

Unclassified

DAF/COMP/AR(2012)24

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

09-Oct-2012

English - Or. English

Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE

DAF/COMP/AR(2012)24  
Unclassified

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY**

-- 2011 --

*This report is submitted by Germany to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 24-25 October 2012.*

JT03328263

Complete document available on OLIS in its original format

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

English - Or. English

## TABLE OF CONTENTS

1.	Executive summary .....	3
1.1	Legislation.....	3
1.2	Organisation.....	3
1.3	Agreements / abusive practices by dominant companies.....	3
1.4	Merger control .....	3
1.5	Sector inquiries .....	3
2.	Changes to competition law and policy, proposed or adopted.....	4
2.1	Government proposals for new legislation .....	4
2.2	Organisation of the Bundeskartellamt.....	5
3.	Enforcement of competition law and policy .....	5
3.1	Action against anti-competitive practices, including agreements and abuses of a dominant position.....	5
3.2	Mergers and acquisitions .....	12
3.3	Sector inquiries .....	20
4.	The role of competition authorities in the formulation and implementation of other policies, <i>e.g.</i> regulatory reform, trade and industrial policies.....	20
4.1	ICN.....	20
4.2	ECN/ECA .....	21
4.3	Annual Meeting of the Working Group on Competition Law .....	22
5.	Resources of Competition Authorities .....	22
5.1	Annual budget (in EUR and USD) .....	22
5.2	Number of employees .....	22
6.	References to new reports and studies on competition policy issues.....	23

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY**

-- July 2011 to June 2012 --

**1. Executive summary****1.1 Legislation**

1. Discussions on the 8<sup>th</sup> amendment to the German Act against Restraints of Competition (ARC, in German: *Gesetz gegen Wettbewerbsbeschränkungen, GWB*) have continued. The changes are foreseen to come into effect on 1 January 2013. In addition, a market transparency unit/monitoring body (*Markttransparenzstelle*) will be established. Its objective will be to carry out monitoring of market transparency in the sector of trading in wholesale energy products (electricity and gas), thereby taking European initiatives into account. Market transparency will also be monitored on the national fuel markets.

**1.2 Organisation**

2. The Bundeskartellamt has implemented an electronic system which allows it to receive anonymous tip-offs of competition law infringements. The introduction of the whistle-blowing system marks a further stage of improvement in the agency's cartel prosecution activities, which have proved increasingly effective in recent years.

**1.3 Agreements / abusive practices by dominant companies**

3. The Bundeskartellamt's modification of its approach in the recent past has led to an intensification of cartel prosecution. This focus was maintained over the past year as well. The Bundeskartellamt has imposed fines, inter alia, against manufacturers of fire-fighting vehicles and manufacturers of consumer goods.

4. The energy sector has remained a major area of focus in abuse control in the period under review.

**1.4 Merger control**

5. The number of merger notifications has further stabilized after a decrease in notifications in the previous year. Among the most significant cases were the prohibition of plans by the slaughterhouse operator Tönnies to merge with the company Tummel and the clearance subject to conditions of the acquisition of the cable network operator Kabel Baden-Württemberg by Liberty Global Europe Holding.

**1.5 Sector inquiries**

6. The Bundeskartellamt concluded its milk sector inquiry and initiated a new sector inquiry into the food retail sector. In January 2012 it published its report on the milk sector. The inquiry into the food retail market is still in progress.

## **2. Changes to competition law and policy, proposed or adopted**

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

7. In May 2012, the German Federal Government published its draft bill on the 8th general revision of the ARC. The changes are foreseen to come into effect on 1 January 2013.

8. The Federal Government in particular proposes replacing the current dominance test in merger control with the SIEC (“significant impediment to effective competition”) test to further align it with European law. Other changes in the area of merger control include mirroring the EU exemption of certain transactions on the stock-market from the stand-still obligation, provided that voting rights are not exercised. Other elements specific to German merger control such as the control of minority shareholdings, the possibility to balance anti-competitive effects with pro-competitive effects in other markets and the possibility of a ministerial authorization of mergers based on an overriding general public interest, will be maintained.

9. In the field of abuse of dominance, the Government plans to prolong a specific provision to address price abuses in the electricity and gas sector. Specific German provisions on “relative” dominance, i.e. on undertakings with a strong position vis-à-vis small and medium-sized companies, will be maintained. The new law will clarify that the Bundeskartellamt has the power to impose structural remedies including the break-up of dominant undertakings in the case of an abuse of such dominant positions.

10. With regard to the enforcement of the ARC, consumer organisations will have more rights in cases where a violation of the ARC has harmed a dispersed customer base. Class actions will not be introduced.

11. Enforcement by the Bundeskartellamt, in particular in cases of fines, shall be streamlined. Legal entities shall be obliged to provide specific data relevant for the calculation of the fine, in particular information regarding the entity’s economic capacity. The Government also intends to close loopholes in the current legislation that provide undertakings with opportunities to circumvent a fine by means of restructuring.

12. The German Federal Government introduced a bill on 2 May 2012 to be deliberated on by the parliament (*German Bundestag*). According to this draft, a market transparency unit/monitoring body (*Markttransparenzstelle*) will be established within the competition authority (*Bundeskartellamt*). Its objective will be to carry out market monitoring – in close cooperation with the national regulatory authority (*Bundesnetzagentur*) – in the sector of trading in wholesale energy products (electricity and gas) to detect infringements of competition and regulatory law. At a regional level, it will cooperate with the Agency for the Cooperation of Energy Regulators (ACER) to ensure the proper monitoring and transparency of energy markets implementing the regulation on energy market integrity and transparency (REMIT). Reporting obligations will be kept to a minimum, and thus not create unnecessary costs for market participants. The details will be specified in a regulation. Furthermore, the *Markttransparenzstelle* will monitor market transparency on the national fuel markets. It will therefore observe price developments along the value-added chain (refinery – wholesale – gas station) with the objective to detect potential infringements of antitrust law. As regards the collection of price data, the government's draft envisages weekly collective notifications to the *Markttransparenzstelle*. The collected data is intended for internal official use only. However, as the draft bill has not yet been adopted by the German Parliament, the draft bill may well be subject to further changes.

## 2.2 *Organisation of the Bundeskartellamt*

13. In a further effort to strengthen its cartel prosecution, the Bundeskartellamt has installed an anonymous whistle-blowing system. It has implemented an electronic system which allows it to receive anonymous tip-offs of competition law infringements. The system has proved effective over many years of practice by certain criminal police offices. It guarantees the anonymity of informers while still allowing for continual reciprocal communication with investigative staff at the Bundeskartellamt via a secure electronic mailbox. The new system gives those informers which have not contacted the Bundeskartellamt up to now for fear of reprisal a chance to support the authority in its cartel prosecution work.

14. Further, in March 2012, the Bundeskartellamt issued the final version of a detailed guidance document on substantive merger control. A draft document was published for consultation in 2011 (see Annual Report 2010, 1.2). Following its invitation for consultation, the Bundeskartellamt received numerous comments on this document from within Germany and abroad. The final guidance document places great emphasis on the necessary appraisal of all relevant conditions in the market. It does not employ a checklist approach. Instead, the focus of examination is to determine how the merger will change market conditions and whether this will be harmful to competition. The guidance document also explains in detail the economic concepts underlying the theories of competitive harm. The document is available in German and in English.

## 3. **Enforcement of competition law and policy**

### 3.1 *Action against anti-competitive practices, including agreements and abuses of a dominant position*

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

15. With regard to cartel detection, the Bundeskartellamt received 31 leniency applications from July 2011 to June 2012. It conducted 9 dawn raids relating to its own proceedings, 6 inspections on behalf of the European Commission and 2 inspections on behalf of other European competition authorities. In the period covered by the report the Bundeskartellamt imposed several fines totalling approx. EUR 178 million.

#### 3.1.2 *Description of significant cases*

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

##### 3.1.2.1 *Agreements*

17. In July 2011, the Bundeskartellamt imposed a fine of EUR 17.5 million against Iveco Magirus Brandschutztechnik (Iveco) for its involvement in anti-competitive agreements on the manufacture of fire engines equipped with turntable ladders. The other participant in the anti-competitive agreements was Metz Aerials, which belongs to the Austrian Rosenbauer group. No fine was imposed against Rosenbauer because the company had informed the Bundeskartellamt of the cartel agreement in 2010 by way of a leniency application. In May 2010 the Bundeskartellamt conducted a search. The proceedings against the sales managers and CEOs involved were referred to the competent public prosecutor's office for examination under criminal law.

18. The cartel agreement concerned the manufacture of fire engines with turntable ladders between 1998 and November 2007. Iveco and Rosenbauer have a combined market share of close to 100% on this market. During the cartel period the companies' sales managers met at regular intervals and divided tenders

among each other on the basis of project lists. The objective was to carve up the market in a ratio of 50/50. In order to conceal the cartel agreements, the sales managers initially communicated via prepaid mobiles and after the football world championship in 2006 in a "football code" referring to cartel meetings as "trainings" and to rebates in the form of match results.

