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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- 2013 --

17-18 December 2014

This report is submitted by Germany to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 17-18 December 2014.

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN GERMANY

-- July 2013 - June 2014 --

1. Executive summary**1.1 Legislation**

1. On 30 June 2013 the 8th Amendment of the German Act against Restraints of Competition (in German: *Gesetz gegen Wettbewerbsbeschränkungen, GWB*) came into force. The Federal Government will evaluate the effects of the new rules that were introduced with the 8th Amendment of the Act against Restraints of Competition.

1.2 Organisation

2. In 2013 the Bundeskartellamt set up the Market Transparency Unit for Fuels which commenced operations in September 2013. The Market Transparency Unit for Fuels is directly responsible to the Vice President of the Bundeskartellamt.

3. At the beginning of 2014 the Bundeskartellamt installed a unit within its General Policy Division which is specialised in data-based analysis and responsible to the newly created function of Chief Economist.

1.3 Agreements / abusive practices by dominant companies

4. The Bundeskartellamt continues to focus on cartel prosecution and imposed a number of fines against, inter alia, rail manufacturers, manufacturers of household porcelain, wallpaper, and sugar, as well as beer breweries.

5. Competition issues raised by e-commerce are increasingly coming into the focus of the Bundeskartellamt's work. The authority's proceedings against HRS on account of most favoured customer clauses were concluded with the prohibition of these clauses. Amazon dropped its price parity clause after the Bundeskartellamt had opposed this practise. Further investigations targeted selective distribution systems and dual pricing which can restrict trade via individual platforms or online sales in general.

1.4 Merger control

6. The number of merger notifications almost exactly matched that of the calendar year 2012. Among the most significant cases were the prohibition of plans by the administrative district of Esslingen and the town of Esslingen to merge the Esslingen district clinics (Kreiskliniken Esslingen) with the Esslingen clinical centre (Klinikum Esslingen) and two clearance decisions subject to conditions: the acquisition of Brink's Deutschland GmbH and Brink's Transport und Service GmbH by the Madrid-based company Prosegur Compania de Seguridad SA and the acquisition by Funke Mediengruppe of Axel Springer's TV programme magazines. In another case which concerned the participation of the hospital group Asklepios in its rival clinic Rhön-Klinikum, for the first time the parties to a merger decided not to comply with their own commitments which had been undertaken in order to eliminate competition concerns. The merger was therefore retroactively prohibited.

1.5 Sector inquiries

7. In the reporting period the Bundeskartellamt finalized a sector inquiry into buyer power in the food retail sector. The inquiry focused on the conditions of competition between the food retail companies on the one hand and their suppliers on the other. The Bundeskartellamt presented the report on 24 September 2014 and will describe the key findings in the OECD Annual Report 2014/15.¹

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

2.1 Government proposals for new legislation

8. The 8th Amendment of the Act against Restraints of Competition came into force on 30 June 2013. It aims to modernise German competition law. In particular, the new legislation replaces the dominance test in merger control with the SIEC (“significant impediment to effective competition”) test to further align it with European law. Regarding the *legal* framework dealing with abuse of dominance 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. The Act also intends to close loopholes in the current legislation that provide undertakings with opportunities to circumvent a fine by means of restructuring. The Federal Government will evaluate the effects of the new rules of the 8th Amendment of the Act against Restraints of Competition. It will consider further steps to improve the administrative and court procedures for antitrust violations and it will aim to strengthen the enforcement of competition law by authorities and private parties.

2.2 New guidelines

9. In June 2013 the authority published its revised Guidelines for the setting of fines in cartel administrative offence proceedings that determine how the Bundeskartellamt punishes serious cartel law violations and on which criteria it sets its fines.

