list of all proceedings against large digital companies on the basis of Sec. 19 a GWB is available [here](#).

⁵ Bundeskartellamt, Executive summary in English published on 29 August 2022, available [here](#).

mobility platforms, highlight the continuously increasing importance of digitalisation and access to data across all industries.

5. In the area of consumer protection, a new investigation into scoring in the online retail sector was initiated. The authority's investigation into messenger and video services is about to be concluded.

6. The Bundeskartellamt also hosted another meeting of the established Working Group on Competition Law. Based on a comprehensive working paper⁶ presented by the Bundeskartellamt, the group discussed challenges and development perspectives of merger control in the digital age.

1.2. Action against anticompetitive practices

7. In 2022, the Bundeskartellamt imposed fines amounting to almost 24 million euros on a total of 20 companies and 7 individuals. The sectors concerned included expansion joints for bridges and the industrial construction sector.⁷

1.3. Merger control

8. In 2022, the Bundeskartellamt examined more than 800 notified merger projects. Eight of these projects were scrutinised in second phase: a merger in the surface drainage sector was prohibited and two others, namely the acquisition of OMV petrol stations by the EG Group (Esso) and the planned strategic connection between Rheinenergie and Westenergie (E.ON), were only cleared subject to conditions. In two other cases, the participating companies gave up their project in the course of the examination. Three examinations were still ongoing as of 31 December 2022.

1.4. Competition Register for Public Procurement

9. The Competition Register for Public Procurement has been in full operation since June 2022. All obligations to consult the register and rights to information are now applicable. The Competition Register provides all public contracting authorities in Germany with information helping them to assess whether a company must or can be excluded from a public procurement procedure for having committed economic offences. The Competition Register is widely used, as is evidenced by the first year's figures. By the end of 2022, approx. 6,000 economic offences had been entered and the register had been consulted over 140,000 times in total (up to 1,000 times per day).

10. In the course of a public procurement procedure, public contracting entities can now check via a web portal whether a company has committed relevant offences. These companies should not benefit from public contracts and concessions. Companies can apply for premature deletion of their entry in the Competition Register. In order to do so, they have to review their misconduct and establish preventive compliance measures for the future (referred to as self-cleaning). The Bundeskartellamt has published guidelines and notes on the procedure. Seven applications for premature deletion were granted in 2022.

⁶ Bundeskartellamt, paper published on 29 September 2022, available [here](#).

⁷ For more detailed information, see Section 2.1.1.1.

1.5. Enforcement of the prohibition to exploit the price caps on gas, electricity and district heating⁸

11. As a result of the energy crisis, the German Bundestag passed two laws in December 2022 capping the prices of electricity and pipeline-based natural gas and heating. The price caps were intended to ease the burden of gas, heating and electricity price increases on end consumers by capping these prices for a set quota. The Bundeskartellamt was entrusted with the task of enforcing these laws and set up a new department for the enforcement of the prohibition to exploit the above-mentioned price caps to this end. If the authority suspects unjustified price increases, it will initiate an examination within its scope of discretion.

2. Changes to competition laws and policies, proposed or adopted

2.1. Summary of new legal provisions of competition law and related legislation

12. The draft for the 11th amendment to the German Competition Act (GWB) reached an advanced stage in 2022. The draft bill was presented by the Federal Ministry for Economic Affairs and Climate Action in September 2022 and passed the Federal Cabinet on 5 April 2023. It will be discussed in parliament in mid-2023. The core of the draft are new powers of intervention for the Bundeskartellamt following a sector inquiry. The draft also aims at facilitating the disgorgement of undertakings' profits derived from infringements of antitrust law.⁹

13. In July 2022, the Federal Parliament (Bundestag) adopted an amendment of the German Competition Act (GWB) that intensified the monitoring and abuse control of the energy sector. The existing framework for stricter abuse control of electricity and gas prices (Section 29 GWB) has been extended to the district heating sector. Moreover, both the mandate and the database of the Market Transparency Unit for Fuels at the Bundeskartellamt has been broadened in order to monitor the entire fuels supply chain.

2.2. New guidelines, studies and reports

2.2.1. Policy-related studies of the Federal Ministry for Economic Affairs and Climate Action

14. For the federal government, both sustainability and functioning competition are crucial aspects of its current agenda. Already in November 2021, the Federal Ministry for Economic Affairs and Climate Action commissioned a study to shed light on the consideration of sustainability issues in competition policy. The study was created by independent researchers from the Heinrich Heine University in Düsseldorf and was published on the ministry's website.¹⁰

15. The study identifies and examines 34 options as to if and how the protection of competition can be better interlinked with a sustainable economy and foster the Sustainable

⁸ Bundeskartellamt, press release published on 20 December 2022, available [here](#).

⁹ A more detailed summary of the draft for the 11th amendment of the German Competition Act (GWB) is given in sub-item 1.3.

¹⁰ cf.: https://www.bmwk.de/Redaktion/DE/Publikationen/Studien/studie-wettbewerb-und-nachhaltigkeit.pdf?__blob=publicationFile&v=4 [only in German].

Development Goals (SDGs). The options are evaluated with supporting and contradicting arguments.

16. The experts come to the conclusion that competition and sustainability do not contradict each other. In the authors' view competitive pressure gives strong incentives to invent new technologies necessary for climate protection, for instance. Nevertheless, the study sees a need for reform, especially regarding companies using manufacturing processes that are harmful to the environment while profiting from cost advantages.

17. The various identified options include ideas such as the possibility for competition authorities to place more focus on pursuing sustainability goals in the future. This way, practices by dominant companies that are harmful to sustainability could be pursued more severely, for example when monopolists play off their power and violate environmental protection standards or pay dumping wages. In such cases, imposing higher fines would also be conceivable. At the same time, cooperation that is currently prohibited by antitrust law could also be permitted to a limited extent.