19. The fined company's willingness to end the proceedings by settlement has been considered in the calculation of the fine. The proceedings on anti-competitive agreements concerning turntable ladders for fire engines have therefore been concluded. The proceedings against Iveco on account of anti-competitive agreements with other members of the cartel on the manufacture of fire engines are still ongoing. The orders imposing fines on the other members of this cartel, which were issued in February 2011 (see Annual Report 2010, 2.1.2.1.), have now become final.

20. In October 2011, the Bundeskartellamt imposed fines totalling approx. EUR 9 million on two manufacturers of instant cappuccino and two senior employees involved for having agreed on price increases for 'Family Cappuccino' in late 2007 / early 2008. The two companies are Kraft Foods Deutschland and Krüger.

21. The proceedings were initiated on the basis of a leniency application filed by Melitta Kaffee; consequently, this company was not fined. Kraft Foods was granted a reduction of its fine as the company had cooperated in clarifying the accusations. Instant cappuccino is sold in various product lines by the manufacturers to food retailers in bags or tins containing 350 - 500 grams. The price increase agreed applied to the selling price ex-factory as well as to the non-binding price recommendation issued by the manufacturers to the food retailers.

22. Senior staff members of the companies discussed the level and time-frame for the intended price increase in telephone conversations. These conversations resulted in detailed price increases of between 20 and 40 cents per bag on the selling price ex-factory and the recommended shelf prices and special offer prices for the various products.

23. As a result of a settlement agreed with Kraft Foods, the fine imposed against this company has already become final. With the conclusion of its two earlier proceedings against coffee roasters in the food retail and out-of-house sectors (see Annual Report 2010, 2.1.2.1.), the Bundeskartellamt has now concluded all proceedings on account of horizontal price agreements in the roasted coffee and cappuccino sector.

24. In October 2011, in cartel proceedings against companies in the milling industry, the Bundeskartellamt imposed a fine of EUR 23.8 million on VK Mühlen on account of its involvement in illegal agreements in the sale of flour. VK Mühlen is one of the leading suppliers of flour to the German market.

25. In February 2008, the Bundeskartellamt had searched several milling companies in Germany after receiving information from the market about agreements on prices and quantities. The Bundeskartellamt was able to uncover a system of price, customer allocation and market sharing agreements for different sorts of flour which had been practised over a number of years. With the decision against VK Mühlen a first fine was imposed on a member of the cartel in the mills case. Investigations against around 40 more milling companies are still ongoing. VK Mühlen was granted a reduction in fine for its extensive cooperation in clarifying the accusations. In this case the Bundeskartellamt worked closely with other European competition authorities, which were also investigating the companies concerned.

26. The companies sell their flour to industrial producers and bakers (such as e.g. bakery product manufacturers and bakery chains) and to artisan bakers. Some milling companies with small packaging units sell flour in small packets (usually 1 kg packets) directly to food retailers.

27. Since 2000 some senior members of staff of the milling companies involved had agreed on prices, customer allocation and supply volumes in numerous regular rounds of talks. The agreements applied to all forms of distribution. In addition, the companies coordinated capacity planning by shutting down mills or preventing mills which had already been shut down from being returned to operation. An agreement was reached with the company to end the proceedings by settlement, which was also considered in calculating the fine.

28. In November 2011, the Bundeskartellamt imposed in two proceedings fines amounting to approx. EUR 24 million on Reckitt Benckiser Deutschland as well as employees involved. The company is accused of having illegally agreed on prices for dishwasher detergents. It had also exchanged competition relevant information with various brand product manufacturers at regular meetings, which is inadmissible under competition law. In several cases Reckitt Benckiser and Henkel had agreed price increases for dishwasher detergent of the brands "Calgonit" and "Somat". For years both companies had coordinated price increases for their products.

29. The proceeding on illegal price agreements was triggered in 2010 by an application for leniency by Henkel Wasch- und Reinigungsmittel. No fine was imposed on Henkel in accordance with the Bundeskartellamt's Leniency Programme. Between mid 2005 and mid 2007 Henkel and Reckitt Benckiser had agreed in four cases on the level as well as the dates of price increases.

30. Another proceeding concerned the illegal exchange of competition relevant information with several other brand product manufacturers. This proceeding was triggered in 2006 by the leniency application of Colgate Palmolive. The Bundeskartellamt subsequently imposed fines totalling approx. EUR 20 million in 2008/2009 on eight manufacturers of drugstore products.

31. Together with other companies in the sector, the branded goods manufacturers had for years exchanged information about upcoming price increases, new demands for rebates from and the state of negotiations with retailers.

32. In both proceedings Reckitt Benckiser was granted a reduction of its fines for its co-operation in clarifying the accusations. In addition, settlements were agreed with the company in order to bring the proceedings to conclusion, which further reduced the level of fines.

33. With its decision of November 2011 against the Federal Guild of Hearing Aid Acousticians (BIHA) the Bundeskartellamt removed a significant obstacle to competition in the distribution of hearing aids. Up to now BIHA has offered health insurance funds more favourable conditions for hearing aids only if they promise to accept hearing aid retailers as the sole providers. Alternative distribution channels such as the dispensing of a hearing aid directly by the treating physician were thus excluded. The Bundeskartellamt has now prohibited this practice by BIHA.

34. BIHA represents around 90% of all hearing aid acousticians in Germany and, according to the German Social Code, is tasked with negotiating conditions for the sale of hearing aids with the health insurance funds and health insurance associations on behalf of its members.

35. The Bundeskartellamt has established that in its negotiations with different health insurance funds since 2008, BIHA had tied the allowance of more favourable special conditions for the supply of hearing aids to patients without co-payment to the condition that the insurance funds do not conclude any other supply contracts, in particular with providers dispensing hearing aids via a shorter supply channel.

The term "shorter supply channel" is used in this case to describe a situation where a patient procures a hearing aid directly from his ENT specialist and not from a hearing aid retailer. In this way competition for different channels of distribution of hearing aids to end users was limited without objective justification, to the detriment of competitors and statutorily insured patients.

36. The decision now allows alternative hearing aid providers access to the sales market and to stimulate competition in favour of the health insurance funds and statutory health insurance patients. This opens up substantial savings potential.

37. In December 2011, the Bundeskartellamt imposed fines totalling approx. EUR 15.5 million on six manufacturers and distributors of hydrants and other water pipe fittings, as well as on four individuals involved in illegal price agreements. In the German markets for hydrants and other water pipe fittings, such as gate valves and butterfly valves, the participants in the cartel had a combined market share of approx. 70%.

38. The Bundeskartellamt obtained first indications of the agreements while investigating a cartel of two manufacturers of cast iron pipes. In February 2007 the authority searched nine companies in the hydrants industry. Following the search three companies filed applications for leniency.

39. The companies agreed on increased list prices, general discounts as well as individual maximum discounts and conditions for specific customers. Directors and sales managers had met regularly, in some cases even since 1995, to exchange competition relevant information. The cartel agreements had a very negative impact on competition in the affected markets over a long period of time.

40. In March 2012, the Bundeskartellamt concluded its cartel proceedings against manufacturers of concrete pipes and shafts for sewage systems. In August 2011 the authority had already imposed fines totalling more than EUR 11 million against Berding Beton and Betonwerk Bieren. In this last step, the fines were imposed against eight manufacturers of concrete pipes. The investigative proceedings against five other manufacturers have been discontinued. The Bundeskartellamt imposed further fines of, in total, just over EUR one million on eight companies and their representatives.

41. The detected cartel agreements were mainly price fixing and customer allocation agreements, most of them bilateral. They were applied during different intervals between February 2006 and February 2010 in several regions in the federal states of Lower-Saxony, North Rhine-Westphalia, Schleswig-Holstein and Hamburg.

42. The Bundeskartellamt also imposed first fines against four manufacturers on account of illegal agreements on standard concrete paving stones and platform edges. These total more than EUR 1.9 million. The proceedings were triggered by the leniency application of Berding Beton. In accordance with the Bundeskartellamt's Leniency Programme, no fine was imposed on Berding.

43. The companies primarily agreed on product prices and carved up supply areas among themselves. The agreements were applied during several intervals between January 2006 and February 2010 in several regions in Germany, mostly in the north and east. An agreement was reached with most of the companies and their representatives to end the proceedings by settlement.

44. In March 2012, the Bundeskartellamt also imposed a fine amounting to EUR 30 million on IVECO Maidus Brandschutztechnik (IVECO). The company was accused of having implemented illegal price-fixing and quota agreements together with three other manufacturers of fire-fighting vehicles, and of having carved up the German market for fire-fighting vehicles among themselves since at least 2001.