10. In December 2013 the Bundeskartellamt published a draft of its guidance document “Domestic Effects in Merger Control” for public consultation. The document is designed to help companies and their advisers assess whether a proposed concentration fulfils the requirements of the domestic effects clause in the German Act against Restraints of Competition. The domestic effects clause is one part of the procedural rules in merger control which determine whether a proposed concentration is subject to notification in Germany.²

2.3 Organisation of the Bundeskartellamt

11. In 2013 the Bundeskartellamt set up the Market Transparency Unit for Fuels which commenced operations in September 2013. Its purpose is to monitor the trade with fuels with the objective to detect potential infringements of antitrust law. Furthermore, the Market Transparency Unit enables the consumer

¹ The report on the sector inquiry (in German) and a summary (in English) are available at the Bundeskartellamt’s website:
http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Summary_Sector_Inquiry_food_retail_sector.html?nn=4143316

² In November 2014 the Bundeskartellamt published the revised guidance document:
<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20document%20domestic%20effects%202014.html?nn=3590380>

to get an updated and comprehensive picture of the petrol prices in his area in real-time and consequently to select the petrol station with the lowest prices. The Market Transparency Unit itself does not directly offer price information to the public. Instead, it passes on the price data received to private providers of consumer information services, who in turn will inform the consumers. The Market Transparency Unit for Fuels is directly responsible to the Vice President of the Bundeskartellamt.

12. The Market Transparency Unit for Electricity and Gas Wholesale Trading (MTU-Energy) was established by law in December 2012 as part of the national regulatory authority (*Bundesnetzagentur*); it is to be jointly operated by Bundesnetzagentur and Bundeskartellamt. Its objective is to carry out market monitoring – in close cooperation with the Bundeskartellamt – in the trading of 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, thus implementing the regulation on energy market integrity and transparency (REMIT). Reporting obligations will be kept to a minimum to avoid unnecessary costs for market participants. The MTU-Energy is currently preparing to commence operations. Detailed rules governing the cooperation between Bundesnetzagentur and Bundeskartellamt in the MTU-Energy have been compiled. The MTU-Energy is in the process of procuring a complex IT system to facilitate its data collection and data analysis efforts. At the same time, the MTU-Energy has been taking an active part in the drafting of and consultation on the REMIT implementing regulation, which is to govern the data collection through ACER, to ensure that additional national data collections can be kept to a minimum.

13. At the beginning of 2014, in order to improve the balance between refined analysis and effective competition protection, the Bundeskartellamt installed a unit within its General Policy Division which is specialised in data-based analysis. With this measure it intends to make more effective use of the information potential offered by data-based analysis methods. The now two economic units within the division, Economic Issues in Competition Policy and Data Analysis, Survey Techniques and Econometrics, are coordinated within the newly created function of Chief Economist.

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

14. With regard to cartel detection, the Bundeskartellamt received 44 leniency applications from July 2013 to June 2014. It conducted 12 dawn raids relating to its own proceedings, 6 inspections on behalf of the European Commission and 2 on behalf of other European Competition Authorities. In the period covered by the report the Bundeskartellamt imposed several fines totalling approximately EUR 1 billion.

3.1.2 Description of significant cases

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

3.1.2.1 Agreements

- Competition among ophthalmologists from different federal states in Germany

In July 2013 the Bundeskartellamt concluded a cartel administrative proceeding against the Brandenburg ophthalmologists cooperative "Augenärztegenossenschaft Brandenburg" and the health insurance fund AOK Nordost. Participation in two selective contracts and membership in

the Brandenburg ophthalmologists cooperative had only been allowed to those ophthalmologists who have an accreditation in the federal state of Brandenburg to provide health care services within the statutory health insurance scheme. Competition from ophthalmologists accredited in other federal states was consequently excluded.

- Rail cartel

In July 2013 the Bundeskartellamt concluded its two sets of rail cartel proceedings. The total fines imposed in the rail cartel case amount to 232.14 million Euros.

The first set of proceedings (July 2012 and July 2013) dealt with agreements to the detriment of Deutsche Bahn. The Bundeskartellamt punished a price and quota agreement and imposed fines on ThyssenKrupp GfT Gleistechnik GmbH, TSTG Schienen Technik GmbH & Co. KG, a subsidiary of the voestalpine group and voestalpine BWG GmbH & Co. KG, another voestalpine subsidiary, Stahlberg Roensch GmbH, which since 2010 belongs to the Vossloh group and Moravia Steel Deutschland GmbH. The companies had colluded in the submission of bids for the supply of rails to Deutsche Bahn and thus kept prices at an artificially high level. The fines imposed in these proceedings amount to € 134.5 million Euros.