18. The Federal Ministry for Economic Affairs and Climate Action is currently examining all options and a possible need for action, also against the background of current initiatives at EU level (in particular the Horizontal Guidelines [Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements] and the Guidelines on Article 210a CMO of the EU Commission). These options could be taken into account in a future amendment of the German Competition Act (GWB).

2.2.2. New guidelines on Transaction Value Thresholds

19. The Austrian Competition Authority and the German Bundeskartellamt published a revised version of the Guidance on Transaction Value Thresholds in 2022.¹¹ The guidance was adapted to the respective new legal situations. In the case of Germany, this concerned in particular the adjustments to the domestic turnover thresholds adopted by the 10th amendment to the German Competition Act (GWB).

20. The new Section 35(1) GWB introduced the criterion of merger considerations as an additional, subsidiary threshold for the notification requirement. As a result, mergers where companies or assets, which (as yet) generate little or no turnover are purchased at a high price can now be examined under competition law. The aim of the threshold is to cover cases where current turnover and the purchase price for the company differ to a disproportionate extent. The high purchase price in such takeovers is often an indication of innovative business ideas with great competitive market potential.

21. The revised guidance paper is based on initial experience with the transaction value thresholds, discussions with lawyers specialising in competition law and mergers and acquisitions, and submissions received during the public consultation on a draft version of the guidance paper. The paper aims to offer users first assistance with interpreting statutory provisions and represents the current legal opinion of the German Bundeskartellamt and the Austrian Bundeswettbewerbsbehörde on the applicability of the new provisions.

¹¹ Bundeskartellamt, Guidance on Transaction Value Thresholds, document available [here](#).

2.2.3. Annual Report of the Market Transparency Unit for Fuels replaced by monthly newsletter

22. The Market Transparency Unit for Fuels collects real-time price data from about 15,000 petrol stations in Germany. This data is passed on to consumers via authorised service providers' apps or websites. Armed with this information, 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, therefore, save a substantial amount of money

23. In February 2023, the Market Transparency Unit for Fuels decided to abandon its traditional annual report and replace it with a monthly newsletter in order to meet the public's need to learn about new developments in the fuel market in a more timely manner. In doing so, the authority has perpetuated its more frequent reporting on the prices of E5, E10 and Diesel since the escalation of the war in Ukraine.

2.2.4. Energy Monitoring Report 2022

24. In November 2022, 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. The report's data analyses primarily relate to 2021 but also reflect the developments of 2022 because of the particular situation in the energy markets following Russia's invasion of Ukraine. The report states, among other things, that the war in Ukraine had a noticeable effect on German electricity and gas consumers in the shape of rising energy prices. Furthermore, the report shows that the reduction in conventional electricity generation capacity in the market, which was also needed to make up for the lack of renewable generation when there was little wind or sun, has reinforced the importance of the remaining capacity of a conventional power plant fleet that is getting smaller overall.¹²

2.3. Government proposals for new legislation

25. On 20 September 2022, the Federal Ministry for Economic Affairs and Climate Action published a draft of the 11th amendment of the German Competition Act (GWB). After various adjustments to increase legal certainty and specify terms newly introduced into German competition law, the Federal Cabinet adopted the draft on 5 April 2023.¹³ The government draft will be debated in parliament in May and June 2023.

26. The aim of the government draft is to strengthen competition especially in markets that feature a low intensity of competition, for example due to high (asymmetric) market power, tacit collusion or substantial barriers to market entry. In June 2022, against the background of rising inflation rates as well as significant price and profit increases in some sectors, Federal Minister Dr Robert Habeck decided to prioritise the revision of the national competition law planned for 2023. While competition policy is not the primary instrument for fighting inflation, an increased competition intensity does generally have an impact on the price level of a market.¹⁴ More competition – in addition to an increase in product

¹² Bundeskartellamt, press release published on 30 November 2022, available [here](#). Full report available [here](#) [only in German].

¹³ cf.: https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschaenkungen.pdf?__blob=publicationFile&v=6 [only in German]

¹⁴ cf.: Competition and Inflation – Note by Germany, DAF/COMP/WD(2022)90; [https://one.oecd.org/document/DAF/COMP/WD\(2022\)90/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)90/en/pdf).

quality and innovation activity – ensures low prices and thus benefits consumers (albeit in the medium term).

27. The government draft mainly contains new powers for the Bundeskartellamt: following a sector inquiry, the Bundeskartellamt will in future have the power to impose measures to remedy a substantial and lasting “malfunctioning of competition” that it has previously identified. The remedies can target both the market structure and the conduct of undertakings. Amongst other measures, the Bundeskartellamt can order undertakings to reduce market entry barriers and to notify mergers in certain markets (even if the transactions are below the current turnover thresholds).

28. Furthermore, it can counteract or prohibit facilitating practices in oligopolies and as a last resort in extreme cases order a divestment of undertakings with a dominant market position. Since a “malfunctioning of competition” does not necessarily have to be grounded in a prohibited agreement or an abuse of a dominant position, a violation of competition law is no prerequisite for remedial measures.

29. The government draft also aims at improving an already existing provision that has turned out to be insufficient: pursuant to Section 34 GWB the Bundeskartellamt may currently order the disgorgement of economic benefits resulting from a proven violation of competition law. However, due to high legal barriers, the instrument has so far never been used by the authority so far. In particular, the government draft achieves a facilitated application of the instrument through the introduction of presumption rules.

30. Finally, the government draft creates, among other things, the legal basis for the Bundeskartellamt to investigate possible violations of the Digital Markets Act (DMA).

31. The political core of the government draft is the instrument that can be applied following a sector inquiry. Similar instruments already exist in other countries. In particular, the government draft was inspired by the market investigation tool of the British Competition and Markets Authority (CMA). By making the sector inquiry more effective, the government draft creates a “fourth pillar” of German competition policy in addition to the already existing “pillars” (ban on cartels, abuse control and merger control). Against this background, the 11th amendment of the GWB will be one of the key revisions of national competition law made in recent times.

