

Unclassified

DAF/COMP/AR(2013)44

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

22-Oct-2013

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2013)44
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- 2012 --

This report is submitted by Germany to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 30-31 October 2013.

JT03346934

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1. Executive summary

1.1 Legislation

1. The Act on the 8th amendment to the German Act against Restraints of Competition (ARC, in German: *Gesetz gegen Wettbewerbsbeschränkungen, GWB*) came into force on 30 June 2013. Two market transparency units (*Markttransparenzstellen*) are about to be established. The objective of one unit is 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 is also monitored by another unit on the national fuel markets.

1.2 Organisation

2. In preparation for the launch of the transparency unit for fuels, the Bundeskartellamt appointed a self-contained team which is directly responsible to the Vice President of the Bundeskartellamt.

1.3 Agreements / abusive practices by dominant companies

3. The Bundeskartellamt continues to focus on cartel prosecution and imposed a number of high fines, inter alia, against rail manufacturers, manufacturers of power transformers, branded confectionery, consumer goods and branded drugstore products, companies in the milling industry and TV broadcasting groups.

4. The energy sector has remained an area of focus in abuse control. The Bundeskartellamt monitored the selection procedure for the award of concessions for electricity and gas networks in a number of cities and intervened where necessary in order to guarantee a transparent and non-discriminatory procedure.

1.4 Merger control

5. The number of merger notifications almost exactly matched that of the calendar year 2011. Among the most significant cases was the prohibition of the intended acquisition by Kabel Deutschland Holding AG, the largest cable network operator in Germany, of Tele Columbus GmbH, the third largest network operator.

1.5 Sector inquiries

6. The Bundeskartellamt concluded three sector inquiries and initiated a fourth one. In August 2012 it published its report on the district heating market, in September 2012 its report on the rolled asphalt sector and in December 2012 its final report on the waste management sector. The inquiry on the refineries and oil wholesale market which was initiated in September 2012 is still in progress.

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

2.1 Government proposals for new legislation

7. On 30 June 2013 the Act on the 8th general revision of the ARC came into force. It aims to modernise German competition law. In particular, the new legislation replaces 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. However, some 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.

8. Regarding the *legal* framework dealing with abuse of dominance a specific provision to address price abuses in the electricity and gas sector is prolonged. Specific German provisions on “relative” dominance, i.e. on undertakings vis-à-vis companies that are dependent on them, are maintained. The new law clarifies 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 a dominant position.

9. 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. But class actions are not introduced.

10. Enforcement by the Bundeskartellamt, in particular regarding fines, is now further streamlined. Legal entities are obliged to provide specific data relevant for the calculation of the fine, in particular information regarding the entity’s economic capacity. The Act also aims to close loopholes in the current legislation that provide undertakings with opportunities to circumvent a fine by means of restructuring.

11. In December 2012 Parliament (German Bundestag) passed the Act on the Establishment of a Market Transparency Unit for Electricity and Gas Wholesale Trading (*Gesetz zur Einrichtung einer Markttransparenzstelle für den Großhandel mit Strom und Gas*). This Act regulates the establishment of two different market transparency units (*Markttransparenzstellen*). The Market Transparency Unit for Fuels is set up within the Bundeskartellamt. Its purpose is to establish a data reporting mechanism to monitor the trade with fuels with the objective to detect potential infringements of antitrust law. Furthermore, the collected data shall enable consumers to conduct a comprehensive fuel price comparison in real-time. The Market Transparency Unit for Electricity and Gas Wholesale Trading will be established within the national regulatory authority (*Bundesnetzagentur*). Its objective is to carry out market monitoring – in close cooperation with the Bundeskartellamt – in the sector of trading in wholesale energy products (electricity and gas) to detect infringements of competition and regulatory law. 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.

2.2 Organisation of the Bundeskartellamt

12. The new Market Transparency Unit for Fuels is directly responsible to the Vice President of the Bundeskartellamt. As soon as the necessary technical infrastructure is set up, oil companies and petrol station operators are obliged to report to the Market Transparency Unit for Fuels any change in price of the fuel types Super E5, Super E10 and Diesel. The Market Transparency Unit itself will not directly offer price information to the public. Instead, it will pass on the price data received to private consumer information providers, who in turn will inform the consumers.

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

13. With regard to cartel detection, the Bundeskartellamt received 85 leniency applications from July 2012 to June 2013. It conducted 11 dawn raids relating to its own proceedings and 4 inspections on behalf of the European Commission. In the period covered by the report the Bundeskartellamt imposed several fines totaling approximately EUR 306.5 million.

3.1.2 Description of significant cases

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

3.1.2.1 Agreements

15. In July 2012 the Bundeskartellamt imposed fines totalling EUR 124.5 million on four rail manufacturers and suppliers for concluding anticompetitive agreements to the detriment of Deutsche Bahn AG. The proceedings were triggered by an application for leniency filed by an Austrian company, which was therefore granted full immunity from fines.

16. The agreements applied to three different product markets: normal rails, head-hardened rails and switch blades. The cartel members monitored compliance with the agreed contract volume quotas, assigned each other projects and set protective prices in order to steer the contract award process.

17. All the companies have cooperated with the Bundeskartellamt within the framework of its leniency programme. In calculating the fines, which are based on the turnover which the companies achieved with Deutsche Bahn from the cartelized business and the gravity of the infringement, the Bundeskartellamt also took into account the cooperation by the companies, the duration of the cartel involvement and the willingness of the companies to terminate the proceedings by settlement.