The second part of the rail cartel proceedings was directed at price and customer protection agreements which have harmed local public transport companies, private, regional and industrial railways as well as construction companies. The aim of the agreements was to divide up tenders or projects among the members of the cartel. The Bundeskartellamt imposed fines amounting to 97.64 million Euros on ThyssenKrupp GfT Gleistechnik GmbH, voestalpine BWG GmbH, Schreck-Mieves GmbH, Holz-Fehlings Gleistechnik und Entsorgung GmbH, Fehlings Narosch Gleistechnik und Entsorgung GmbH, Künstler Bahntechnik GmbH, Heinrich Krug GmbH & Co. KG, and Betzler Eisenbahntechnik GmbH. Nearly all the companies mentioned cooperated with the Bundeskartellamt in the course of the proceedings within the scope of its leniency programme. The rail cartel proceedings were initially triggered by an application for leniency filed in 2011 by the Austrian company voestalpine AG.

- Fine imposed on WALA Heilmittel GmbH for vertical price fixing practices

In July 2013 the Bundeskartellamt imposed fines amounting to a total of approx. 6.5 million Euros on WALA Heilmittel GmbH and representatives of the company on account of vertical price fixing practices. The company was accused of having put pressure on retailers for years, obliging them to comply with WALA's recommended prices for its natural cosmetics products sold under the brand name "Dr. Hauschka". WALA products are mainly sold in pharmacies, perfumeries, beauty salons, department stores and organic supermarkets. A settlement agreement was reached with WALA and its representatives involved. The company has undertaken to formulate its future depot contracts in such a way as to ensure that the contracts cannot be used to fix prices, retailers will be treated equally and internet sales will not be restricted.

- Joint online marketing of videos

In September 2013 the ARD and ZDF broadcasting groups abandoned plans for the online platform "Germany's Gold" they were planning to set up via commercial subsidiaries together with eleven other production and licensing companies after the Bundeskartellamt had expressed competition concerns regarding the business model. The concept envisaged the joint online marketing of videos whose production was mainly financed by user fees against payment. The

plans included agreements on prices as well as certain exclusivity agreements. The Bundeskartellamt had called on the companies to design the business model of their platform in such a way as to ensure compliance with competition law and to provide alternative platforms with non-discriminatory access to productions financed by fees, e.g. to operate an open marketplace based on a technical platform. But ARD and ZDF did not present a concept that would be in line with competition law.

- Manufacturers of household porcelain

In October 2013 the Bundeskartellamt concluded cartel proceedings against manufacturers of household porcelain and imposed fines totalling just under 900,000 Euros on the companies Porzellanfabrik Christian Seltmann GmbH and KAHLA/Thüringen Porzellan GmbH, the ceramic industry association (Verband der Keramischen Industrie) and two individuals involved.

The porcelain manufacturers agreed, inter alia, to raise their prices already from 1 October 2006 in order to implement the increase in value-added tax which only came into effect on 1 January 2007. The association actively assisted the members of the cartel with their agreements. Two of the companies concerned could not be prosecuted due to insolvency and the proceedings against two other parties involved were discontinued for other reasons. A settlement could be reached with the company Kahla, which had cooperated with the Bundeskartellamt during the proceedings and with the ceramic industry association. The proceedings were triggered by an application for leniency by the company Villeroy & Boch AG.