3. Enforcement of competition laws and policies

3.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

3.1.1. Summary of activities of competition authority and courts

Summary of the Bundeskartellamt’s activities

32. In 2022, the Bundeskartellamt imposed fines amounting to almost 24 million euros on a total of 20 companies and 7 individuals. The sectors concerned included expansion joints for bridges for the industrial construction sector.

33. 13 companies informed the authority about infringements in their sector by making use of the authority’s leniency programme. Further tip-offs were received from other sources. In two cases, the proceedings were triggered by information received via the anonymous whistle-blowing system.

34. In 2022 the Bundeskartellamt carried out a total of 12 dawn raids and provided official assistance in six other raids.

Summary of the courts' activities

Antitrust

- Lufthansa/Condor

35. In the interim proceeding regarding the Bundeskartellamt's Lufthansa/Condor case, the Düsseldorf Higher Regional Court turned down a motion brought by Lufthansa to immediately suspend the effectiveness of the authority's decision for the duration of the interim proceeding. In the court's view, Lufthansa had not sufficiently demonstrated that it had suffered harm from being obliged to continue supplying rival airline Condor with feeder flights on the basis of their former long-standing cooperation agreements.

- Meta (Facebook)

36. In the Bundeskartellamt's Facebook case, the Düsseldorf Higher Regional Court submitted a set of questions to the European Court of Justice (ECJ) after the Federal Court of Justice (BGH) had upheld the Bundeskartellamt's decision in the interim proceeding. The ECJ held a hearing on the case in May; the Advocate General submitted his opinion in September, largely siding with the authority's view on the interplay between data protection and competition law. The date for the ECJ's ruling has been set for 4 July 2023.

Cartel prosecution

- Düsseldorf Higher Regional Court upheld most of the charges against technical building service provider for bid rigging

37. The Düsseldorf Higher Regional Court upheld most of the charges brought by the Bundeskartellamt against a large technical building service provider for bid rigging. However, following the ECJ's "Eltel" judgment, the court held that the charges regarding a number of bids had become time-barred and fines could thus no longer be imposed. With regard to one bid, the Düsseldorf Higher Regional Court held that the employee acting on behalf of the company was not senior enough to have his conduct attributed to the undertaking. Thus, the case demonstrates a possible divergence between the standards of German and European law for attributing personal conduct to a legal entity. The Bundeskartellamt is seeking clarification on all issues in question from the BGH.

- Settlement with Rossmann in third proceeding before the Düsseldorf Higher Regional Court

38. In another case, which the BGH had referred back to the appellate court twice, a settlement could be reached in the third proceeding before the Düsseldorf Higher Regional Court. The drugstore chain Rossmann accepted a fine of 20 million euros for vertical price fixing in the sale of roasted coffee. The case had seen the fine of 5.25 million euros imposed by the authority increased by the court to 30 million euros before the BGH annulled the decision twice on formal grounds. The discrepancy between the fine handed out by the authority and the fine imposed by the court originated from the different ways in which the role of the product-related turnover was perceived when setting the fine. The divergence has now been addressed by the 2021 overhaul of the law.

- Suit for damages rejected in all three instances

39. A member of the pesticides cartel sued the Bundeskartellamt for damages due to alleged procedural misconduct in the initial phase of the proceeding. The undertaking had accepted the authority's findings on the cartel and ended the cartel proceeding with a settlement. The following suit for damages aiming at the reimbursement of the fine and the defence costs was thrown out in all three instances.

3.1.2. Description of significant cases, including those with international implications

Agreements

Manufacturers of modular expansion joints for bridges¹⁵

40. The Bundeskartellamt imposed fines totalling around 7.3 million euros on two manufacturers of modular expansion joints (expansion joint systems for road bridges) for engaging in an illegal quota cartel. The companies concerned were Maurer SE, Munich, and Mageba GmbH, Göttingen.

41. For several years, the only two manufacturers in the market for modular expansion joints for bridges engaged in a quota cartel. The companies had agreed on a system of fixed market shares in the form of quotas to carve up the market between them. Compliance with the quotas was monitored by their sales staff who intervened in the case of substantial deviation from the agreed quotas. To maintain these quotas the companies split important future contracts. Furthermore, a uniform price calculation formula was agreed in order to implement the cartel.

42. The Bundeskartellamt and the Braunschweig public prosecution office, which closely cooperated throughout the proceeding, followed up tip-offs from market participants and jointly carried out dawn raids at several companies and private homes in January 2019. In setting the fines, the Bundeskartellamt took into account that Maurer SE and Mageba GmbH cooperated extensively with the Bundeskartellamt in uncovering the agreements and that a settlement could be reached.

Air Transport¹⁶

43. The Bundeskartellamt prohibited Lufthansa to terminate long-standing cooperation agreements with Condor for the time being. On the basis of the cooperation, passengers can use through tickets for feeder flights operated by Lufthansa and its airlines for Condor long-haul flights. The Bundeskartellamt also removed several other impediments to competition included in the existing agreements between the airlines as the entitlement to access feeder flights would otherwise have been partly ineffective. The Bundeskartellamt's decision is not final yet. The case is pending before the Düsseldorf Higher Regional Court.

¹⁵ Bundeskartellamt, press release of 10 February 2022, available [here](#).

¹⁶ Bundeskartellamt, press release of 1 September 2022, available [here](#).

Financial Services

44. In March 2022, the Bundeskartellamt gave the green light for the further development of the giropay system envisaged by Deutsche Kreditwirtschaft (German Banking Industry Committee). The parties to the cooperation had stated that they were prepared to give up their plans for an exclusivity agreement regarding the joint project, which was originally part of the development project.