18. In these proceedings the Bundeskartellamt also cooperated closely with the public prosecutor's office and criminal investigation department since they concerned cartels which involved publicly tendered products and services. The public prosecutor's office investigated the natural persons involved in the cases on suspicion of collusive tendering.

19. In July 2012 the Bundeskartellamt imposed fines totalling approximately EUR 2.4 million on eight manufacturers of automatic door systems and their association, as well as one senior member of staff, on account of several illegal agreements.

20. The illegal agreements concerned uniform price ranges for certain manufacturer services, as well as the standardization of rebates, hourly rates and flat rate call out charges used in the internal invoicing of spare parts and subcontractor services.

21. The proceedings were initiated in 2009, after an application for leniency by two automatic door manufacturers against which no fines were imposed in accordance with the Bundeskartellamt's Leniency Programme. Two companies, which applied for leniency at a later stage in the proceedings, were given a reduced fine.

22. In August 2012 the Bundeskartellamt imposed fines of approximately EUR 2.4 million on the confectionery manufacturer Haribo GmbH & Co. KG and its sales representatives involved, for exchanging competitively relevant information.

23. The proceedings were triggered by a leniency application filed by Mars GmbH against which no fine was imposed in accordance with the Bundeskartellamt's Leniency Programme.

24. In 2006 and 2007 senior sales staff of the four companies involved regularly met for informal discussions. In so-called "four party talks", the responsible Haribo sales representative participated in the reciprocal exchange of information on the state of negotiations with various major retailers. In this way the companies involved gained knowledge of demands from the retail trade for rebates from the other confectionery manufacturers, as well as information about how the manufacturers had reacted or intended to react to these demands. This type of information is usually treated by companies with strict confidence, and influenced the companies' own market conduct in the negotiations with the retail trade. The proceeding was ended by way of settlement.

25. A fine of EUR 8.2 million was imposed on TTS Tooltechnic Systems Deutschland GmbH (TTS) in August 2012 for setting up and imposing a vertical resale price maintenance system.

26. Under the trademark "Festool" TTS sells high-quality power tools for joiners, painters, car sprayers and discerning private clients. These products are selectively distributed and sold exclusively in specialist stores. The proceedings were triggered by complaints from the specialist trade, which had been asked by TTS to strictly observe the "non-binding price recommendation" (RRP). The specialist outlets were threatened with disadvantages such as worse conditions or contract suspension if they deviated from this price.

27. TTS's competition law infringement could be proved in a series of hearings with personnel of the specialist trade involved. A representative selection of specialist outlets were questioned as witnesses and thus obliged to provide correct and complete information about the case. TTS agreed to have the proceedings terminated by way of a settlement.

28. In September 2012 the Bundeskartellamt imposed fines amounting to a total of EUR 24.3 million on four manufacturers of power transformers. Power transformers reduce or increase voltage for the transmission of electricity through a grid.

29. From 1999 until 2004 the companies engaged in agreements on quotas and collusive tendering and carved up the German market for power transformers between them, which affected the tender procedures of a large number of energy suppliers.

30. In the course of the proceedings all four companies involved filed applications for leniency with the Bundeskartellamt and were granted a reduction in fine. Furthermore, all the companies agreed to have the proceedings terminated by settlement.

31. In December 2012 the Bundeskartellamt imposed fines of about EUR 55 million on the two TV broadcasting groups Pro7Sat1 and RTL as well as on two individuals involved. The companies were accused of having entered into anticompetitive agreements when they introduced the encryption of their digital free TV Programmes in 2005/2006.

32. All the companies agreed to have the proceedings terminated by settlement. Furthermore, the Bundeskartellamt was given binding commitments by both broadcasters to stop the basic encryption of their free TV programmes broadcast in SD throughout Germany from 2013. The two groups will maintain their unencrypted broadcasting in SD for a minimum period of ten years. This commitment covers the

cable, satellite and IPTV transmission paths. It does not include the encryption of HD programmes. By giving up the encryption the broadcasting groups lose the basis for charging cable network operators of other transmission paths fees for broadcasting in SD. At the same time the basis for implementing signal protection restrictions will be eliminated.

33. In December 2012 in the course of a Bundeskartellamt proceeding Deutsche Lufthansa undertook to remove certain clauses from current and future corporate client contracts. The Bundeskartellamt declared these commitments as binding.

34. The proceeding was triggered by complaints from corporate clients of Lufthansa from across the German business community as well as the travel office of the German government.

35. For the calculation of special discounts and sales refunds corporate clients had to transmit to Lufthansa all the sales data of flights which they had bought within a certain calculation period by means of a specific corporate credit card. This information also included flights which the client had booked with Lufthansa's competitors. With the information acquired about the sales and discount conditions of its competitors, Lufthansa could have distorted competition on specific routes through short-term and targeted measures.

36. In January 2013 the Bundeskartellamt concluded its fine proceedings against several manufacturers of branded confectionery. On account of several cartel infringements, fines of approximately EUR 60 million were imposed on 11 companies and some of their sales representatives. The proceedings were initiated after a leniency application filed by Mars GmbH, against which no fine was imposed in accordance with the leniency programme. In February 2008, the Bundeskartellamt conducted sector-wide searches which triggered several more leniency applications.