- Amazon - price parity clauses

In November 2013 the Bundeskartellamt terminated its proceedings against Amazon for enforcing price parity clauses on its Marketplace platform after the company had met the requirements set by the authority. Under the price parity clause sellers are prohibited from selling products they offer on Amazon cheaper through any other sales channel. The Bundeskartellamt had called for the legally binding deletion of the price parity clauses from Amazon's contractual conditions with all the sellers on its Marketplace platform and for Amazon to inform the sellers in no uncertain terms that it had changed its conditions and price parity strategy. The Bundeskartellamt cooperated with the British competition authority within the scope of the Network of European Competition authorities, ECN.³

- Gardena - dual pricing system

In November 2013 the Bundeskartellamt terminated proceedings against the garden product manufacturer Gardena after the company promised the Bundeskartellamt to abolish a recently introduced discount system which discriminated against online trading. The contentious issue were staggered trade discounts which Gardena awarded to retailers on the basis of which sales channel (brick-and-mortar or online) they used to sell its products. In the Bundeskartellamt's view this amounted to an illegal dual pricing system because the functional discounts were structured in such a way that only brick-and-mortar retailers were able to benefit from the full discount. In the future the company will apply the same discounts for its brick-and-mortar and online retailers.

³ See case summary B6-46/12 (German): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&v=2. All case summaries are available at the Bundeskartellamt' website.

- HRS - 'best price' clause

In December 2013 the Bundeskartellamt prohibited HRS from continuing to apply its 'best price' clause (most favoured nation clause) and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014 as far as the clause affects hotels in Germany. Most favoured customer clauses restrict competition between existing online portals and make the market entry of new platforms considerably more difficult because they prevent new platforms from offering hotel rooms at lower prices. The most favoured customer clauses in the contracts concluded between the HRS online platform and its hotel partners obliged the hotels to always offer their lowest room price, maximum room capacity and most favourable booking and cancellation conditions available on the Internet also via the HRS portal. Since March 2012 the hotels were even prohibited from offering guests better conditions if they booked in directly at the hotel's reception desk.⁴

- Bosch Siemens - dual pricing system

In December 2013 in the course of a Bundeskartellamt proceeding the household appliances manufacturer Bosch Siemens Hausgeräte GmbH undertook to discontinue its system of performance rebates introduced on 1 January 2013. The rebate system put hybrid dealers at a disadvantage who sold household appliances both in a brick-and-mortar shop and via a webshop. On account of the rebate system, the more turnover hybrid dealers generated via their webshop, the less rebates they received. The Bundeskartellamt was of the opinion that the rebate system of Bosch Siemens Hausgeräte GmbH constituted an anti-competitive system of dual pricing.

- First fines against breweries for price fixing

In January 2014 the Bundeskartellamt imposed first fines in cartel proceedings against breweries for price fixing totalling 106.5 million Euros on the companies Bitburger, Krombacher, Veltins, Warsteiner and Barre as well as seven individuals personally involved on account of illegal price fixing agreements for beer. The proceedings were triggered by an application for leniency filed by Anheuser-Busch InBev Germany Holding GmbH (AB InBev), on which no fine was imposed in accordance with the Bundeskartellamt's leniency programme.

In joint meetings and bilateral contacts the national breweries were the first to agree price increases and their order of magnitude for draught and/or bottled beers. Subsequently, at meetings of the North Rhine-Westphalian regional brewery association in June 2006 and September 2007 several of the nationally active breweries (AB InBev, Veltins and Warsteiner) agreed these price increases with breweries active in North Rhine-Westphalia (including Barre).

In the course of the proceedings not only AB InBev but also Bitburger, Krombacher, Veltins and Warsteiner cooperated with the Bundeskartellamt in compliance with the authority's leniency programme. In addition, the Bundeskartellamt was able to reach a settlement with all five breweries fined in order to terminate the proceedings. The breweries' cooperation in the proceedings as well as the settlement reached were taken into account as mitigating factors in the calculation of the fines.

- Fines imposed on sugar manufacturers for agreements on sales areas, quotas and prices

⁴

See case summary B9-66/10 (German): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B9-66-10.pdf?__blob=publicationFile&v=3

In February 2014 the Bundeskartellamt imposed fines amounting to around 280 million Euros on the three major German sugar manufacturers Pfeifer & Langen GmbH & Co.KG, Südzucker AG Mannheim/Ochsenfurt, and Nordzucker AG, for concluding anticompetitive agreements on sales areas, quotas and prices. The infringements involved the sale of sugar for the processing industry (industrial sugar) and sugar for the end consumer (retail sugar). They took place over several years up to the Bundeskartellamt's search in 2009 and in some cases dated back to the mid '90s. Nordzucker AG cooperated extensively with the Bundeskartellamt within the scope of its leniency programme and obtained extensive immunity from fines. All the companies concerned agreed to have the proceedings terminated by settlement.