45. In 2020, the Bundeskartellamt had already examined the combination of the giropay, paydirekt and Kwitt systems under the joint brand name giropay. In a second step the role of the joint venture paydirekt GmbH as the central provider of the giropay payment system was to be strengthened.

Provision of medical aids¹⁷

46. Several associations of suppliers of medical aids joined forces to demand coordinated price increases in the rehabilitation and care segments from the statutory health insurance companies, which they achieved in some cases. The associations organised themselves under the “ARGE” umbrella and represent in particular health care supply stores and orthopaedic workshops. The Bundeskartellamt initiated a cartel administrative proceeding against the ARGE members in March 2022. Initial investigations showed that the collective negotiations of price increases in the ARGE context could constitute an infringement on competition law.

47. Agreements between suppliers and health insurance companies are subject to special regulations under social law, which in some cases allow exemptions from the ban on anti-competitive agreements. However, there was much to suggest that an exemption did not apply in this case. ARGE represents the largest part of all suppliers of medical aids for rehabilitation and care on which patients in Germany rely. The proceeding therefore did not only investigate a potential infringement of the ban on anti-competitive agreements, but also whether there has been an abuse of dominance.¹⁸

Portable and hand-guided motorised tools for gardening and landscaping, landscape maintenance and forestry

48. In May 2022, the Bundeskartellamt decided that a non-competition clause imposed by the STIHL company had been unlawful. The sales company of the German STIHL Group which is responsible for the German market had concluded reseller agreements with several hundreds of authorised STIHL resellers in Germany containing his particular non-competition clause with regard to a range of competitors’ products. Since STIHL gave up the clause during the investigation the Bundeskartellamt’s decision is a formal declaration upon the unlawfulness.

¹⁷ Bundeskartellamt, press release of 23 March 2022, available [here](#).

¹⁸ The Bundeskartellamt has sent its preliminary investigation results in the proceeding for comments at the end of January 2023. Press release of 23 January 2023, available [here](#).

Animal welfare¹⁹

49. In March 2022, the Bundeskartellamt informed the QM-Milch e.V. that it had no serious competition law concerns against the “industry agreement milk” (Branchenvereinbarung Milch). Key elements of the programme are the introduction of a label for products which fulfil the animal welfare criteria set by the QM+ programme, and the financing of the additional costs incurred through a so-called animal welfare surcharge payable to farmers. Companies and associations from the agricultural sector (farmers) as well as dairies and food retailers are parties to the QM industry agreement. The aim is to implement a programme for improving animal welfare in the production of milk along the lines of the animal welfare initiative “Initiative Tierwohl” in the cattle fattening sector.

50. The Bundeskartellamt’s decision to tolerate QM-Milch’s industry agreement within the scope of its discretion was also made in light of Article 210a of the European Regulation establishing a common organisation of the markets in agricultural products (CMO).

Automotive industry²⁰

51. In May 2022, the Bundeskartellamt gave the green light for establishing a data network for the automotive industry (Catena-X), which aimed to create a data network for collaboration in the automotive industry. Catena-X is a first major component of the GAIA-X initiative to create a competitive data infrastructure in Europe. More than 80 companies mainly active in Germany’s automotive and IT industry wish to collaborate in this project.

52. When examining the project, the Bundeskartellamt assessed both the agreement regarding the setting of standards as well as the cooperation for research and development purposes. A research and development cooperation which is not aimed at jointly using the results usually has anti-competitive effects only if competition in innovation is appreciably reduced. However, there were no indications that this would be the case, especially since the standards that were to be developed were to be interoperable so that companies active in the automotive industry could still use and develop their own cloud and software solutions.

Industrial construction²¹

53. In June 2022, the Bundeskartellamt imposed fines totalling approx. 12.5 million euros against Aktien-Gesellschaft der Dillinger Hüttenwerke (Dillinger Hütte) and Hochtief Solutions AG (Hochtief) for concluding illegal agreements within the context of award procedures.

54. In the early 2000s, a representative of a Saarland-based industrial construction company which has meanwhile been liquidated had concluded an agreement with representatives of Dillinger Hütte, the potential contracting party, while at the same time also reaching an agreement with representatives of Hochtief, the construction company’s main competitor in the award procedure for the contracts in question. The agreements fined by the Bundeskartellamt covered the period from early 2010 until March 2014. The fine imposed on Dillinger Hütte is final. Hochtief has appealed the order imposing its fine and the Bundeskartellamt’s findings on which the authority’s decision is based to the Düsseldorf Higher Regional Court. Dillinger Hütte agreed to a settlement.

¹⁹ Bundeskartellamt, press release of 29 March 2022, available [here](#).

²⁰ Bundeskartellamt, press release of 24 May 2022, available [here](#).

²¹ Bundeskartellamt, press release of 9 June 2022, available [here](#).

Abuses of a dominant position

Digital mobility services

55. In April 2022 the Bundeskartellamt issued, as part of an abuse proceeding, a statement of objections against Deutsche Bahn (DB) due to possible hindrance of mobility platforms. As the digital transformation progresses, the market potential for online and app-based mobility services “from a single source” is increasing, too. Such mobility services include the provision of travel information, comparisons of transport modes or real-time information in the form of an application, but also offers of itineraries using different modes of transport and integrated ticketing, which should be as neutral as possible and extend across companies and modes of transport.

56. Based on the Bundeskartellamt’s preliminary assessment, Deutsche Bahn, which is vertically integrated from network operation to ticket distribution, is the dominant rail transport company in Germany and thus has to fulfil special obligations towards mobility service providers. The authority’s preliminary view is that they are entitled to access traffic data of Deutsche Bahn, such as information on delays, the progress of a journey, cancellations or platform changes, because these forecast data on passenger rail services are crucial for organising and booking intermodal mobility chains.