37. Between March and September 2007 representatives from two of the confectionery companies informed each other in a series of telephone calls on their envisaged price increases for chocolate bars. Furthermore, in 2007, at regular meetings of a discussion group, senior members of the three major companies agreed on price increases for chocolate products. The companies informed each other about demands from the retail trade for rebates from the other confectionery manufacturers and about how the manufacturers had reacted to these demands. This information enabled the companies to adjust their own strategies in the negotiations. Moreover, at least between 2004 and the beginning of 2008 information about the state of negotiations with food retailers and in some cases about planned increases in list prices was exchanged at meetings of a working group of an association of the German confectionery industry.

38. In calculating the fines it was taken into account that some companies had cooperated with the Bundeskartellamt in clarifying the facts of the case. Most of the proceedings could be concluded by way of settlement.

39. In February 2013 the Bundeskartellamt concluded its cartel proceedings against companies in the milling industry and imposed fines of approximately EUR 41 million on 22 companies, the association of German mills (*Verband Deutscher Mühlen e.V.*) and their representatives on account of their involvement in illegal agreements in the sale of flour. A first fine of approximately EUR 24 million had already been imposed on VK Mühlen AG in the same proceeding in October 2011 (see Annual Report 2012, 2.1.2.1).

40. In February 2008 the Bundeskartellamt searched several milling companies in Germany after receiving information from the market about agreements on prices and quantities. Subsequently, several companies filed applications for leniency and offered their cooperation in clarifying the facts of the case.

41. From 2001 until 2008 representatives of the milling companies involved had agreed on prices, customer allocation and supply volumes in regular rounds of talks. In addition, the companies coordinated

capacity planning by shutting down mills or preventing mills which had already been shut down from being operated again.

42. A representative of the association of the German mills also participated in the cartel discussions and assisted the representatives from the various mills in organising meetings of the cartel and coordinating the agreements.

43. The fines imposed on the individual companies were calculated according to the seriousness and duration of the involvement in the cartel. In addition, the economic viability of the companies involved was given special consideration in this particular case, also in view of the fact that the French and Dutch competition authorities had already imposed heavy fines on German mills for their involvement in other agreements. The proceedings were conducted in close cooperation with the competition authorities of the two neighbouring countries.

44. 17 of 24 proceedings could be concluded by settlement, which was also considered in the calculation of the fines.

45. In February 2013 the Bundeskartellamt launched a web survey of 2,400 sellers who offer their products through Amazon Marketplace.

46. Within the framework of administrative proceedings under competition law the Bundeskartellamt examined the effects of the price parity clause used by Amazon.de for its Marketplace sellers. Apart from the direct sale of products through Amazon, other sellers also have the opportunity to offer their products on the Amazon platform. The price parity clause prohibits them from selling products they offer on Amazon Marketplace cheaper on any other internet sales channel

47. In March 2013 the Bundeskartellamt concluded a series of proceedings against consumer goods manufacturers on account of illegal exchange of competition-relevant information. The proceedings were concluded with fines totalling approximately EUR 20 million imposed on Nestlé Deutschland AG. In 2011, the Bundeskartellamt had already imposed fines on other companies involved totalling approximately EUR 38 million (see Annual report 2011, 2.1.2.1). Nestlé was granted a reduction of its fine for its cooperation in clarifying the allegations.

48. In March 2013 the Bundeskartellamt concluded its proceedings against several manufacturers of branded drugstore products. The authority imposed fines of another EUR 39 million on six companies, the trademark association (Markenverband e.V.) and their representatives on account of anti-competitive information exchange. In previous proceedings, nine companies had already been fined (see Annual Report 2012, 3.1.2.1).

49. Between 2004 and 2006, information was exchanged at regular meetings of the trademark association's working group on "body care, cleaning agents and detergents". The participants of these meetings were manufacturers of branded drugstore products and included all the leading suppliers in Germany of branded body care products, cleaning agents and detergents.

50. The proceedings were triggered by a leniency application by Colgate Palmolive GmbH, against whom no fine was imposed in accordance with the leniency programme.

51. In March 2013 the Bundeskartellamt expressed its concerns to the companies involved about the online platform "Germany's Gold" set up in April 2012 by several companies of the ARD and ZDF broadcasting groups, together with eleven other production and licensing companies.

52. While the joint venture structure could be cleared under merger control rules it requested further examination under cartel aspects.

53. The joint marketing of videos on the Internet by the commercial subsidiaries of ARD and ZDF would have led to the coordination of prices and availability of the videos. Another concern was that alternative platforms would have no or only limited access to the videos. The parties meanwhile abandoned the project.

3.1.2.2 *Abuse of a dominant position*

54. In December 2012 the Bundeskartellamt prohibited the municipality of Mettmann from assigning the rights of way for the operation of the electricity and gas network “in-house” to its subsidiary without a transparent and non-discriminatory procedure.

55. The municipality of Mettmann had first launched a Europe-wide award procedure in which it sought a cooperation partner willing to have a minority share in its envisaged new municipal utility. It was planned that the municipal utility should then be awarded the concession for the electricity and gas networks without a further selection procedure. Competitors that were only interested in the concession would therefore have been excluded from the procedure, even if they were able to operate the network more efficiently and with greater benefit to consumers. Although concessions are supposed to be awarded to the applicant who is able to ensure the most efficient network operation, the municipality of Mettmann chose the option that was best for its financial interests.