- Fines imposed on wallpaper manufacturers for price fixing

In February 2014 the Bundeskartellamt imposed fines totalling around 17 million Euros on four wallpaper manufacturers, their representatives and a trade association on account of price fixing agreements. The companies involved are A.S.Création Tapeten, Marburger Tapetenfabrik J.B. Schaefer, Erismann, Pickhardt + Siebert and the Association of German Wallpaper Manufacturers (Verband der Deutschen Tapetenindustrie e.V., VDT). The proceedings were initiated with a sector-wide dawn raid in November 2010 following an application for leniency by Tapetenfabrik Gebr. Rasch upon which no fine was imposed in accordance with the Bundeskartellamt's leniency programme. The proceedings against Erismann and Pickhardt + Siebert could be concluded by settlement.

- Second set of fines against breweries concerning price fixing agreements

In April 2014 the Bundeskartellamt concluded its cartel proceedings against breweries concerning price fixing agreements for beer with the imposition of further fines amounting to 231.2 million Euros on the companies Carlsberg, Radeberger, Bolten, Erzquell, Früh, Gaffel, the regional trade association Brauereiverband NRW, as well as seven individuals personally involved.⁵

- Standard charges for retailers in electronic cash card payment system

In April 2014 the leading banking associations in Germany undertook a commitment to the Bundeskartellamt to abandon their agreement on standard charges payable by retailers for the use of the electronic cash card payment system. Retailers in Germany paid a standard charge to the bank issuing the Girocard (formerly ec card) for each Girocard transaction. In the Bundeskartellamt's view the standard charge constituted a restraint of competition. Instead individual negotiations between the market participants, i.e. the retailers and card issuing banks, were possible and there was no justification for this restraint. In future the level of the charge will be negotiated between the card issuing banks and retailers.⁶

⁵ See case summary B10-105/11 (German): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B10-105-11.pdf?__blob=publicationFile&v=1

⁶ See case summary B4-9/11 (German): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B4-9-11.pdf?__blob=publicationFile&v=2

- Adidas and ASICS

The Bundeskartellamt initiated proceedings against adidas AG and ASICS after it had received numerous complaints by sports retailers. The companies operate selective distribution systems which only allow authorised retailers to sell their products to consumers. The conditions for online sales include far-reaching prohibitions for retailers to sell via the large online market places.

The Bundeskartellamt closed its proceedings against adidas in July 2014 after adidas amended its conditions for online sales in such a way that they comply with competition law.⁷ The proceedings against ASICS are ongoing.

3.1.2.2 *Abuse of a dominant position*

- Food retail case - abusive demands on suppliers

In July 2013 the Bundeskartellamt issued a statement of objections against EDEKA Zentrale AG & Co. KG for the use of so called "wedding rebates" after the Plus takeover. The authority considered EDEKA's demands on suppliers as abusive. According to the Bundeskartellamt's preliminary assessment, EDEKA had violated the prohibition to induce its suppliers to grant it certain benefits without any objective justification ("Anzapfverbot"). The prohibition applies to retailers which are dominant buyers on the market or (as in the present case) on which the suppliers are at least dependent for the sale of their goods.

In the past years the German food retail market has undergone a strong concentration process. The four main retail groups, namely the Rewe Group, EDEKA, the Schwarz Group and Aldi, together hold a market share of around 85 per cent. For manufacturers of branded products, EDEKA is the strongest buyer for a wide range of their products.