57. At present, DB reserves these data for itself and for a few selected mobility service providers such as Google. These data cannot be obtained anywhere else. The authority is also concerned about a number of contractual restrictions imposed on mobility service providers using rail services in their offers. These include clauses in which, for instance, DB prohibits its contractual partners from using terms that are specific to DB in advertising (in search engines, app stores and social networks), price specifications for passenger tickets, far-reaching bans on discounts and possible discrimination against some mobility platforms with regard to the commission rate paid for ticket sales.

58. DB and mobility platforms admitted to the proceeding commented on the Bundeskartellamt’s preliminary findings. After several months of negotiations, DB AG offered commitments to eliminate the contested restraints of competition. The Bundeskartellamt is currently putting these commitments through a market test. If the parties reach an agreement, the proceeding could be concluded with a consensual commitment decision pursuant to Section 32b of the German Competition Act (GWB).

New powers for the Bundeskartellamt under Section 19a GWB

59. In January 2021, the 10th amendment to the German Competition Act (GWB Digitalisation Act) came into force. A new key provision set forth in Section 19a GWB now enables the authority to intervene earlier and more effectively, in particular against the practices of large digital companies. In a two-step procedure the Bundeskartellamt can prohibit companies which are of paramount significance for competition across markets from engaging in certain anticompetitive practices. Examples of conduct which can be prohibited under the new provision include the self-preferencing of a group’s own services, the envelopment of non-dominated markets by way of non-performance based anticompetitive means, such as tying or bundling strategies, or creating or raising barriers to market entry by processing data relevant for competition. Throughout 2022, the Bundeskartellamt closed, opened new or expanded existing proceedings against Google, Amazon, Meta and Apple based on the new provision under Section 19a GWB.

Section 19a GWB proceeding against Facebook

60. In May 2022, the Bundeskartellamt determined that Meta (formerly Facebook) is of paramount significance for competition across markets. The toolkit for extended abuse control according to Section 19a GWB can thus be applied to Meta. Meta has announced not to appeal the decision and not to deny its status as norm addressee of the provision.²²

61. Furthermore, the Bundeskartellamt had initiated abuse proceedings against Facebook due to the linkage between Oculus and the Facebook network in 2020 and extended the scope of its proceedings in 2021, also examining whether Facebook was subject to the rules under section 19a which apply to undertakings of paramount significance for competition across markets and whether linking the services was to be assessed on this basis.²³ In November 2022, Meta responded to the authority's concerns and allowed the use of VR headsets without a Facebook account. The case was still ongoing at the end of 2022.²⁴

Section 19a GWB proceeding against Amazon

62. In July 2022, the Bundeskartellamt concluded a proceeding against Amazon based on Section 19a GWB in order to determine whether the company is of paramount significance for competition across markets.²⁵ The case is pending before Court.

63. In addition, the Bundeskartellamt is currently conducting two abuse control proceedings against Amazon: In one proceeding, the authority is examining to what extent Amazon is influencing the pricing of sellers on Amazon Marketplace by means of price control mechanisms and algorithms. A second proceeding concerns the investigation whether agreements between Amazon and brand manufacturers excluding third-party sellers from selling brand products on Amazon Marketplace infringe competition law. Both cases were extended to Section 19a(2) GWB in November 2022.

Section 19a GWB proceedings against Google

64. The proceeding against Google and its parent company Alphabet Inc. based on Section 19a GWB to analyse in-depth Google's data processing terms that was initiated in 2021 was still ongoing in 2022. A statement of objections against these terms was issued in December 2022.²⁶ The Bundeskartellamt is examining whether Google/Alphabet makes the use of services conditional on users agreeing to the processing of their data without giving them sufficient choice as to whether, how and for what purpose such data are processed.

65. Furthermore, the Bundeskartellamt concluded its proceeding against Google/Alphabet with regard to the "Google News Showcase" online news after Google made a number of important adjustments to the benefit of publishers. Google News Showcase is a Google service which offers the possibility to present news content from publishers in a prominent and more detailed way, by using "story panels". The Bundeskartellamt examined, among other things, whether similar services offered by other

²² Bundeskartellamt, press release of 4 May 2022, available [here](#).

²³ Bundeskartellamt, press release of 28 January 2021, available [here](#).

²⁴ Bundeskartellamt, press release of 23 November 2022, available [here](#).

²⁵ Bundeskartellamt, case summary of 6 July 2022, available [here](#).

²⁶ Bundeskartellamt, press release of 11 January 2023, available [here](#).

providers could be squeezed out of the market and whether participating publishers could be unreasonably disadvantaged by Google.²⁷

66. In February 2022, the Bundeskartellamt initiated a proceeding against Google Maps Platform in order to examine possible anti-competitive restrictions imposed by Google Maps Platform to the detriment of alternative map service providers.²⁸

Section 19a GWB proceeding against Apple

67. The Bundeskartellamt continued a proceeding against Apple based on Section 19a GWB in order to determine whether the company is of paramount significance for competition across markets.²⁹ The proceeding was concluded on 3 April 2023. Apple has appealed the decision, the case is therefore currently pending before Court.

68. Furthermore, the Bundeskartellamt initiated a proceeding against Apple to review under competition law its tracking rules and the App Tracking Transparency Framework. In particular, Apple's rules have raised the initial suspicion of self-preferencing and/or impediment of other companies.³⁰

3.2. Mergers and acquisitions

3.2.1. Statistics on the number, size and type of mergers notified and/or reviewed under competition law

69. In 2022 the Bundeskartellamt examined more than 800 notified merger projects. Eight of these projects were scrutinised in second phase: a merger in the surface drainage sector was prohibited and two others, namely the acquisition of OMV petrol stations by the EG Group (Esso) and the planned strategic connection between Rheinenergie and Westenergie (E.ON), were only cleared subject to conditions. In two other cases, the participating companies gave up their project in the course of the examination. Three examinations were still ongoing as of 31 December 2022.

3.2.2. Summary of the Bundeskartellamt's significant cases

70. The list of cases described below is not 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 and where examinations were concluded as of 31 December 2022.