56. In April 2013, the Bundeskartellamt closed its proceedings on adequate network access for the Ingolstadt refinery against the group companies of the Transalpine Ölleitung (transalpine oil pipeline, TAL). The Ingolstadt refinery was granted access to TAL for its crude oil supplies, on the basis of appropriate network fees.

57. The Ingolstadt refinery is one of 13 refineries in Germany that process crude oil into mineral oil products (inter alia petrol and diesel fuels). The Gunvor group purchased the Ingolstadt refinery after the latter had become insolvent. To resume the operation of the refinery, it was decisive that the supply with crude oil via TAL (which leads from Trieste to Bavaria) was assured. Access to the pipeline was initially denied to the refinery. Gunvor therefore filed a complaint with the Bundeskartellamt in August 2012.

58. On account of the high time pressure in the insolvency proceedings the Bundeskartellamt had suggested a settlement agreement to the parties at the beginning of September 2012. This suggestion was accepted by the parties and subsequently implemented. The operation of the refinery was thus secured for the time being.

59. In the further course of the proceedings, the Bundeskartellamt investigated whether the allocation of capacities in the case of shortages and the level of network fees were appropriate. In the Bundeskartellamt’s view, both the capacity management and the new tariff system of TAL are non-discriminatory and in line with competition law. The proceedings could therefore be terminated.

3.1.3 *Activities of the courts*

60. The Federal Court of Justice (*Bundesgerichtshof*, BGH) largely confirmed the fines imposed on the members of the so-called cement cartel - leading producers of cement had carved up the German cement markets among themselves - amounting to a total of EUR 380 million, the highest fine ever imposed in a Bundeskartellamt proceeding.

61. The BGH also decided on the constitutionality of the key provision on the fining of cartel law violations. In 2005, the level of fines imposed for cartel law infringements was harmonized with European legal practice. Since then a fine imposed on a company can amount to up to 10% of its turnover. The BGH confirmed the constitutionality of this fine provision and added the instruction that the limitation should not be regarded as a capping threshold, as is done in European cartel law, but as a maximum value within a range of fines.

62. The Düsseldorf Higher Regional Court imposed fines of EUR 244 million on five members of the liquefied gas cartel or their successor companies. The Higher Regional Court raised the total amount of fines to a level higher than that previously imposed by the Bundeskartellamt on the companies concerned. In 2007 the Bundeskartellamt had issued orders imposing fines totalling approx. EUR 180 million on the companies or their predecessors. The companies concerned had operated a system of customer protection agreements in their sales of liquefied petroleum gas for standard tanks.

63. The District Court of Bonn rejected an appeal against a dawn raid carried out by the Bundeskartellamt of the office on a company's premises of a lawyer who was active on behalf of the company. According to the court, the company had joint legal responsibility for the room. Furthermore, the Bundeskartellamt was able to assume that the lawyer was a permanent legal adviser and the right to refuse to testify does not apply to permanent legal advisers.

64. The Düsseldorf Higher Regional Court decided that victims of cartels should not be granted access to leniency documents as the interest of the accused parties in keeping confidential the information they had voluntarily submitted to the Bundeskartellamt overrides the interest of the party applying for access to the file. The court held that the Bundeskartellamt's leniency programmes afford the leniency applicants protection of confidence. According to the court, this rule was justified by a public interest, i.e. the objective of the leniency programme to efficiently uncover and end competition law violations. The court pointed out that the refusal of inspection of the documents of the leniency programme would not make it impossible or considerably more difficult for the parties to gain compensation for damages.

65. The Federal Constitutional Court decided that imposition of interest on cartel fines is consistent with the German Basic Law.

66. Section 21 (2) ARC prohibits undertakings to threaten or cause disadvantages to other undertakings in order to induce them to engage in conduct which is prohibited under the ARC, Art. 101 or 102 of the TFEU or according to a decision issued by the European Commission or the Bundeskartellamt pursuant to the ARC or Art. 101 or 102 of the TFEU. In the *Sternjakob* case the BGH decided that an implicit threat ("between the lines") can also constitute such an inadmissible exertion of influence. In the case, a producer had informed a dealer by phone that he did not find the price calculation of the latter economically sound. On the question of the dealer whether this meant that he would no longer supply him, the producer replied that he hadn't said that and repeated his remark about the economically questionable calculation of the dealer instead of clearly stating whether or not he would continue to supply him. According to the BGH the dealer could only understand the phone call in such a way that, in view of the significant price deviation of the dealer, the producer was intervening to induce the dealer to adjust his prices.

67. The BGH revoked an appeal decision of the Düsseldorf Higher Regional Court in the so called Scandlines case. Scandlines Deutschland GmbH is the owner of the Puttgarden ferry port on the island of Fehmarn. It is the only provider of ferry services from Puttgarden to Rødby/Denmark. Two Norwegian companies intend to also offer ferry services on this route and wish to use the ferry port of Puttgarden. Scandlines refuses to grant access. In the Bundeskartellamt's view, this refusal constitutes an abuse of a

dominant position violating European and German antitrust law. The Bundeskartellamt required Scandlines to submit a proposal for access.

68. Scandlines successfully appealed this decision before the Düsseldorf Higher Regional Court. The court was of the opinion that Scandlines' refusal to grant access was justified. According to the court, a joint use of the Puttgarden ferry port was impossible for legal reasons because the areas intended by the Norwegian companies for use were classified as railway facilities. It was not sufficiently likely that this impediment could be removed. The BGH did not follow this view. According to the court complex projects almost always required an application for approval by the authorities whose outcome was usually unpredictable. The facts of the case did not give rise to the assumption that the joint use of the infrastructure was permanently impossible.