45. In February 2011, after settlements had been agreed, the Bundeskartellamt had already imposed fines totalling EUR 20.5 million on the other companies involved, as well as on a Swiss chartered accountant (see Annual Report 2010, 2.1.2.1.). In a further proceeding a fine amounting to EUR 17.5 million had been imposed on Iveco on account of illegal agreements in the sector of turntable ladder vehicles. On the basis of the Bundeskartellamt's decisions the municipalities harmed by this practice also have the possibility to claim damages.

46. The companies concerned are the leading manufacturers of fire-fighting vehicles in Germany. For years the companies granted one another a certain share of sales, so-called target quotas. The companies would notify their order intake to an accountant based in Switzerland. The latter would then compile lists which were used to monitor adherence to the agreed quotas at regular meetings of the cartel at Zurich Airport. The companies also coordinated price increases. In addition to the "Zurich meetings" of the managing directors, regular meetings were held at sales manager level. At these meetings invitations to tender received from municipalities for orders of fire-fighting vehicles were divided among the cartel members. In both cases the companies' aim was to consolidate their customer allocation system and prevent competition moves on prices and rebates. The proceedings against the sales managers, CEOs and directors involved were referred to the competent public prosecutors offices for examination under criminal law.

47. In addition to the other companies which had already been fined, IVECO also filed an application for leniency with the Bundeskartellamt. Its cooperation with the authority was taken into account in the calculation of the fine.

48. In March 2012, the Bundeskartellamt imposed fines totalling EUR 8.7 million on 13 companies in the chemical wholesale sector on account of anti-competitive agreements. Together with the fines decisions of December 2010 (see also Annual Report 2010, 2.1.2.1.), the Bundeskartellamt imposed fines on a total of 25 companies. For years representatives of the companies had agreed on prices, quotas and customer allocation in several supply areas.

49. The illegal agreements concerned standardised industrial chemicals that were distributed from the warehouses of the chemical wholesalers. Direct supplies from the chemical producers to the customers were not part of the agreements. The agreements fined in the decision of March 2012 concerned eight regional cartels south of the River Main. For several years representatives of the companies had agreed on prices and supply quotas and concluded customer protection agreements. In December 2010, in the same proceedings, fines totalling EUR 15.1 million were imposed on 12 companies. At that time the investigations focused on regional cartels in the north and west of Germany.

50. In the course of the proceedings all the companies agreed to cooperate fully with the Bundeskartellamt. This was taken into account in the setting of the fines. All the companies have agreed to have the proceedings terminated by settlement.

51. The Bundeskartellamt also imposed fines in further proceedings against traders of heavy fuel oil for sea-going ships, manufacturers of chipboard, OSB panels and other wood-based products and manufacturers of concrete pipes.

### *3.1.2.2 Abuse of a dominant position*

52. In March 2012, the Bundeskartellamt obliged the energy provider Entega to pay out approx. EUR 5 million in reimbursements to its electric heating customers. The authority discovered that from 2007 to 2009 the company charged its household and small business customers abusively excessive prices. In the electric heating sector with its monopolistic structures the customers are dependent on their supplier and

there is virtually no possibility to switch provider. Around 23,000 electric heating customers can expect to receive an average reimbursement of EUR 215 plus interest and value added tax. The actual amount will depend on individual consumption.

53. In autumn 2009, the Bundeskartellamt carried out searches at 25 electric heating providers across Germany. As a consequence, in 2010 companies with conspicuous pricing patterns had already undertaken to pay reimbursements of approx. EUR 27.2 million, lower their prices and introduce measures to open up the market (see Annual Report 2010, 2.1.2.1. with an attached detailed overview of the market and report on the respective proceedings (attachment available in German only)).

54. Even in comparison with these companies, Entega was the most expensive electric heating provider. After attempts to reach an agreement with the company had failed, the Bundeskartellamt compared in detail Entega's profit levels with those of other providers and examined whether the high prices charged by the company were objectively justified. In its analysis the authority took into consideration particular costs incurred by Entega in its procurement of electricity. These are due to load profiles established by the network operator in Entega's supply area. These load profiles determine that, to some extent, significant quantities of electricity also have to be supplied to electric heating consumers in the daytime, which increases Entega's procurement costs for electricity. However, even these justified additional costs could only explain a fraction of the excessive prices.

55. In June 2012, the Bundeskartellamt issued its final decision against Berliner Wasserbetriebe (BWB) ordering the utility to lower its excessive drinking water prices. In its decision the Bundeskartellamt ordered that the utility's revenue (excluding taxes and duties) from the supply of drinking water in Berlin must be reduced by 18% for 2012 and by 17% on average for the period 2013-2015, as compared to 2011.

56. Berliner Wasserbetriebe is Germany's largest water provider which is responsible for water supply and waste water management in Greater Berlin. BWB charges prices under private law, which means that competition law is applicable. Water providers have a monopoly position in Germany because customers cannot switch to other providers. In Berlin this natural monopoly is also legally protected by way of compulsive connection and use.

57. The proceedings against BWB were opened in March 2010. The authority took the prices of water providers in Hamburg, Munich and Cologne as a benchmark for the water prices in Berlin as the conditions of supply in these cities are comparable in structure with those in Berlin. It discovered that BWB's sales returns were significantly higher than those of the water providers in the other three major cities. In its assessment the Bundeskartellamt took account of the additional expenses incurred by BWB after reunification (inter alia for the restoration of the East Berlin water system). These expenses were recognized as deductible additional costs.

58. According to the Bundeskartellamt's decision, BWB must reduce its sales revenue for the period 2012-2015 by a total of approx. EUR 254 million. This will directly benefit water customers in Berlin, which includes both household and industrial customers. In order to achieve this as soon as possible the Bundeskartellamt has ordered the immediate enforceability of the decision. It has also expressly reserved the option to order the reimbursement of excessive water prices charged in the period 2009-2011.

59. How the price cuts will be distributed among customer groups is at BWB's discretion, provided the distribution is non-discriminatory. The respective price cuts are to be implemented together with the final annual statement for consumers of the following year. For the year 2012, for example, this means until 31 December 2013 at the latest. This has been ensured by the order of immediate enforceability issued by the Bundeskartellamt. The price cut applies to the net revenue per sale, i.e. the average prices per

cubic metre across all tariffs and excluding taxes and duties. The percentage cut in gross prices will therefore be slightly lower.

60. Compared to the second statement of objections issued on 30 March 2012 that demanded a total price cut of EUR 292 million for the years 2012-2015, the price cut ordered in the final decision was slightly lower. In its comments on the second statement of objections, BWB had claimed that in the survey on its investments (including maintenance and restoration costs) that had been part of the Bundeskartellamt's proceedings, it had significantly underestimated its personnel expenditures. The Bundeskartellamt therefore adjusted its calculation on the basis of the new data submitted by BWB.

### 3.1.3 *Activities of the courts*

61. The case-law of the Federal Court of Justice (Bundesgerichtshof, BGH) on the so-called 'passing on defence' provided new impulses for private enforcement. Accordingly, not only direct customers but also secondary (i.e. indirect) victims of an anti-competitive conduct on the downstream markets are entitled to claim damages. The burden to present the relevant facts and prove that the primary victim was able to reduce his damage by passing it on to the downstream market level lies with the party violating antitrust law. This requires proof that the raise in customer prices initiated by a primary victim was a direct reaction to the cartel price increase of his suppliers and not due to other pricing factors; entrepreneurial achievements or sales efforts of the primary victim do not relieve the party causing the damage. The BGH has expressed reservations against a duty of the damaged party to assist in the clarification of the facts of the case. Such a duty could have a deterrent effect because it could increase the risk of losing the case and adversely affect the confidentiality interests of the damaged party. This in turn would unjustly relieve the party causing the damage and interfere with the requirement of effectiveness stipulated under EU law. According to the BGH, a duty to assist in the clarification of the case is the more conceivable, the more likely it is that the damaged party has passed on the damage and the more difficult it is for the damaging party to meet its burden of proof.

62. There is a growing tendency of so-called 'follow-on claims' to be brought before the courts after a decision in fine proceedings of the German competition authorities or the Commission. Examples were the car glass cartel or the fire engine cases. Once a fine decision has become final, the victims can rely on the validity of the finding that an infringement has occurred (Section 33 (4) ARC). Accordingly, in private actions for damages, the court is bound by the previous finding of the competition authority that an infringement has occurred, and the victim only has to prove the causality and the extent of the damage.

63. Combined with contractually agreed liquidated damages for cartel law violations (as used, for example, in the damages claims in the fire engine cases), this enables victims of cartel law violations to effectively and efficiently pursue private antitrust enforcement measures. The damages can be claimed without any further evidence, solely based on the administrative order imposing the fine and the agreement on liquidated damages. In particular, there is no need for the damaged party to have access to information disclosed by a cartel member in order to fulfil its duty to present the facts and prove its damages. By this approach, potential conflicts between private and public enforcement can be avoided.