²⁷ Bundeskartellamt, press release of 21 December 2022, available [here](#).

²⁸ Bundeskartellamt, press release of 21 June 2022, available [here](#).

²⁹ The proceeding was concluded in April 2023, press release of 5 June 2023 available [here](#).

³⁰ Bundeskartellamt, press release of 14 June 2022, available [here](#).

*Clearance with remedies*EG/OMV³¹

71. The Bundeskartellamt cleared plans by EG Group Limited, Blackburn/UK, which operates the ESSO service station network in Germany, to acquire the service station network of OMV Retail Deutschland GmbH, Burghausen after amendments to the proposed merger.

72. According to the Bundeskartellamt's extensive investigations, an acquisition of OMV's entire service station network would have increased concentration in the market in the regions where there would have been the risk of the merger creating or strengthening a joint dominant position of the leading fuel companies BP/Aral, Shell and EG Group. However, in the other regions in which OMV operates service stations, a large number of other competitors are active with in some cases substantial market shares and different marketing strategies, especially with regard to pricing. Furthermore, the current market position of EG Group or OMV is weaker in some regions than in others.

73. The Bundeskartellamt cleared the merger under the condition precedent that 24 petrol stations of EG Group and 24 OMV petrol stations in the problematic market areas first be sold to third companies. The Bundeskartellamt must approve these companies prior to them acquiring the petrol stations.

Rheinenergie/Westenergie³²

74. The Bundeskartellamt cleared the planned strategic connection between the E.ON subsidiary Westenergie and Rheinenergie in second-phase proceedings following changes to the merger plans. Rheinenergie has to sell large parts of its heating electricity business to another company.

75. According to the Bundeskartellamt's investigations, competition concerns mainly arose with regard to heating electricity. Without selling large parts of its heating electricity business, Rheinenergie's dominant position in and around Cologne would have been strengthened. In the operation of charging stations for electric vehicles, the planned merger also led to a critical strengthening of the parties' position in some local markets. However, this concerned only a few very narrowly defined local areas currently still generating marginal revenues. The market was also expected to develop very dynamically in the future. The plans did not raise any concerns under merger control rules in any of the other energy supply markets affected.

76. The Bundeskartellamt's clearance was subject to the condition precedent that Rheinenergie sells a large part of its heating electricity business to a single acquirer, including the wholesale quantities required to supply these customers in the coming year. The sold part of the heating electricity business included around 6,000 heating electricity supply contracts.

77. While selling the heating electricity business did not address the issues in all problematic markets, the investigations showed that creating a new strong competitive force would nevertheless clearly outweigh the loss of Westenergie's (E.ON) competitive position in the region. In the end, the competitive concerns arising with regard to charging stations were therefore not relevant either. In its competitive assessment the

³¹ Bundeskartellamt, press release of 11 February 2022, available [here](#).

³² Bundeskartellamt, press release of 30 September 2022, available [here](#).

Bundeskartellamt made use of the rarely applied balancing clause (Section 36(1) no 1 of the German Competition Act, GWB) according to which a concentration is not to be prohibited if it will also lead to improvements of the conditions of competition and these improvements outweigh the impediment to competition.

Withdrawals in second-phase proceedings

- CIMC/MCI³³

78. The parties withdrew the notification of the planned acquisition of Maersk Container Industry (MCI) by China International Marine Containers (Group) Co. Ltd. (CIMC). After intensive and worldwide investigations, the Bundeskartellamt had provided the companies with a detailed explanation of its considerable competition concerns about the concentration. Both companies are active in the manufacture of shipping containers.

- VRM/Nassauische Neue Presse

79. VRM Holding GmbH & Co. KG (“VRM”) abandoned its planned acquisition of the daily “Nassauische Neue Presse” (“NNP”) during the second-phase proceeding after the Bundeskartellamt had given a critical indication. The merger would have led to a monopolisation of the reader market in the circulation area of VRM’s daily “Weilburger Tageblatt” (“WT”). Its circulation area is completely within that of the NNP. The NNP’s local news coverage overlaps with the WT’s circulation area in significant and not only selective parts. The newspapers’ main and local sections differ from one another. There are also considerable price differences between the newspapers. Under these aspects and in view of the lack of further competitors, price and quality competition would have ceased.

Prohibitions

ACO/Birco³⁴

80. The Bundeskartellamt prohibited the planned takeover of BIRCO GmbH based in Baden-Baden (“BIRCO”) by ACO Ahlmann SE & Co. KG based in Büdelsdorf (“ACO”). Both companies are particularly active in the sector of line drainage. The term line drainage refers to surface draining (e.g. roads, public squares, private and commercial properties) where drainage channels collect surface water and conduct it to the sewage system.

81. ACO and BIRCO achieved joint market shares of 45-50 per cent on the market for line drainage systems and would thus have achieved a dominant position post merger. As a joint economic entity they would almost have been three times the size of the second-largest player in the market, Hauraton. Other competitors such as Richard Brink, ANRIN, Rinninger or MEA are even significantly smaller, and foreign suppliers only have marginal shares in the German market. Even if open drainage channels were included in the market, the joint ACO-BIRCO market share would still have exceeded 40 per cent.

82. By joining forces ACO and BIRCO would have been able to have superior access to contracting entities and traders of building materials to the detriment of their competitors. Both companies were already very well positioned in terms of sales activities which they would have been able to intensify post merger (for example by expanding their product portfolio which covers various types of materials and special types of drainage channels).

³³ Bundeskartellamt, press release of 26 August 2022, available [here](#).

³⁴ Bundeskartellamt, press release of 14 January 2022, available [here](#).

There was also the risk that the companies' competitors might be less successful in future tender procedures or could be squeezed out of the building materials trade.