3.2 Mergers and acquisitions

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

69. In the calendar year 2012 1127 mergers were notified to the Bundeskartellamt. In-depth investigations were initiated in 16 cases. 4 of these cases were withdrawn during these second phase proceedings. The Bundeskartellamt prohibited 3 mergers and cleared 9 mergers. One merger was cleared subject to conditions and obligations.

3.2.2 Summary of significant cases

3.2.2.1 Prohibition of mergers

70. In November 2012 the Bundeskartellamt prohibited Lenzing AG from acquiring 90 % of the shares in Kelheim Hygiene Fibres GmbH. Kelheim Hygiene Fibres produces special viscose fibres used in the production of tampons and is the major supplier worldwide. Lenzing is its only competitor.

71. Special viscose fibres are bought by the big manufacturers of branded goods and trademarks. Switching production from conventional viscose fibres to the special fibres used in the production of tampons is not economically viable. This would require substantial investment which would be difficult to amortize in the relatively small market. For the same reason the market entry of other companies is unlikely. Cotton fibres are also not regarded as an adequate substitute within the industry. But even if the manufacturers of suitable cotton fibres were taken into consideration, Lenzing and Kelheim Hygiene Fibres would still jointly dominate the market.

72. As the two parties to the merger are the only manufacturers of these special viscose fibres in the world, the planned takeover would have created a monopoly in the market. This would have eliminated competition not only in Germany, but worldwide.

73. In November 2012 the Bundeskartellamt prohibited Brenntag Germany Holding GmbH and CG Chemikalien GmbH & Co. KG from continuing with their joint venture, CVH Chemie-Vertrieb GmbH & Co. KG. All three companies are active in the trade with chemicals. They are also active on the same regional markets, achieving joint market shares of up to 70%.

74. The Bundeskartellamt found that the joint venture placed an inadmissible restraint on competition and prohibited the further implementation of the CVH partnership agreement.

75. Examination proceedings were initiated against the joint venture CVH in 2008 after a cartel proceeding against twelve companies involved in the chemicals trade had revealed extensive corporate

links between the companies. Among the companies participating in the cartel were Brenntag, CG and CVH. This proceeding has since been concluded with fines imposed against the companies.

76. In February 2013 the Bundeskartellamt prohibited Kabel Deutschland Holding AG (KDG) to acquire the cable network operator Tele Columbus GmbH.

77. KDG is the largest cable network operator in Germany. The second largest is Unitymedia KabelBW. Tele Columbus is the third largest network operator and operates mainly in the new Länder and to a smaller extent in North Rhine-Westphalia (NRW) and Hesse. The Bundeskartellamt came to the conclusion that the collective dominance of Unitymedia KabelBW and KDG on the German-wide retail TV services market would have been strengthened by the merger. On the retail TV services market, the cable network operators compete for agreements permitting the transmission of TV signals to residential premises with multiple housing units, in particular housing associations, via a broadband cable network.

78. In the proceedings, KDG claimed that the acquisition of Tele Columbus would enable it to competitively challenge Unitymedia KabelBW in NRW and Hesse. The investigations of the Bundeskartellamt revealed, however, that from an objective perspective this was most likely not to be expected in the near future. Post merger, only a small proportion of the acquired household connections would have been directly connected to KDG's networks. Moreover, even without the merger it would require little economic effort for KDG to become active in NRW and Hesse.

3.2.2.2 Clearances subject to conditions and obligations

79. In March 2013 the Bundeskartellamt approved plans by Asklepios Kliniken Verwaltungsgesellschaft to acquire a 10.1% stake in Rhön-Klinikum AG, subject to a condition precedent. The project would have strengthened Asklepios' dominant position in one regional market. Asklepios therefore had to sell a hospital and a medical care centre in this market to an independent hospital operator.

80. In Germany the Asklepios group operates 56 acute care hospitals, 15 rehabilitation clinics and 14 nursing centres as well as doctors centres and medical care centres. After the Helios clinics, which are part of the Fresenius group, and Rhön-Klinikum AG, Asklepios is the third largest private hospital operator in Germany.

81. Under Rhön's articles of association, the owner of 10% of the shares acquires a similar right to block decisions as an owner of 25% of the shares under the Stock Corporation Act. With the merger Asklepios would gain a blocking minority right and could thus prevent competitive moves by Rhön in the regional hospital markets.

3.2.2.3 Clearances of mergers

82. In July 2012 the Bundeskartellamt cleared the sale of E.ON's subsidiary Open Grid Europe (OGE) to an investment consortium consisting of the Australian Macquarie Bank, the Abu Dhabi Investment Authority, British Columbia Investment Management Corporation and MEAG MUNICH ERGO Asset Management. Macquarie and MEAG have pooled their shares in MacCo which has acquired more than 40 % of OGE. This made the project subject to German merger control.

83. OGE operates the largest gas transport network in Germany. With its east-west and north-south pipelines it is considered to be the most important gas hub in Europe. Due to ownership unbundling requirements under European law, E.ON hived off its network to OGE in autumn 2010.