In July 2014 the Bundeskartellamt issued a decision stating that the demands made by EDEKA were abusive.⁸

- Compador

The Bundeskartellamt initiated abuse of dominance proceedings against Compador Technologies GmbH, an affiliated company of Deutsche Post AG (DPAG) after Compador had refused to continue a maintenance service contract for letter sorting machines with PostCon Deutschland GmbH, a competitor of DPAG. In October 2013 the Bundeskartellamt abandoned its proceedings after Compador had submitted to PostCon a proposal for a new contract.

Compador develops, produces and services letter sorting machines for alternative postal service providers. One of its customers is PostCon, a company affiliated with the Netherland-based

⁷ See http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B10-105-11.pdf?__blob=publicationFile&v=1 case summary B3-137/12 (German): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2

⁸ See case summary B2-58/09 (German): http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2014/B2-58-09.pdf?__blob=publicationFile&v=2

PostNL via TNT Post Deutschland B.V. & Co. KG. At the end of 2012, DPAG acquired a minority stake in Compador Technologies GmbH as well as in the newly established Compador Dienstleistungen GmbH, a consolidator and new entrant in the market. Consolidators are companies which collect letter post items from business customers and hand them over to the DPAG mail sorting centres for delivery. Around the time of DPAG's acquisition of stakes in Compador, the maintenance services contracts for the sorting machines supplied by Compador to PostCon were terminated. Without maintenance services a situation could have arisen where a portion of the letters could not have been sorted. Some of the maintenance services could only be provided by Compador. It has since become known to the Bundeskartellamt that after the conclusion of the proceedings PostCon has decided not to conclude a new maintenance service contract with Compador because of other business considerations.

- Deutsche Bahn AG - Suspicion of restricting competition in ticket sales

In January 2014 the Bundeskartellamt initiated proceedings against Deutsche Bahn AG on the suspicion that it had abused its dominant position in the sale of rail passenger tickets after competitors complained that they had at the most only limited access to Deutsche Bahn's sales channels. The Bundeskartellamt is investigating why Deutsche Bahn's competitors cannot sell their tickets at railway stations. It is also examining ticket sales which Deutsche Bahn undertakes on behalf of other companies and to what extent different rates of commission charged for ticket sales on behalf of competitors are justified. Furthermore, it is examining whether Deutsche Bahn is abusing its obligation by law to set joint tariffs to oblige its competitors to use its ticket sales services.

- Water prices in Berlin

In May 2014 Berliner Wasserbetriebe (BWB) and the Bundeskartellamt reached a settlement according to which BWB was to extend measures to lower its water prices as ordered by the Bundeskartellamt for three more years until 2018. The Bundeskartellamt will in return refrain from ordering the reimbursement of excessive prices from the years 2009 to 2011.

On 24 February 2014 the Düsseldorf Higher Regional Court (OLG) rejected BWB's appeal against the Bundeskartellamt's decision of 4 June 2012. In its decision the authority had ordered that the revenue (excluding taxes and duties) which BWB was to earn from the supply of drinking water in Berlin for the period 2012 to 2015 should not exceed a set upper limit. This corresponded to a reduction of on average 18 and 17% compared to 2011. In its order to reduce the level of revenue, which was confirmed by the Düsseldorf Higher Regional Court, the Bundeskartellamt had also reserved the option to order the reimbursement of excessive water prices charged to customers in Berlin in the period 2009 to 2011. The proceedings would have had to be continued to achieve this and an amended decision issued. In agreeing the settlement the Bundeskartellamt has taken into account that continuing the proceedings and a possible judicial review would have taken up more time and resources. The consumers might have had to wait years for the result. A reversal of the previous transactions between BWB and its customers and between landlords and their tenants would also be very time-consuming and costly for all parties concerned. According to the Bundeskartellamt's calculations the volume of reimbursements for the period 2009 to 2011, including interest, would have amounted to just over 170 million Euros. In calculating the savings achieved by extending the order to lower prices (more than 185 million Euros) the Bundeskartellamt based its figures on an inflation rate of 1.5% as provided for in its decision. The settlement also resolved contentious issues such as the exact calculation of the adjusted amount of revenue by deducting fees for special use permits and calculations for the deduction of fees for water abstraction.