3.2.3. Activities of the courts

Funke/OTZ

83. In the *Funke/OTZ* case, the Bundeskartellamt prohibited a company of Funke Mediengruppe from acquiring the sole control of the publishing companies of the daily newspaper "Ostthüringer Zeitung". The Düsseldorf Higher Regional Court rejected the parties' appeal on formal grounds. The parties are now seeking leave to appeal the Düsseldorf Higher Regional Court's decision from the BGH.

Meta/Kustomer

84. In a court decision on the legality of the fee charged by the Bundeskartellamt for examining the merger between Meta and Kustomer, the court held that the Bundeskartellamt had no jurisdiction over the case and thus annulled the decision setting out the fee. Invoking a new provision under German merger law, the Bundeskartellamt had required the parties to file the merger but then cleared it in the first phase of merger control. The provision aims at giving the authority jurisdiction over mergers which are still below the turnover thresholds but exceed the newly introduced transaction value threshold. The court held that the authority had failed to demonstrate a sufficient local nexus for the transaction. The Düsseldorf Higher Regional Court granted leave to appeal the decision; this appeal is pending before the BGH.

XXXLutz/Tessner Group

85. Furthermore, the Düsseldorf Higher Regional Court annulled the Bundeskartellamt's decision outlining the conditions attached to its clearance of the merger between XXXLutz and Tessner Group. The conditions addressed the Bundeskartellamt's competitive concerns about the effects of the merger on a couple of regional furniture retail markets. For the first time ever, the Bundeskartellamt had based these concerns solely on the application of the SIEC test incorporated into German merger law in 2013 without a parallel application of the dominance test. In the course of its reasoning, the Düsseldorf Higher Regional Court established guiding principles for the application of the German SIEC test. However, it did not feel inclined to grant leave to appeal the decision. The Bundeskartellamt is now seeking leave to appeal this decision from the BGH.

3.3. Sector inquiries

3.3.1. Sector inquiry in the waste management sector

86. In January 2022, the Bundeskartellamt initiated a sector inquiry in the waste management sector. The authority is examining whether the Rethmann Group can be obliged to also notify future takeovers of smaller companies. The rationale behind this is that in some sectors large companies buy a great number of small companies without the Bundeskartellamt being able to examine such takeovers, which results in growing concentration outside of the Bundeskartellamt's control. The authority suspects that this might apply to numerous acquisitions by Rethmann/Remondis in the waste management sector.

87. The new provisions of Section 39a GWB, which entered into force with the 10th amendment to the GWB in early 2021, allow the Bundeskartellamt to oblige companies to also notify takeovers of smaller companies, i.e. companies that do not reach the normal turnover thresholds, in certain economic sectors, provided that a sector inquiry in the affected economic sector has been conducted beforehand. The sector inquiry in the waste management sector is to update some of the authority's findings from the sector inquiry into household waste collection, which was published on 21 December 2021, and from investigations into several merger projects in recent years and specify these findings with regard to the requirements of Section 39a GWB.

Sector inquiry into scoring in the online retail sector

88. In March 2022, the Bundeskartellamt launched a sector inquiry under consumer protection law into "scoring" practices used in the online retail sector. It deals with retailers' practices to check consumers' credit standing, i.e. their ability to pay when shopping online.

89. When shopping online, the consumers' credit standing is checked based on so-called score values, especially when buying products on account. The sector inquiry will examine whether and how online retailers provide information on such practices, how the checks are carried out and on which criteria the credit checks are based.

90. Carrying out credit checks is subject to strict requirements under data protection law, such as obtaining the voluntary consent of the persons in question to the processing of their data. When ordering products from online retailers, the practice in this regard is inconsistent and in many cases not immediately clear to consumers. Shortcomings with regard to transparency and obtaining consent could trigger violations of consumer protection law.

Report on the sector inquiry into non-search online advertising

91. In August 2022, the Bundeskartellamt published a report for public discussion in the context of its sector inquiry into non-search online advertising.³⁵ The investigation focused on the market conditions and functioning mechanisms in the non-search online advertising sector, in particular on the various technical services (so-called ad tech) operating in the background. Adverts displayed in response to search engine queries (search advertising) were, however, not part of the investigation since in this context other competition issues relating to the great market significance of the Google search engine arise.

92. In the context of the investigation the assumption that individual market players, especially Google – have considerable influence on the overall programmatic advertising system was confirmed. Moreover, the investigations showed that users, who are the data subjects and advertising recipients, are mostly not able to assess the scope and any possible consequences of the data collection which ultimately forms the very foundation of non-search online advertising.

93. The dangers associated with the current data processing practices have contributed to the fact that for some years now there has been an increasingly intense legal policy discussion about restricting the collection and use of data for advertising purposes. The report therefore examined the consequences such measures could have from a competition point of view and how such consequences could be dealt with.

³⁵ Executive summary of the report for public discussion in English, published 29 August 2022, available [here](#).

Interim report on the sector inquiry into refineries and fuel wholesale

94. In November 2022, the Bundeskartellamt published an interim report on its ongoing sector inquiry into fuels at the refinery and wholesale level.³⁶ The report focused on the key conditions regarding production and cost-relevant factors, information on capacity development and utilisation of refineries as well as the procurement of crude oil. The interim report also contains a comprehensive description and an initial assessment of possible reasons for the price development in 2022.

95. The Bundeskartellamt did not find indications of price-fixing agreements between mineral oil companies. Further investigations will analyse whether joint market dominance could be an issue at the refinery level. Furthermore, the Bundeskartellamt investigated whether the reduction of the energy tax which had been reduced to the statutory minimum amount under European law between June and August had been passed on to consumers. The Bundeskartellamt's investigation reached the conclusion that the tax reduction was largely passed on to consumers.

96. The authority's investigations are being extended in a next step to include in particular the competitive situation in the sale of fuels at the wholesale level. Its assessment will also look into possible reasons for the price development. A more precise definition of the relevant product and geographic markets at the refinery and wholesale level will play a key role for the assessment under competition law. The Bundeskartellamt will also continue to investigate the concrete formation of prices.