84. Before this, Macquarie had already acquired Thyssengas' gas transport network, which had previously belonged to RWE. Thyssengas operates a gas transmission network mainly in North Rhine-Westphalia and Lower Saxony, which also includes gas pipelines operated jointly or in parallel with OGE.

85. The Bundeskartellamt's investigations showed some indication that within the regulatory framework there is factual competition between OGE and Thyssengas on some gas transmission networks. Nevertheless the project could be cleared under merger control. In the Bundeskartellamt's view the dominant position of OGE and Thyssengas was not strengthened because, due to legal provisions, the calculation and setting of their network fees would continue to be the sole responsibility of the management of the two companies without any involvement of their shareholders. Under the German Energy Industry Act, OGE and Thyssengas are defined as independent transmission network operators (Unabhängige Transportnetzbetreiber, UTB). The UTB model ensures that independent transmission network operators are in a position to decide independently on all issues concerning network operation.

86. In October 2012 the Bundeskartellamt cleared the strategic alliance between General Motors Holding and Peugeot S. A.

87. The two vehicle manufacturers planned to pool their entire global purchasing activities and standardize their production material as far as possible. The alliance also provided for a 7 % equity holding in Peugeot for General Motors, several agreements on the joint development of vehicle platforms and modules for vehicle manufacturing and a logistics agreement between General Motors and the Peugeot subsidiary Gefco. However, there were no plans for joint advertising, marketing and distribution activities.

88. Before entering into the alliance, the two vehicle manufacturers bought at least 20,000 – 40,000 different parts and modules for vehicle manufacturing alone. General Motors and Peugeot planned to jointly purchase these and virtually all non-production material in the future as one purchasing organisation. The Bundeskartellamt examined the market structures for the purchase of key modules and found no indications that the project was likely to create a dominant position. Other vehicle manufacturers are much stronger buyers in all product groups.

89. The examination of the alliance project fell within the competence of the Bundeskartellamt and not the European Commission since under European merger control, in contrast to German competition law, only the acquisition of control over another company is subject to notification.

90. In December 2012 the Bundeskartellamt cleared the acquisition of Fenwal Holdings Inc by Fresenius Kabi AG. Both companies are active in blood transfusion technology and manufacture products used in blood collection, filtration and processing.

91. In the course of its intensive investigations the Bundeskartellamt examined in detail the situation on the market. The authority concluded that in spite of the high market shares of the two companies, the project was not expected to create a dominant position. The companies concerned are faced with strong customers, which procure blood bag systems by tender and are usually supplied by a number of manufacturers. In addition, customers are able to switch to an adequate number of alternative suppliers in Germany and abroad. The investigations also revealed strong price competition.

92. In December 2012 the Bundeskartellamt cleared the acquisition of Pernod Ricard's aquavit brands Aalborg Jubiläumsaquavit and Maltserkreuz by the Swedish company Ratos AB, owner of the aquavit brand Linie Aquavit. The bitter brand Gammel Dansk was also part of this transaction.

93. On completion of the merger, Ratos AB has become market leader on the German market for aquavit and kümmel schnapps on account of its brand presence and sales volumes. Nevertheless, the Bundeskartellamt was able to rule out that the merger would create a dominant position on the market.

From the perspective of both, the consumer and the retail trade, where demand is high, aquavit and kummel schnapps are regarded as interchangeable. Moreover, other spirits (in particular digestives and clear spirits) are also in a competitive relationship with aquavit. The Bundeskartellamt also took account of new market entries in this segment and the substantial sales volumes of private labels.

94. In February 2013 the Bundeskartellamt cleared plans by Frankfurter Allgemeine Zeitung GmbH (FAZ), or rather its printing house Frankfurter Societät GmbH, to acquire the publishing business of the daily newspaper Frankfurter Rundschau from the insolvent Druck- und Verlagshaus Frankfurt am Main.

95. The project gave no cause for competition concerns under merger control aspects regarding its effects on the German national newspaper markets, on which the publications of the parties to the merger are represented. Its effects on the regional newspaper reader and advertising markets in the Frankfurt/Rhine-Main area, however, were problematic as the merger was expected to create or strengthen a dominant position for the acquiring company.

96. The clearing of the project under the failing company defense depended on whether the market position of Frankfurter Rundschau would accrue to FAZ anyway should the Frankfurter Rundschau disappear from the market. Among other aspects, the Bundeskartellamt also examined in detail the alternative offer of the Turkish media entrepreneur Akbay. Ultimately, it could not be assumed that this would prevent a liquidation of Frankfurter Rundschau if the acquisition of the paper by FAZ failed.

97. In March 2013 the Bundeskartellamt cleared plans by DMK Eis GmbH to acquire Roseneis group. The merger mainly affected the German production of ice cream sold by food retail companies under their own private labels (so called private-label ice cream).

98. Pre merger there were essentially four suppliers in Germany who have focused their key activities on the production of private-label ice cream. These include the two merging companies Roseneis and DMK. Although the level of concentration in the sector is very high and still increasing, the merger could be cleared following an in-depth examination of the project. The food retail sector will continue to have enough scope in its procurement activities hence the manufacturers face a strong demand side. Furthermore, in the production of ice cream there are free capacities which lead to competitive pressure.

3.2.3 *Activities of the courts*

99. In the *ProSiebenSat1* case the Düsseldorf Higher Regional Court rejected appeals against the prohibition of the joint video-on-demand platform planned by the broadcasting groups concerned. According to the court, the Bundeskartellamt had rightly prohibited the project. (see Annual Report 2011, 2.2.2.1).