64. This conflict between public and private enforcement was also an issue in a case before the local court (*Amtsgericht*) in Bonn, in which a damaged party had requested access to information provided by a cartel member. The court denied access to the file after having requested a preliminary ruling in this matter from the European Court of Justice (C-360/09). The local court reasoned that the claimant already benefited from the fact that the finding of an infringement was unchallengeable in the subsequent damages action and, in addition, had been granted access to the evidence. To state the amount of his damages, the claimant could refer to his turnover with the members of the cartel. In addition, the court stated, Section 287 of the German Code of Civil Procedure provided for an alleviation of the burden of presentation and

proof. The refusal of access to the file therefore did not render it excessively difficult or virtually impossible for the claimant to obtain compensation for his damages, so that his interest in accessing the file had to take second place to the interest in keeping the information confidential. In the court's view, the leniency programme would lose its attractiveness if access to information disclosed by cartel members was granted, and there was no alternative, equally effective tool available to the authorities for the detection and prosecution of cartels. In addition, the defendant's interest in keeping the information provided by him confidential merited protection because it contained evidence that would not be available without the leniency programme and was provided by the defendant under the assumption that it would be treated as confidential. Also with regard to the privilege against self-incrimination, the court argued, the information provided by cartel members merited a greater degree of protection than other sources of evidence. A similar ruling was later given by the Düsseldorf Higher Regional Court (August 2012).

65. The BGH declared valid the termination by a publishing house of its business relations with a press wholesaler active in the so-called Pressegrasso (predominant distribution system of press products in Germany). In the Pressegrasso system, publishing houses sell their products to press wholesalers which, in turn, supply the retail sector with these products. For this purpose, the wholesalers have their own exclusive distribution areas, on which they agreed about 40 years ago. The BGH has left open the question of whether the competition restraints resulting from the Pressegrasso system are eligible for an exemption under Section 2 (1) ARC (which corresponds to Art. 101 (3) TFEU). In any case, the court held, the termination did not constitute an unfair discrimination within the meaning of Section 20 (1) ARC. The subsidiary of the publishing house, which will distribute its products in the future, did not fulfil the prerequisite of similarity necessary for the assumption of unfair hindrance. Also, the court reasoned, the fact that the publishing house intended to continue its business relations with the other press wholesalers did not constitute a case of unfair hindrance. For it was not the aim of Section 20 (1) ARC to prevent any form of discrimination, but merely to protect equal opportunities in competition. On account of the territorial protection agreements, however, the wholesaler concerned was not in competition with the other wholesalers.

66. In another decision on the Pressegrasso system, the District Court of Cologne (*Landgericht Köln*) held that the central negotiation of conditions on behalf of the press wholesalers participating in the Pressegrasso by the association of German press wholesalers violated antitrust law. The court argued that, despite the agreement on exclusive distribution territories, the press wholesalers remained at least potential competitors. The endeavours of the association to prevent bilateral negotiations between the press wholesalers and the publishing houses constituted a violation of antitrust law. In the court's view, the exemption from the prohibition of vertical resale price maintenance under Section 30 ARC covered only the retail prices, not the conditions under which the press wholesalers were supplied by the publishing houses.

### **3.2 Mergers and acquisitions**

#### *3.2.1 Statistics on the number, size and type of mergers notified and/or controlled under competition law*

67. In the calendar year 2011, about 1,100 mergers were notified to the Bundeskartellamt. The number of mergers has slightly increased since its significant decrease between 2008 and 2009. This decrease was attributable both to the economic crisis and the 2nd domestic turnover threshold that was introduced into German merger control law in 2009.

68. In depth investigations were initiated in 16 cases in the period covered by the report. Two of these cases were withdrawn during second phase proceedings. In the period covered by the report, the

Bundeskartellamt prohibited three mergers and cleared nine mergers. A further two mergers were cleared subject to conditions and obligations.

### 3.2.2 *Summary of significant cases*

#### 3.2.2.1 *Prohibition of mergers*

69. In November 2011, the Bundeskartellamt prohibited plans by the slaughterhouse operator Tönnies to merge with the company Tummel. Tönnies holds a dominant position in the procurement of cull sows and distribution of sow meat to meat processors in Germany. The acquisition of a majority share in the slaughterhouse operator Tummel would have further strengthened this dominant position.

70. Due to the fact that Germany is a centre for sausage manufacture, approx. 65% of all sows slaughtered in the EU are boned and sold here. As Germany's leading slaughterer of pigs and sows, the Tönnies Group is dominant in this market. Tönnies already dominates the value-added chain of sow slaughtering and processing in Germany. Its access to Tummel's procurement and slaughter volumes would have further diminished the likelihood of effective competition in this area.

71. On account of its high market shares (more than 40% of the procurement market), its vertical integration at different market levels and business links with competitors and buyers, Tönnies is an indispensable contract partner in the market. Via the group's principal shareholder, Mr Clemens Tönnies, the company is also associated with Germany's largest sausage manufacturer, the Mühlen Group. An analysis of Tönnies' actual market conduct has also shown that, with its considerable buyer power, the company is able to influence procurement conditions to the detriment of its competitors.

72. The planned acquisition would have resulted in the disappearance from the market of Tummel, which has up to now been an independent slaughterhouse situated in a geographic area which is favourable for the acquisition of sows. The increase in volumes of around 10-15% would also further expand Tönnies' scope of action. This includes the volumes which Tummel currently slaughters for Westfleisch, Tönnies' second largest competitor on the domestic market, on the basis of a contract slaughter agreement.

73. As a solution to the competition problems, Tönnies had proposed commitments, in particular to offer contract slaughtering facilities to Westfleisch and other actual or potential competitors. However, the Bundeskartellamt's investigation showed that the commitments offered would not have dispelled the competition concerns and would have necessitated the continued control of Tönnies' conduct by the Bundeskartellamt, which is inadmissible under competition law. The authority's assessment was largely confirmed by the market participants consulted.

74. In February 2012, the Bundeskartellamt prohibited Haspa Finanzholding from acquiring a stake in the savings bank Kreissparkasse Herzogtum Lauenburg. In the Herzogtum Lauenburg district the planned acquisition would have led to the creation or strengthening of a dominant position in the regional markets for loans to small and medium-sized companies and private current accounts.

75. Due to the special circumstances in the greater Hamburg area, the concentration would have led to the elimination of an important provider of loans to the region's small and medium-sized businesses. The investigations had shown that the majority of private customers were reluctant to dispense with their local banks, and that the provision of loans to smaller businesses also required the local presence of a bank.

76. Haspa Finanzholding owns Hamburger Sparkasse and holds stakes in four other independent savings banks in Northern Germany. Haspa intended to acquire 25.1% of the savings bank's nominal capital stock. Under the ARC, even such a minority stake clearly constitutes a concentration which must be examined under competition criteria.

77. In March 2012 the Bundeskartellamt prohibited the acquisition of the Danish aerated concrete manufacturer H+H International A/S by the market leader Xella International Holdings S.à.r.l.. As a result of the merger Xella would have gained a dominant position on two regional markets for aerated concrete in northern and western Germany.

78. Xella, a building materials supplier active in 30 countries with a turnover of approx. EUR 1.1 billion, is market leader in the manufacture and supply of aerated concrete and calcium silicate bricks and has production sites throughout Germany. The company is well-known for its brand "Ytong". H+H is active in 14 countries and mainly manufactures aerated concrete blocks. With its two production sites in Wittenborn and Hamm, the company is Xella's major competitor in the northern and western German markets for aerated concrete. Due to the high transport costs, aerated concrete is only sold regionally within a certain radius of the production sites. The combined market share of the two companies in the aerated concrete sector in the northern regional market is approx. 60% and in the western regional market over 40%. Their next closest competitors are significantly smaller, mainly medium-sized family-owned companies.

79. Due to the large differences in prices, technical features and long-established regional building traditions, aerated concrete blocks are not interchangeable (from a competition point of view) with other masonry units such as calcium silicate bricks or clay bricks. Even if all types of masonry units were included in the relevant market, Xella's competitive position would be so strong and its lead over its closest competitors so substantial that the acquisition would have to be prohibited in any case. The commitments offered by Xella during the proceedings to avoid the prohibition were insufficient.

### *3.2.2.2 Clearances subject to conditions and obligations*

80. In December 2011, the Bundeskartellamt cleared the acquisition of the cable network operator Kabel Baden-Württemberg by Liberty Global Europe Holding subject to conditions and obligations. Liberty undertook to grant special termination rights for large contracts for retail TV services and to end its encryption of digital free TV programmes. The company also agreed to forgo certain exclusivity clauses and ownership claims or rights to dismantle household cable connections.