3.1.3 *Activities of the courts*

16. In two cartel cases concerning civil antitrust litigation (Stadt Heiligenhafen and Vereinigte Stadtwerke Netz GmbH / Schleswig-Holstein Netz AG) the Federal Court of Justice rejected appeals against decisions by the Schleswig Higher Regional Court, which had held that the award procedure and the criteria according to which the concessions for electricity and gas networks were awarded by the appealing municipalities constituted a violation of competition law. The Federal Court of Justice followed this view.

17. In the Berliner Wasserbetriebe case the Düsseldorf Higher Regional Court confirmed a decision by which the Bundeskartellamt had ordered Germany's largest water provider to lower its excessive drinking water prices.⁹

18. 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. The decision is under appeal before the Federal Court of Justice.

19. The Düsseldorf Higher Regional Court imposed a fine of EUR 55 million on Melitta Europa GmbH & Co. KG, confirming the Bundeskartellamt's fines decision of 21 December 2009. The main focus of the proceedings was not so much the original accusation itself as the question of whether Melitta was liable to pay the fine because since the decision restructuring measures had been carried out within the company group. The Düsseldorf Higher Regional Court decided that Melitta Europa GmbH & Co. KG as the legal successor of Melitta Kaffee GmbH was liable for the fines imposed on the latter because from an economic perspective Melitta Kaffee GmbH and Melitta Europa GmbH & Co. KG could be considered as identical. The Higher Regional Court's decision is not yet final. Melitta Europa GmbH & Co. KG has appealed against the decision to the Federal Court of Justice on points of law.

3.2 *Mergers and acquisitions*

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

20. In the calendar year 2013 1091 mergers were notified to the Bundeskartellamt. In-depth investigations were conducted in 18 cases. The Bundeskartellamt prohibited one merger and cleared eight, two of them subject to conditions and obligations. Two cases were withdrawn during the second phase proceedings. Seven in-depth investigations were still ongoing at the end of 2013.

3.2.2 *Summary of significant cases*

3.2.2.1 *Prohibition of mergers*

- Participation of Asklepios Group in Rhön-Klinikum.

In July 2013 the participation of the Asklepios Group in the rival clinic Rhön-Klinikum was retroactively prohibited because the parties failed to fulfil a divestiture obligation.

⁹ Cf. recital 35 *Water prices in Berlin*

In spring 2013 the Bundeskartellamt had approved plans by Asklepios Kliniken Verwaltungsgesellschaft to acquire a stake of up to 10.1 % in Rhön-Klinikum AG, subject to a condition precedent. The acquisition of the minority stake would have enabled the group to exercise a competitively significant influence and would have strengthened Asklepios' dominant position in the Goslar region. For this reason the Bundeskartellamt cleared the project subject to the condition that the Harzlinik hospital / Dr.-Herbert-Nieper-Krankenhaus and the medical care centre MVZ Harz, both operated by Asklepios, were sold to an independent hospital operator.

It was the first case in which the parties to a merger decided not to comply with their own commitment which was undertaken in order to eliminate competition concerns.

- Hospitals in Esslingen

In May 2014 the Bundeskartellamt prohibited plans by the administrative district of Esslingen and the town of Esslingen to merge the Esslingen district clinics (Kreiskliniken Esslingen) with the Esslingen clinical centre (Klinikum Esslingen). In the Bundeskartellamt's view the merger would have led to a significant impediment of effective competition on the hospital markets of Esslingen and Kirchheim/Nürtingen.

Klinikum Esslingen is the largest hospital in the administrative district of Esslingen. The Esslingen district clinics operate three hospitals for the treatment of somatic illnesses in the administrative district. In 2012 the district clinics were faced with a difficult financial situation in the course of which they took several measures to improve their standing in the market, in particular vis-à-vis their competitor Klinikum Esslingen. Already in 2013 they were able to generate a positive operational result. The operator of the clinics is the administrative district of Esslingen, which also owns the district savings bank Kreissparkasse Esslingen-Nürtingen, one of the major savings banks in Germany. The merger would have led to competition restraints in the market for acute hospitals in the regions of Esslingen and Kirchheim/Nürtingen in which there are no alternative acute hospitals. With the merger of the two leading and closest competitors, a dominant hospital operator would have emerged in the region. The parties to the merger would no longer have been subject to any pressure to follow suit on improvements in the performance and quality of the other party. The parties did not put forward any arguments that the merger would have created advantages which could not have been achieved to a similar extent by less anticompetitive measures. On the contrary, the town and district of Esslingen were firmly set on merging their hospitals and rejected any alternatives to this plan, such as the participation of other hospital operators.