4. Cooperation in international forums and conferences

4.1. G7 Digital Competition Summit

97. On 12 October 2022, the German Ministry for Economic Affairs and Climate Action and the Bundeskartellamt hosted the G7 Joint Competition Policy Makers & Enforcers Summit in Berlin to facilitate an exchange on policy approaches and enforcement related to competition in digital markets. The representatives of the G7 member states (Germany, France, UK, Italy, Japan, Canada, USA) and the European Commission discussed the state of legal reforms around the globe, digital enforcement and the intersection of competition law and other fields of law and policy.

98. During the Summit, two documents have been presented: First, the policy makers "G7 Inventory of new rules for digital markets", prepared by the OECD Competition Division, compiles a comprehensive overview of legislative approaches to competition in digital markets within the G7, in order to improve mutual understanding with a view to fostering greater coordination to support competitive digital markets. Second, the authorities' "Compendium of approaches to improving competition in digital markets" highlights the key aspects of each G7 competition authority's work on digital markets.

³⁶ Bundeskartellamt, interim report, published 28 November 2022, available [here](#).

4.2. International Competition Network (ICN)

99. The ICN is the most important network of competition authorities worldwide. It comprises more than 140 competition agencies from 130 jurisdictions. 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. Andreas Mundt, President of the Bundeskartellamt, has been the ICN Steering Group Chair since September 2013.

100. The Bundeskartellamt played an active role in all ICN Working Groups and took part in several seminars and workshops. Furthermore, the Bundeskartellamt hosted and actively participated in the 21st Annual ICN Conference held on 6 May 2022 in Berlin. The in-person event with over 450 representatives from more than 80 countries was also livestreamed and video recorded. The topics covered included, amongst others, the standard of proof, cartel enforcement in the next decade, regulatory and competition law tools in the digital markets, merger control and effective remedies, sustainability, the impact of the COVID-19 pandemic on agencies' investigative processes and international enforcement cooperation.³⁷

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

101. In 2022, the competition authorities of the EU continued their successful cooperation within the ECN.

102. 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, Digital Markets, Competition Chief Economists, Digital Investigation and Artificial Intelligence, and Merger Working Group).

103. The Working Group on Horizontals and Abuse deals with cross-sectoral substantive issues relating to (1) the prohibition of restrictive agreements in horizontal cases and (2) abusive conduct. The Working Group met once in 2022 and discussed, among other things, the revision of the Horizontal Guidelines and the Block Exemption Regulations (Research and Development BER and Specialisation BER), as well as the antitrust treatment of sustainability initiatives. The Working Group on Vertical Issues met once in 2022 and focused mainly on new developments, in particular in the food delivery markets.

104. Furthermore, the Bundeskartellamt plays an active role in all ECN sectoral subgroups, where an exchange of practical experience takes place. In 2022, the Bundeskartellamt's representatives took part in the following sub-group meetings: Environment, Telecommunications, Pharma and Health, Food, Energy and Financial Services. While most meetings were still held online, there was an increasing tendency to hold meetings in person compared to the previous year.

105. 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.

³⁷ The recordings and more information are available [here](#).

4.4. Annual meeting of the Working Group on Competition Law

106. The meeting of the Working Group on Competition Law was held on 29 September 2022. At the invitation of the Bundeskartellamt more than 90 competition experts joined the discussion and exchange of views on “Merger control in the digital age - challenges and development perspectives.”

107. The Working Group on Competition Law mainly discussed two areas in which problems arise for effective merger control within the context of takeovers by large digital companies. Firstly, so-called killer acquisitions, i.e. the strategy of large companies to acquire smaller (potential) competitors in order to stop their innovation activities or remove already existing products from the market. There is concern that merger control has so far not sufficiently been able to prohibit such projects. Secondly, it is also feared that large digital companies could use mergers to expand or strengthen their ecosystems consisting of various interrelated products and thus secure or expand their positions of power.

108. In the context of this event, the Bundeskartellamt published a comprehensive background paper to foster the debate.³⁸

4.5. Working Group on Competition Economics

109. The Working Group on Competition Economics held its seventh conference on 25 October 2022. Bundeskartellamt staff and economic researchers discussed topical issues of competition economics. The agenda of the meeting included discussions about the competitive situation on petrol station and waste disposal markets and the experiences the Bundeskartellamt had gathered so far in applying the stricter abuse control rules regarding large digital corporations (Section 19a of the German Competition Act, GWB).

4.6. International Conference on Competition

110. In May 2022, the 21st International Conference on Competition was hosted by the Bundeskartellamt in Berlin as a back-to-back conference with the 21st ICN Annual Conference. The in-person event was also livestreamed and video recorded.³⁹ Over 450 representatives from more than 80 countries followed the invitation.

111. The conference started with a greeting by Robert Habeck, Minister for Economic Affairs and Climate Action followed by keynote speeches by Sven Giegold, State Secretary, and André Schwämmlein, CEO of Flix. The subsequent panel discussions addressed the growing demands placed on competition law by policymakers, and the interplay between competition law and other areas of law, such as consumer protection and data protection.

³⁸ Digital Markets Act: Perspectives in (inter)national competition law, Bundeskartellamt, 7 October 2021, available [here](#).

³⁹ The recordings and more information are available [here](#).

5. Resources of the Bundeskartellamt

5.1. Annual budget

Table 1. Annual budget

Budget 2022	Change over 2021
EUR 43.1 million/USD 46.2 million	-EUR 0.4 million / -USD 0.43 million

5.2. Number of employees

Table 2. Number of employees

	2022*	Change over 2021
Economists	69.8	+12.5
Lawyers	100.7	-4.9
Other experts	21.3	+2.4
Support staff	201.3	+12.5
Total	393.1	+ 22.5

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

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