81. In view of the aggregate turnover of the companies involved the project was initially subject to European merger control. However, at the Bundeskartellamt's request and in agreement with the Federal Ministry of Economics and Technology, the case was referred by the EU Commission to Germany for examination.

82. As a result of the merger, the dominant oligopoly of the large regional cable network operators (Kabel Deutschland, Unitymedia, Kabel BW) on the German retail TV services market will be reduced from three to two. In this market the cable network operators compete for retail TV service contracts which are concluded with the owners of large premises with a large number of housing units. The TV cable network operators are dominant in this area and can also offer end customers telephony services and internet access ("triple play"). Long-term contracts with terms of 10 or 15 years as well as building exclusivity and legal uncertainty about network ownership after expiry of the contract, pose considerable barriers to market entry for other competitors such as small cable network operators or telecommunications providers.

83. In addition, due to the extension of range of operation, the merger will also have a negative impact on the so-called feed-in market, i.e. the competitive relationship between the cable network operators and TV channels. In the Bundeskartellamt's view the commitments increase the competition opportunities of third providers and compensate for the negative impact of the merger.

84. Housing associations in the network areas of Unitymedia and Kabel BW will be granted a special contract termination right. This will offer them an earlier opportunity to look for a less expensive network operator for their housing units. The special termination right applies to contracts for retail TV services with more than 800 housing units and remaining contract terms of more than three years. This covers a large amount of the particularly attractive retail TV service contracts.

85. The abolition of exclusivity and ownership clauses will ensure legal security. Finally, the decision not to encrypt digital free TV programmes will make it easier for rival companies to compete for retail TV service contracts and will thus also have a positive impact on the feed-in market. Following intense negotiations on which form these commitments should take, the merger was cleared subject to the above mentioned obligations.

86. In February 2012 the Bundeskartellamt cleared the acquisition of the business segment "Returnable Transit Packaging" ("Linpac RTP") of Linpac Group Limited by Private Equity Fonds one Equity Partners II L.P. ("OEP") subject to conditions and obligations. Clearance was granted subject to the condition subsequent that the business segment "Beverage Crates" was sold to an independent third party.

87. The merger concerned the manufacture and sale of reusable transport packaging (also referred to as "returnable transit packaging" or "RTP"). This includes beverage crates, material containers and plastic pallets.

88. The geographic market definition for material containers and plastic pallets could be left open. The relevant geographic market for beverage crates was a national market covering the whole of Germany. This definition was supported by the high transport costs, the nation-wide sales structure of the manufacturers, and barriers to entry resulting from industrial property rights.

89. On account of its controlling stake in the Schoeller Arca Systems group ("SAS"), OEP was already dominant on the German market for beverage crates prior to the merger. This dominant position was based on the following aspects: The low number of suppliers, the market shares, the limited options for customers to change their supplier, and the superior position of SAS with regard to industrial property rights and expertise, access to procurement markets and financial and other resources.

90. The dominant position of SAS in the German markets for beverage crates would have been strengthened by the proposed merger. Also, an analysis of contract awards since 2000 showed that in the past Linpac RTP exerted considerable competitive pressure on SAS. This pressure would have been eliminated as a result of the merger.

91. However, the merger was cleared subject to a divestment remedy which prevented a strengthening of the dominant position of SAS on the German markets for beverage crates. The divestment prevented SAS from gaining the competitive potential of Linpac's "Beverage Crates" segment. At the same time, with the sale of the business segment, a considerable competitive potential was released into the market. This allowed a market participant to expand its market position and reduce the gap to the market leader SAS.

### 3.2.2.3 *Clearances of mergers*

92. In July 2011, the Bundeskartellamt cleared the acquisition of Rügen Feinkost by the Homann group. The merger affected the market for the manufacture and sale of delicatessen salads and fish specialities, chiefly to food retail companies in Germany. With the merger Homann group acquired a regional specialist in the manufacture of herring and matjes herring specialities.

93. With the food retail sector, the manufacturers face a strong demand side. In addition, the sector has sufficient procurement alternatives with other suppliers which pose effective competition to Homann, the market leader. Most retailers have organized their procurement operations in such a way that smaller or only regionally active manufacturers can also be considered as potential suppliers. In the last two years the market leaders have even had to suffer slight market share losses to the advantage of these manufacturers. As a result the retail trade already has a whole range of nationally active or regionally important manufacturers of delicatessen salads and fish specialities as alternative suppliers.

94. In December 2011, the Bundeskartellamt cleared the 24% participation of RWE in the municipal utility Stadtwerke Unna after in-depth examination under merger control. Despite RWE's market position in the electricity markets, the merger project will not have any strengthening effects.

95. The minority participation in Stadtwerke Unna had already been acquired in the late 1990s by RWE's predecessor VEW. However, this participation was limited to twelve years. The project notified and examined in 2011 aimed at a permanent participation of RWE in Stadtwerke Unna.

96. Despite the existing minority participation of RWE, which had to be examined once again, Stadtwerke Unna had proven to be an independent buyer of electricity and gas. In the past, the usual practice was to have contracts covering the full supply of municipal utilities by the upstream supplier which in most cases also operated the network. This also applied in Stadtwerke Unna's case. Meanwhile network operators and distributors have largely been unbundled. The liberalisation process has expanded product portfolios and fundamentally changed procurement behaviour, which is also apparent in the case of Stadtwerke Unna. Several years ago, Stadtwerke Unna had already terminated its long-term contracts for the full supply of both electricity and gas by RWE. Despite RWE's participation, Stadtwerke Unna had its own market-oriented procurement management system.

97. In February 2012, the Bundeskartellamt cleared Gazprom's acquisition of a minority interest in VNG, the largest gas supplier in east Germany. Gazprom planned to increase its participation in VNG to 10.52%. With the holding of 15.79% in VNG by the BASF subsidiary Wintershall, the Bundeskartellamt was of the view that the project would enable Gazprom and Wintershall to jointly exert a competitively significant influence on VNG. Both shareholders cooperate closely in several joint ventures such as, e.g., Wingas.

98. For the first time the Bundeskartellamt closely examined the import level in the gas market, where the companies Gazprom, Gasterra and Statoil together hold a market share of more than 70%. Although the question of dominance was not decisive for the decision in this particular case and was therefore not further assessed at this stage, the Bundeskartellamt has gained important insights for the evaluation of any future merger plans in this market.

99. The Bundeskartellamt defined a national German market for the production of natural gas and its import to Germany. In this market the Russian state-owned company Gazprom has a share of one third; the Dutch state-owned company Gasterra and the Norwegian state-owned company Statoil each hold a 20% share.

100. Whether Gazprom was therefore dominant in the market could be left open as its minority share in VNG did not strengthen its market position in a way which would be negative for competition.

101. In assessing the gas markets under competition law, different market levels were taken into consideration. Downstream of the import level are the markets for the supply of regional distributors by long-distance wholesale transmission companies and the supply of large industrial customers by long-distance wholesale transmission companies. The Bundeskartellamt identified a positive development of

competition in these two downstream markets. It therefore abandoned its previous geographic market definition which was limited to the respective supply area and now defined the markets as national. According to the Bundeskartellamt's assessment, neither VNG nor Wintershall can be regarded as dominant on either of these national markets.

102. After extensive examination, the Bundeskartellamt cleared the merger of the Cologne and Neuss-Düsseldorf port and rail transport companies in February 2012. Although the merger of the two major Rhine river ports between Wesel and Bonn (Wesel-Bonn range) constricted the structure of the market, the new joint venture was not expected to create a dominant position. Duisburger Hafen AG still remains the market leader.

103. The companies Häfen und Güterverkehr Köln AG and Neuss-Düsseldorfer Häfen/ Neuss planned to combine their separate port operation and rail transport activities in a joint venture – RheinCargo. The merger primarily affected the market for the operation of inland ports and the market for port services (cargo handling). These markets were defined as regional according to the industrial region served by these ports, in this case the Rhine-Ruhr region (Wesel-Bonn Range).

104. Following in-depth investigations, the Bundeskartellamt cleared the acquisition of a minority stake in Vossloh AG by the chairman of the supervisory board and principal shareholder of Knorr-Bremse AG, Heinz Hermann Thiele, in March 2012.

105. Knorr-Bremse AG is a component supplier to the railway industry and manufactures braking systems, air conditioning systems, doors and other components for the railway sector. Vossloh AG specializes in railway technology (rail fastening systems, switch systems) but also produces electrical systems for trams (components of the drive train, air conditioning systems etc.), diesel locomotives and, to a small extent, lightweight rail vehicles. Knorr-Bremse has a very strong position in the market for braking systems for rail vehicles. Therefore, the Bundeskartellamt thoroughly examined the concentration from different perspectives. Ultimately, however, the project did not give any substantial cause for concern about competition in this sector.