100. The Bundeskartellamt prohibited the proposed joint venture of RTL and ProSiebenSat.1 in March 2011, because the creation of the platform in its envisioned form would have further strengthened the collective dominance of the two broadcasting groups on the TV advertising market. In addition, the expected coordination of business interests via the joint venture would have constituted a violation of the prohibition of anti-competitive agreements.

101. In the *Lenzing/Kelheim* case the Düsseldorf Higher Regional Court rejected the appeals of the parties against the prohibition of the merger. In the view of the parties, the project was not subject to merger control because it affected a minor market. When calculating the domestic turnover for the application of the minor market clause the parties did not include supplies to domestic production sites because the respective supply contracts were concluded by the purchase department in Switzerland. According to the court, all turnover from the supply of goods within Germany was to be included because the actual consignments determine the domestic competition situation. The place of contract, which is coincidental, is irrelevant.

3.3 *Sector inquiries*

102. In June 2012 the Bundeskartellamt started the second phase of its ongoing sector inquiry into the food retail sector by sending out requests for information to almost 200 food producers. This investigative stage focuses on the results of negotiations between food producers and retailers in order to determine which factors are particularly relevant for their bargaining power. A corresponding request for information was sent out to food retailers.

103. In its first investigative stage, the Bundeskartellamt conducted a survey on company and market structures in the food procurement sector. The first survey addressed the market positions of retailers and the options available to producers to partially or completely bypass the major retailers.

104. In August 2012 the Bundeskartellamt published its final report on the inquiry into the district heating sector which it had launched in September 2009. The objective of the inquiry was to clarify key questions on market and competition processes in district heating markets.

105. It was found that there are clear competition deficits in this sector. The locally established providers face practically no competition. Thus the district heating customers have no possibility to switch provider. There are no indications of a generally excessive price level in the district heating sector. However, differences between prices in the individual network areas are considerable and in some cases amount to over 100 %.

106. The sector inquiry showed that installation and network infrastructure as well as the procurement of fuel are the major cost factors in the supply of district heating. Furthermore, the prices in areas where the municipalities make access to the district heating network mandatory tend to be higher. The Bundeskartellamt criticized these legal monopolies and recommended that district heating prices should be published in the Internet and shorter contract periods should be introduced in order to increase competition between different heating systems such as oil, gas or other fuels and district heating.

107. In September 2012 the Bundeskartellamt published its final report on the inquiry into the rolled asphalt sector which it had launched in June 2010. Rolled asphalt is the material used for more than 90 % of road surfacing nationwide. The Bundeskartellamt found that there are competition problems arising from company interlocks between the different suppliers of rolled asphalt in Germany.

108. The inquiry revealed that there is a nationwide, closely-knit network of company participations and jointly operated asphalt mixing plants in Germany. In particular the four major suppliers hold participations in 405 of the 550 asphalt mixing plants. 60 % of these are operated as joint ventures. Such a widespread network can result in conflicts of interest as well as mutual dependencies and business considerations and thus have a negative impact on competition in the sector.

109. The Bundeskartellamt examined recurring problematic market constellations and assessed them under competition law aspects. According to case law it is generally presumed that anti-competitive business considerations are practised among associates and a joint venture if at least two of the associates and the joint venture are active on the same product and geographic markets with their own mixing plants. The application of this general presumption has to be reviewed in each case. In the case of rolled asphalt, the presumption applies to close to 60 % of the 130 joint ventures in the market.

110. In December 2012 the Bundeskartellamt published its final report on the sector inquiry into compliance schemes („dual systems“) which it had launched in July 2012. The object of the inquiry was to analyse the effects of the liberalisation on the market for the recovery and recycling of sales packaging discarded by private end consumers.

111. The company “Duales System Deutschland” (DSD) held a monopoly position in the waste management sector in Germany since its foundation in 1990 until 2003. With a number of competition enforcement measures this monopoly has been gradually transformed into a competitive market. The competition which has since developed between nine service providers in Germany has led to substantial cost savings and improvements in the quality of recycling. As a result previous annual total costs of around EUR 2 billion have in the meantime fallen under EUR 1 billion per year.

112. The opening up of this sector to competition was accompanied by concerns that this could have negative consequences for the quality and reliability of the system. The report proves that the opposite is true. In addition to the substantial savings in costs, a wave of innovation in technology for sorting the mix of waste material in the yellow bin has been unleashed.

113. In spite of the success of liberalisation, municipal waste management providers and to some extent the private waste management industry are still calling for the elimination of competition between compliance schemes. They suggest that the awarding of contracts for disposal services be transferred from the compliance schemes to a “central agency” or the municipalities. The Bundeskartellamt indicated that a renewed monopolisation of the award of waste management services would result in higher disposal costs and a loss of innovation.

114. In September 2012 the Bundeskartellamt launched its inquiry into the refineries and oil wholesale sector. The aim of this ongoing sector inquiry is to obtain information about the intensity of competition in the refinery and oil wholesale markets and to reveal any competition problems.

115. The focus of this inquiry is on competitive conditions on the production and wholesale levels of the sector, which are upstream of the petrol station market. These include the refinery sector on the one hand and the physical transport and storage of crude oil and oil products on the other. At the same time the inquiry examines trading activities in the oil wholesale markets.