106. In March 2012, the Bundeskartellamt also cleared the acquisition of ESW GasVertrieb by Enovos after a thorough examination of the merger project. Enovos is the result of a merger between two Luxembourg suppliers of electricity and gas and the German company Saar Ferngas, which was completed in 2009. Enovos is the major gas supplier in Luxembourg, the federal state of Saarland and the southern part of Rhineland-Palatinate.

107. The Bundeskartellamt examined this merger case in detail to review its previous market assessment in view of the increasing competition in the gas sector. The Bundeskartellamt still defines geographic markets for the supply of end consumers and the distribution level that are limited to the respective network areas and are not nationwide (the distribution level concerns the supply of municipal utilities by, i.a., gas transmission companies).

108. Although competition in the gas sector has increased, there are still barriers to market entry. In addition, in some regions competition in the gas sector is even weaker than in the rest of the country. Remunicipalisation has only partly resulted in a stimulation of competition. At present, Enovos has a dominant position in the market for the supply of downstream distributors with gas in the Saarland and southern Rhineland-Palatinate. The Bundeskartellamt expects, however, that competition in this area will significantly increase in the coming years. Therefore, the merger does not strengthen the market position of Enovos to an extent that would harm competition.

109. In April 2012, following an in-depth examination of the merger project, the Bundeskartellamt cleared plans by the Dutch chemical company Akzo Nobel to increase its share in the Italian company Metlac from 49% to 100%.

110. Metlac, like Akzo Nobel, produces coatings for food and beverage cans and other metal packaging. In Europe, metal packaging coatings are manufactured only by a small number of companies. Apart from the parties to the merger, PPG and Valspar are large producers on the European market, which generates a total volume of over EUR 650 million. Important buyers of the products are, among others, the companies Rexam, Crown and Ardagh.

111. In spite of Akzo Nobel's powerful market position, the acquisition will neither create a single firm dominance nor was there sufficient evidence that the company would become part of a collectively dominant oligopoly together with other large coatings manufacturers.

112. In May 2012, after an in-depth examination, the Bundeskartellamt cleared the launch of the joint venture Agronovita by Hans-Willi Böhmer and Krohn Holding. Agronovita is to coordinate the supply of potatoes and onions to REWE and its discount subsidiary Penny on behalf of Böhmer and Krohn. Rainer Bauschwill continue its participation in Agronovita, but at a level which falls below German merger control thresholds.

113. Böhmer and Krohn are leaders on the German markets for the supply of potatoes and onions to food retailers and other bulk buyers and between them have a nationwide network of processing facilities. This notwithstanding, the Bundeskartellamt does not expect the joint venture to create a dominant position at this stage. Its investigations have shown that in their purchasing activities most buyers consider regional suppliers in addition to the parties to the joint venture.

114. Currently more than 30 companies are active in the German market for the supply of potatoes and onions. The geographical proximity of the producers as well as sustainable production and processing are important factors in the procurement of fruit and vegetables by the retail trade.

115. In spite of its clearance under merger control provisions, the cooperation will also be examined for its compliance with general competition law. This is necessary because the strategic pooling of important distribution activities in Agronovita could lead to further coordination on pricing and product range strategies by the parent companies. The Bundeskartellamt has already opened examination proceedings.

116. In March 2012 the Bundeskartellamt also cleared the acquisition of Barsortiment Könemann GmbH Co. KG ("Könemann") by Libri GmbH ("Libri"). Libri is one of two companies forming a dominant duopoly in the German book wholesale market. With the merger, a member of a dominant duopoly acquired a smaller competitor from outside the duopoly. The market concerned was the market for book wholesalers who store books in their own warehouses and supply these to book retailers in their own name and on their own account. The merger project did not result in the creation or strengthening of a dominant position, because it was to be expected that the structural change of one member of the duopoly (prior to the merger) would lead to significant competition between the two members of the duopoly.

117. The majority of the customers are retail bookstores, but internet booksellers and other distribution channels (e.g. sales points in department stores) also belong to the demand side. The investigations of the Bundeskartellamt showed that direct orders and orders from the book wholesalers did not form one uniform wholesale market, because the two distribution channels fulfilled fundamentally different functions for the book retail trade.

118. At the time of the decision, Libri and another company on the book wholesale market (Koch, Neff & Volckmar, “KNV”) formed a dominant duopoly in the book wholesale market. Their joint high shares had hardly changed over the past years. Substantial internal competition between the two members of the duopoly could not be found, nor was there any substantial external competition from the remaining book wholesalers.

119. Market entries of potential competitors were also unlikely on account of the high barriers to market entry. The fragmented demand side (the book retailers) did not exert any substantial competitive pressure on the duopoly either.

120. Still, the Bundeskartellamt expected KNV's consolidation strategy to destabilise the existing dominant duopoly of Libri and KNV. It was to be expected that KNV and Libri would have different cost structures in the future, which would make coordination within the duopoly more difficult and less likely.

121. The merger resulted in only minor market share gains for Libri. Its cost structures improved only slightly and were still not comparable to those of KNV. It was therefore not to be expected that the acquisition of Könemann by Libri would strengthen the duopoly of Libri and KNV.

### 3.2.3 *Activities of the courts*

122. The BGH refined the examination criteria for collective dominance. Following a series of decisions made during the past few years, the BGH has recently undertaken a careful overall assessment of all relevant circumstances without a priori assigning a decisive role to any individual factors. In addition to the comprehensive analysis of the Airtours criteria, further parameters are to be considered if, depending on the circumstances of the case and market conditions, they can provide relevant information with regard to the assessment of whether implicit collusion is facilitated in the market

123. A further decision deals with the earlier decision of the Düsseldorf Higher Regional Court, which had revoked the prohibition of a merger between two regional subscription dailies which had quasi-monopolistic positions in their adjoining circulation areas (see Annual Report 2010, 2.2.3). The Higher Regional Court had denied the finding that the concentration would eliminate potential competition. According to the court, without the merger it was not very likely that one of the parties concerned would enter the adjoining market.

124. The concentration was therefore not expected to result in the strengthening of a dominant position. In the reporting period, the BGH confirmed the decision of the Higher Regional Court. A statement of the grounds on which the decision was based has not been issued so far. However, on the basis of the oral proceedings it can be expected that, although the BGH deems a lower degree of probability of market entry sufficient for the strengthening of a dominant position, even this lower probability could not be found in the case in question.

125. The Düsseldorf Higher Regional Court ruled that the issue of whether a merger is subject to notification cannot be decided ex ante by the cartel courts. According to the court, the legislator has opted in favour of a system of ex post legal protection. If it is obvious that a project is not subject to notification, the parties can be expected to put the merger into effect without notification. If this is not obvious, however, the parties can be reasonably expected to notify their project and, if necessary, defend it against a prohibition by lodging an appeal. Only if the system of legal protection provided for by law is not adequate or sufficient, ex ante legal interim relief can exceptionally be considered. According to the court, however, this would only be the case if legal protection measures taking effect after a violation were faced with irrevocable facts, i.e. irreparable disadvantages which could not easily be compensated for. Neither would an exception be justified by the aspect of procedural economy as, particularly in the area of merger control,

the time limits regime in place (with a deadline of a maximum of four months before an authority's decision is issued) ensures simpler and faster legal protection than a system in which preliminary issues would first be subject to clarification by a court, possibly to be followed by proceedings conducted by the competition authority.

### **3.3 Sector inquiries**

126. In autumn 2011, the Bundeskartellamt launched a sector inquiry into the food retail sector. The examination focused on the competitive conditions in the markets for the procurement of food and beverages by food retailers. The authority sent out questionnaires to food retailers and manufacturers of food and beverage products.

127. The sector inquiry is not only relevant for the case practice of the Bundeskartellamt but is also meant to provide new information for the public debate of the issue. The ongoing debate on the concentration process in the food retail sector and the power relations between retailers and manufacturers proves that there is a strong public interest in this issue. The launch of the sector inquiry has therefore been welcomed by a large part of the industry. In January 2012, the Bundeskartellamt published its final report on its milk sector inquiry. In the report the authority presents an in-depth assessment of the business relationships in the milk sector.

128. In its sector inquiry the Bundeskartellamt conducted an extensive analysis of the milk sector, ranging from the procurement of raw milk through the dairy to the retail sector. Whereas its interim report in January 2010 (see Annual Report 2010, 2.3.) focused on competition structures and power relationships between the individual market levels, the final report concentrates on the classification under competition law of the competition problems identified and on the authority's case practice. In addition to a comprehensive survey of the sector and numerous discussions with representatives of the various market participants, associations and interest groups, the final report is also based on the large number of comments on the interim report and the results of a two-day hearing of the sector at the Bundeskartellamt.