116. The sector inquiry is of great significance for the Bundeskartellamt’s case practice, not only in respect of the market levels under examination but also for assessing the intensity of competition in the petrol station markets.

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

117. The Bundeskartellamt continued to actively participate in the activities, working groups and conferences of the International Competition Network (ICN). In April 2012, Andreas Mundt, President of the Bundeskartellamt, was elected as ICN Vice-Chair. In addition the Bundeskartellamt, together with the US Department of Justice and the Japanese Fair Trade Commission co-chaired the ICN Cartel Working Group.

118. The Bundeskartellamt actively participated inter alia in the 9th Cartel Working Group Workshop, which was held in Panama City, Panama. The Workshop’s main theme was “Enhancing Global Cartel Enforcement: Building on Solid Foundations”. The forum allowed experts from ICN members and Non-Governmental Advisers to discuss relevant topics in-depth.

119. The Bundeskartellamt also actively participated in the 12th ICN Annual Conference in Warsaw, Poland. On this occasion all ICN Working Groups presented current work products and discussed the work plans for the next ICN year.

4.2 ECN/ECA

120. In 2013 the competition authorities of the EU continued their successful cooperation within the European Competition Network (ECN).

121. By the end of June 2013, a total of 1 629 cases were posted on the competition authorities' joint intranet, 168 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 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 dawn raids and hearings of witnesses. The Bundeskartellamt assisted for example the Danish Competition Authority in recovering some electronic evidence. In the period July 2012 to June 2013, under Article 11(3) of Regulation 1/2003, the European Commission was informed about 115 new proceedings initiated by the national competition authorities (NCAs), 13 of which were Bundeskartellamt cases.

122. 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 De-Minimis Guidelines, Merger Working Group). The Working Group on Cooperation Issues and Due Process, of which Germany has been one of the co-chairs since 2004, is currently dealing with the issue of whether and to what extent the divergences in antitrust procedures between member states call for more procedural harmonization to further facilitate cooperation between the national competition authorities. Following up two comparative projects that were finalised last year the Working Group on Cooperation Issues and Due Process issued several recommendations such as the recommendation on powers to investigate or the recommendation on interim measures. The Working Group will continue to work on several other recommendations until the end of 2013. Finally, the ECN Cartel Working Group will finish its comprehensive work on Leniency Convergence at the end of 2013. The highly productive project has inter alia resulted in a recent update of the ECN Model Leniency Programme and a Joint Resolution of the Cartel Authorities concerning the protection of leniency materials from disclosure. It has also led to a very profitable exchange of best practices in the application of leniency programmes.

123. 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 sector and the banking sector are particularly active. As the Bundeskartellamt is carrying out a comprehensive sector inquiry into the food retail sector and is also leading proceedings in the food distribution sector, the experience gained in these areas can be fed into the discussions within the ECN Subgroup Food. Also in the sectoral subgroup for banking and means of payments the Bundeskartellamt presented interim results of several investigations in this area e.g. a case concerning a bank-independent online payment scheme.

124. 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.

125. This year the annual Directors General meeting of the ECA forum (European Competition Authorities) took place in Bucharest/Romania. The issues discussed at the meeting included the advantages and disadvantages of competition in the health sector, the challenges involved in the competitive assessment of vertical competition restraints in online markets, and the issue of minority shareholders in merger control.

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

126. On 4 October 2012, at the invitation of the Bundeskartellamt, the Working Group on Competition Law met in Bonn to discuss current challenges of antitrust implementation and enforcement in Germany and Europe. The Working Group meets once a year to discuss fundamental issues of competition policy. Attendees are primarily university professors from law and economics faculties, high-ranking representatives of national and international competition authorities and ministries, as well as judges from the cartel divisions of the Düsseldorf Higher Regional Court and the Federal Court of Justice.

4.4 *International Conference on Competition*

127. From 20 to 22 March 2013, the Bundeskartellamt organized the 16th International Conference on Competition (ICC) in Berlin. The conference has been held every two years since 1982 and assembles representatives of competition authorities and other competition experts. The Federal Minister of Economics and Technology, Dr Philipp Rösler, the European Commissioner for Energy, Günther H. Oettinger, and the Chairman of the Executive Board of Merck KGaA and President of the German Chemical Industry Association (VCI), Dr Karl-Ludwig Kley, delivered keynote speeches.

128. The four panel discussions examined current issues of international competition law. In the first panel discussion, participants from academia and practice discussed the political content of antitrust. The topic of the second panel was “Different systems – different rights? Due process in a global environment”. In the third panel the latest experiences in competition practice with the use of economic methods in merger assessment were discussed. The conference ended with a panel on competition and the digital economy.

129. With approx. 350 participants from more than 60 countries, the International Conference on Competition provided a forum for leading personalities and competition experts from all over the world to exchange their views and experiences.

5. Resources of Competition Authorities

5.1 *Annual budget (in EUR and USD)*

Budget 2013	Change over 2012
EUR 29.1 million	+2.4 million
USD ¹ 38.06 million	+4,44 million

5.2 *Number of employees*

	2013*	Change over 2012
Economists	54	+2
Lawyers	77	-2
Other experts	11	+2
Support staff	158	+2
Total	300	+4

Updated: 30 June 2013

*Full-time equivalent.

¹ European Central Bank: Exchange rate as of 30 June 2013: 1 EUR = 1.3080 USD
<http://www.ecb.int/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html>

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