129. The final report illustrates that the issue of power imbalances between dairies and the food retail sector must be addressed individually. The market position of a dairy depends strongly on the size of its share of supply to retailers, its product portfolio and whether it has distribution alternatives. The final report on the sector inquiry also analyses the proposals that have been made at European level with regard to the amendment of the legal framework conditions in the milk sector. The provisions of the so-called milk package will expand the exemptions from competition law for the milk sector and thus be detrimental to the liberalisation of the milk markets. The intended strengthening of producer organisations will extend opportunities for milk producers to engage in cartel agreements. These are quite pronounced in Germany as it is. One of the intended measures is to introduce the possibility for states to regulate the production quantities of cheese with a registered designation of origin. This would constitute a significant intervention into the competitive processes in the sector.

## **4. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

### **4.1 ICN**

130. The Bundeskartellamt continued to actively participate in the working groups and conferences of the International Competition Network (ICN). It co-chaired the ICN Unilateral Conduct Working Group (UCWG) together with the US Federal Trade Commission and the Swedish competition authority until April 2012. At the 11th ICN Annual Conference the UCWG presented a chapter on the Objectives of Unilateral Conduct Laws and a further chapter on Predatory Pricing Analysis.

131. The UCWG held three teleseminars in the reporting period, dealing with Price Cost Tests (July 2011), the Abuse of Dominance in the Energy Sector – A European Perspective (November 2011), and the Objectives and Principles of Unilateral Conduct Rules (March 2012). All teleseminars were very well received.

132. In April 2012 the Bundeskartellamt gave up its role as a co-chair of the UCWG and took up the position of co-chair of the ICN Cartel Working Group, which it now co-chairs together with the US Department of Justice and the Japan Fair Trade Commission.

133. Also in April 2012, Mr Andreas Mundt, President of the Bundeskartellamt, was elected as ICN Vice-Chair. In this capacity he is responsible for assisting ICN Working Groups in assessing their accomplishments and setting out a course for the future that will help the ICN to reach its vision for the 2nd decade, while fully respecting the bottom-up philosophy that has been a cornerstone of ICN work.

#### **4.2 ECN/ECA**

134. In 2011 the competition authorities continued their successful cooperation within the European Competition Network (ECN).

135. By the end of June 2012, a total of 1,498 cases were posted on the competition authorities' joint intranet, 153 of these were Bundeskartellamt cases. The competition authorities also made use of the opportunities for information exchange and official assistance within the ECN. In several cases last year the Bundeskartellamt exchanged confidential information with other competition authorities in accordance with Article 12 of Regulation 1/2003. Within the framework of official assistance under Article 22 of Regulation 1/2003 the Bundeskartellamt assisted other competition authorities in searches and hearings of witnesses. In the period July 2011 to June 2012, under Article 11(3) of Regulation 1/2003, the European Commission was informed about 117 new proceedings initiated by the national competition authorities (NCAs), 12 of which were Bundeskartellamt cases.

136. The Bundeskartellamt is among those competition authorities which participate regularly and actively in the Advisory Committees on competition law proceedings and merger control cases of the Commission in Brussels. An essential part of the ECN's joint work takes place in the various ECN Working Groups (Cooperation Issues, Cartels, Fines, Competition Chief Economists, Forensic IT, Review of the Current Regime for the Assessment of Technology Transfer Agreements, Merger Working Group). The Merger Working Group's Best Practices on Cooperation between EU National Competition Authorities in Merger Review, adopted at the Brussels meeting of the Directors General in November 2011, were mainly coordinated by Germany as the Vice-Chair of the Merger Working Group, the Irish competition authority and the European Commission. The Working Group on Cooperation Issues and Due Process, in which Germany has been one of the co-chairs since 2004, concluded its work on the comparative overview of cartel law proceedings in the Member States and on decision and investigative powers of the national competition authorities. Following up on these two projects the Working Group on Cooperation Issues and Due Process is now dealing with the issue of whether and to what extent the divergences found call for more procedural harmonization to further facilitate cooperation between the national competition authorities. The Working Group on the Review of the Current Regime for the Assessment of Technology Transfer Agreements was actively involved in the review of the Technology Transfer Block Exemption Regulation, which was initiated in 2012.

137. Furthermore, the Bundeskartellamt also plays an active role in all the ECN sectoral subgroups in which an exchange of practical experience takes place. Currently the ECN sectoral subgroups dealing with the food and banking sectors are particularly active. As the Bundeskartellamt is carrying out a

comprehensive sector inquiry into the food retail sector and has already concluded an inquiry into the milk sector, the experience gained in these areas can be fed into the discussions within the ECN Subgroup Food.

138. Last year the Bundeskartellamt again contributed to the ECN Brief, the official ECN newsletter published since 2010, informing the interested public (e.g. lawyers and companies) about the ECN's activities and decisions made by the NCAs. A link to the ECN Brief can be found on the website of the Bundeskartellamt.

139. This year the annual Directors General meeting of the ECA forum (European Competition Authorities) took place in Tallinn/Estonia. The issues discussed at the meeting included the advantages and disadvantages of merging competition authorities with regulatory and/or consumer protection authorities, the challenges involved in the competitive assessment of online markets, and competition issues in the food sector.

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

140. On 6 October 2011, at the invitation of the Bundeskartellamt, the Working Group on Competition Law met in Bonn to discuss competition problems in the fuel markets. The Working Group meets once a year to discuss fundamental issues of competition policy. During the discussion, the possibility of monitoring price levels on the fuel markets was viewed critically because this could not solve the real problem, i.e. dominated market structures. The benefits for competition gained from regulatory intervention by the legislator were also generally viewed with scepticism. Among the participants are primarily university professors from economic and legal faculties as well as judges from the competition law chambers of the Düsseldorf Higher Regional Court and the German Federal Court of Justice.

## 5. Resources of Competition Authorities

### 5.1 *Annual budget (in EUR and USD)*

Budget 2012	Change over 2011
EUR 26.7 million	+2.8 million
USD <sup>1</sup> 33.62 million	-0.88 million <sup>2</sup>

### 5.2 *Number of employees*

	2012*	Change over 2011
Economists	52	+7
Lawyers	79	-3
Other experts	9	0
Support Staff	156	+4
Total	296	+5

Updated: 30 June 2012

\*Full-time equivalent.

<sup>1</sup> European Central Bank: Exchange rate as of 30 June 2012: 1 EUR = 1.2590 USD  
<http://www.ecb.int/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html>

<sup>2</sup> Major changes in the exchange rate lead to the result that the absolute change in USD is negative although the Budget in EUR has increased.

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

Bardong, Andreas	Germany: The Bundeskartellamt's New Merger Guidelines; Journal of European Competition Law & Practice first published online July 31, 2012 doi:10.1093/jeclap/lps042
Bardong, Andreas	Cooperation between National Competition Authorities in the EU in Multijurisdictional Merger Cases - the Best Practices of the EU Merger Working Group; Journal of European Competition Law & Practice (2012) 3(2): 126-140; first published online March 13, 2012 doi:10.1093/jeclap/lpr091
Bardong, Andreas	Der neue Leitfaden Marktbeherrschung des Bundeskartellamts; in FIW-Schriftenreihe „Schwerpunkte des Kartellrechts 2011 – Referate des 39. FIW-Seminars“, 2012, p. 69-112
Baron, Michael	Verfassungswidriges Wettbewerbsrecht oder europarechtswidriges Verfassungsrecht?: Einige spezielle Erfahrungen im Rahmen der 7. GWB-Novelle; In: Kartellrecht in Theorie und Praxis / Studienvereinigung Kartellrecht e.V. - München, 2012; p. 25-35
Barth, Uli	Lokale Teilmärkte : ein Stiefkind der Marktabgrenzung; In: Recht, Ordnung und Wettbewerb / Bechtold, Stefan. – Baden-Baden, 2011; p. [47]-61
Bataille, Marc	Zugangsentgelte zur Infrastruktur der Deutsche Bahn AG : Fluch oder Segen durch vertikale Separierung? / von Marc Bataille und Michael Coenen. - Düsseldorf : Heinrich-Heine-Universität, 2010 (DICE Ordnungspolitische Perspektiven ; Issue 7)
Becker, Carsten	Die Entwicklung der Marktabgrenzung im Lichte der Marktdynamik bei Strom und Gas; In: Energiewirtschaftsrecht im Spannungsfeld von marktlicher Freiheit und hoheitlichen Einschränkungen/ Energierechtliche Jahrestagung; Baden-Baden, 2011; p. 23-34
Becker, Carsten	"Missbrauchsaufsicht über Preise: Sanktionspolitik in der Sackgasse?" - Diskussionsbeitrag Podiumsdiskussion; In: Sanktionen im Kartellrecht / FIW-Symposium Köln [u.a.], 2011; p. 33-36
Bornkamm, Joachim	Verhaltenskodizes und Kartellverbot: Gibt es eine Renaissance der Wettbewerbsregeln? In: Kartellrecht in Theorie und Praxis / Studienvereinigung Kartellrecht e.V. - München, 2012; p. 67-75
Brauer, Eva	Die Behandlung ungewöhnlicher Wagnisse nach der Neufassung der VOL/A; In: Vergaberecht ; 12(2012); p. 343-347
Christiansen, Arndt	The "Best practices for expert economic opinions" by the Bundeskartellamt and their international context; In: Antitrust ; (2011); p. 66-74
Christiansen, Arndt; Locher, Lieselotte	Die neue Standards des Bundeskartellamts für ökonomische Gutachten in der Kartellrechtsanwendung; In: Wirtschaft und Wettbewerb; 61(2011); p. 444-453
Dittmann, Kerstin	Was tun mit unvollständigen Angeboten nach der neuen VOB/A und VOL/A?; In: Vergaberecht ; 12(2012); p. 292-301
Dobler, Christian; Sattler, Sven	Das Spannungsfeld von Wettbewerb, geistigem Eigentum und Standardisierung – Problemaufriss, Konfliktfelder und Lösungsansätze; In: Kartellrecht in Theorie und Praxis, Festschrift für Cornelis Canenbley zum 70. Geburtstag, p. 139-154
Ewald, Christian	Preisbindung, Preisempfehlung und Kartellverbot aus ökonomischer Sicht; In: Schwerpunkte des Kartellrechts 2009/2010 / FIW-Seminar- Köln, 2011; p. 65-86
Ewald, Christian	The economics of resale price maintenance - Why Europe is right not to follow the USA on the slippery slope of Leegin; In: Journal of European competition law & practice ; (2012); p. 1-8
Fritsch, Christoph	Angebotsstrategien in Breitbandfernsehmärkten : eine mikroökonomische Analyse; Baden-Baden, 2010 (Schriften zur Medienwirtschaft und zum Medienmanagement ; Issue 28)

Haucap, Justus	Competiton in the Turkish mobile telecommunications market: price elasticities and network substitution / Justus Haucap; Ulrich Heimeshoff; Mehmet Karacuka. - Düsseldorf : Heinrich-Heine-Universität, 2010 (DICE Discussion Paper; Issue 12)
Haucap, Justus	Legal and illegal cartels in Germany between 1958 and 2004 / Justus Haucap; Ulrich Heimeshoff ; Luis Manuel Schultz. - Düsseldorf : Heinrich-Heine-Universität, 2010 (DICE Discussion Paper; Issue 8)
Haucap, Justus	Eingeschränkte Rationalität in der Wettbewerbsökonomie / Justus Haucap. - Düsseldorf : Heinrich-Heine-Universität, 2010 (DICE Ordnungspolitische Perspektiven; Issue 8)
Haucap, Justus	Mehr Plan- als Marktwirtschaft in der energiepolitischen Strategie 2020 der Europäischen Kommission / Justus Haucap und Michael Coenen. - Düsseldorf : Heinrich-Heine-Universität, 2011 (DICE Ordnungspolitische Perspektiven; Issue 11)
Haucap, Justus	Consumer behavior towards on-net/off-net price differentiation / Justus Haucap; Ulrich Heimeshoff. - Düsseldorf : Heinrich-Heine-Universität, 2011 (DICE Discussion Paper; Issue 16)
Haucap, Justus	Economic principles of state aid control / Justus Haucap; Ulrich Schwalbe. - Düsseldorf : Heinrich-Heine-Universität, 2011 (DICE Discussion Paper; Issue 17)
Haucap, Justus; Coenen, Michael	Regulierung und Deregulierung in Telekommunikations-märkten : Theorie und Praxis; In: Recht, Ordnung und Wettbewerb / Bechtold, Stefan. - Baden-Baden, 2011; p. 1005-1025
Haucap, Justus; Klein, Gordon J.	Einschränkungen der Preisgestaltung im Einzelhandel aus wettbewerbsökonomischer Perspektive; In: Vertikale Preis- und Markenpflege im Kreuzfeuer des Kartellrechts / Ahlert, Dieter. - Wiesbaden, 2012; p. 169-186
Hooghoff, Kai	Aktuelle Entscheidungspraxis des Bundeskartellamtes 2009/2010; In: Schwerpunkte des Kartellrechts 2009/2010 / FIW-Seminar - Köln, 2011; p. 97-108
Hooghoff, Kai	Die Europäische Kommission zwischen Gestaltungsmacht und Rechtsbindung - Die Sicht des Bundeskartellamts; In: Die Kommission zwischen Gestaltungsmacht und Rechtsbindung / Immenga, Ulrich. - Baden-Baden, 2012; p. 89-111
Jungbluth, Armin; Arlt, Annett	Das Buchpreisbindungsgesetz - Entstehungsgeschichte und Herausforderungen für die Zukunft, In: Kartellrecht in Theorie und Praxis / Studienvereinigung Kartellrecht e.V. - München, 2012; p. 259-271
Jungheim, Stephanie	Medienordnung und Wettbewerbsrecht im Zeitalter der Digitalisierung und Globalisierung; Tübingen 2012
Klaue, Siegfried	Einige Bemerkungen zu dem Urteil des BGH "Entega II"; In: Zeitschrift für Neues Energierecht ; 15(2011); p. 278-280
Klaue, Siegfried	Zum Vorschlag einer Entflechtungsregelung in einer Achten Kartellgesetznovelle, In: Kartellrecht in Theorie und Praxis / Studienvereinigung Kartellrecht e.V. - München, 2012; p. 287-290
Lange, Markus	The 10th anniversary of the ICN - a look back and ahead; In: Zeitschrift für Wettbewerbsrecht ; 9(2011); p. 434-442
Meeßen, Gero	Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht - Konturen eines Europäischen Kartelldeliktsrecht? / Gero Meeßen. - Tübingen 2011 (Studien zum ausländischen und internationalen Privatrecht)
Mundt, Andreas	Kartellverfolgung im 21. Jahrhundert : erfolgreich durch wirksame Abschreckung ; In: Recht, Ordnung und Wettbewerb / Bechtold, Stefan. – Baden-Baden, 2011; p. 427-440
Mundt, Andreas	Aus der Kartellrechtspraxis des Bundeskartellamtes ; In: Wirtschaft und Wettbewerb ; 61(2011); p. 1168-1174

Mundt, Andreas	Die Neuausrichtung des Bundeskartellamtes; In: Kartell- und Wettbewerbsrecht, 2011; p. 47-58
Mundt, Andreas	Die Liberalisierung der deutschen Entsorgungswirtschaft; In: Ressource Abfall / Kurth, Peter - Neuruppin, 2011; p. 178-191
Mundt, Andreas	Verfahren ohne Sanktionen - Sanktionen ohne Verfahren? : alternative Instrumente der Kartellbehörden; In: Sanktionen im Kartellrecht / FIW-Symposion Köln [u.a.], 2011; p. 17-30
Mundt, Andreas	Von der Checkliste zum integrierten Prüfungskonzept - Der neue Leitfaden des BKartA zur materiellen Fusionskontrolle im Vorfeld der 8. GWB-Novelle; In: Kartellrecht in Theorie und Praxis / Studienvereinigung Kartellrecht e.V. - München, 2012; p. 351-367
Ost, Konrad; Brenner, Tobias	Das deutsche Kartellbußgeldrecht nach der Entscheidung des EuGH in der Rechtssache VEBIC : vereinbar mit Unionsrecht? In: Kartellrecht in Theorie und Praxis / Studienvereinigung Kartellrecht e.V. - München, 2012; p. 370-379
Ruppelt, Hans-Jürgen	Die Marktabgrenzung im Lebensmittelhandel; In: Wirtschaft und Wettbewerb; 62(2012) ; p. 27-38
Sattler, Sven	Standardisation under EU competition rules - the Commission's new Horizontal Guidelines; In: European competition law review; 32(2011); p. 343-349
Stockmann, Kurt	Zur neueren Bußgeldpraxis bei Kartellverstößen; In: Zeitschrift für Wettbewerbsrecht; 10(2012); p. 20-47
Vollmer, Christof	Erfahrungen mit Settlements in Kartellbußgeldverfahren aus der Sicht eines Kartellbeamten; In: Schwerpunkte des Kartellrechts 2009/2010 / FIW-Seminar - Köln, 2011; p. 135-147
Vollmer, Christof	Settlements in German competition law; In: European competition law review; 32(2011); p. 350-355
Wagemann, Markus	Zum Verhältnis von Regulierungs- und Kartellrecht; In: Telekommunikation, Energie, Eisenbahn / Lüdemann, Jörn, Tübingen, 2008; p. 53-66
Zapfe, Charlotte; Mecke, Ingo	Evaluierung der Beschlüsse zu langfristigen Gaslieferverträgen; In: Wirtschaft und Wettbewerb ; 61(2011); p. 944-954
Zigelski, Sabine	Daten- und Kostenteilung unter REACH - Welche Anforderungen stellt das Kartellrecht? In: Reach & CLP Navigator; 7(2012); p. 2-8