3.2.2.2 *Clearances subject to conditions and obligations*

- Acquisition of Brink's by Prosegur

In July 2013 the Bundeskartellamt cleared the acquisition of Brink's Deutschland GmbH and Brink's Transport und Service GmbH by the Madrid-based company Prosegur Compania de Seguridad SA subject to conditions relating to the Berlin market. The companies had undertaken to sell a substantial share of their business in the Greater Berlin area to third companies prior to the acquisition. The merger affected the markets for cash handling services. These services include inter alia the provision of cash to retailers, banks and their ATMs. Also included are cash processing services (counting, bundling, rolling, authentication). The total national market volume of cash handling services amounts to around half a billion Euros.

The German cash services market is characterised by a highly diverse supply structure. There are local, regional and supra-regional suppliers as well as one single national supplier (Prosegur). A total of around 60 cash services suppliers are active in Germany, most of them regional or local companies. The acquisition of Brink's by Prosegur would have led to the creation of a dominant position in Berlin. Brink's is the leading supplier in Berlin, followed by Prosegur. All other suppliers that are active in Berlin are mainly medium-sized and small companies, and some of them do not offer the complete range of cash handling services. Larger competitors are either not represented in Berlin or, if at all, only with minimal market shares.

- Acquisition by Funke of Axel Springer's TV programme magazines cleared subject to divestiture obligation

In April 2014 the Bundeskartellamt cleared subject to conditions and obligations the acquisition by Funke Mediengruppe of Axel Springer's TV programme magazines Hörzu, TV Digital, Funk Uhr, Bildwoche and TV Neu. Funke Mediengruppe was obliged to sell the former Springer TV programme magazines Bild Woche, Funk Uhr and TV Neu, as well as five minor Funke titles to the independent competitor Mediengruppe Klambt, which so far had not published any TV programme magazines. The Bundeskartellamt accepted Mediengruppe Klambt as an independent competitor after an in-depth examination of the financing provisions of the deal.

Pre merger, four suppliers collectively dominated the reader and advertising markets for TV programme magazines: Axel Springer, Funke Mediengruppe, Heinrich Bauer Verlag (inter alia TV Hören und Sehen, TV 14) and Hubert Burda Media (inter alia TV Spielfilm). The reduction of the number of suppliers in the market by one would have increased the collective dominance of the remaining oligopolists. The Bundeskartellamt expected the sale of the eight magazines to Mediengruppe Klambt to have a sustainable effect, which would prevent a strengthening of the dominant position of the three remaining members of the oligopoly after the withdrawal of Axel Springer from the market. The clearance concluded the second part of an extensive examination of the takeover of several titles of Axel Springer by Funke Mediengruppe.

3.2.2.3 Clearance of mergers

- Acquisition of fireworks importer FKW Keller by Comet

In July 2013 the Bundeskartellamt cleared the acquisition of the fireworks business of FKW Keller by Comet Feuerwerk GmbH in preliminary examination proceedings. Pre merger, there were four major suppliers of fireworks in Germany: WECO, Comet, Keller and NICO. The merger reduced the number of suppliers from four to three. Nonetheless, the Bundeskartellamt was able to establish that the merger did not raise any competition concerns. Large retailers usually invite offers for the supply of fireworks once a year and there is a constant change of supplier. The acquisition strengthens Comet's position as number two in the market. Keller informed the Bundeskartellamt that it was in a very difficult economic situation which it planned to ease by selling off its fireworks business. Due to Keller's difficult economic situation there would have been the risk, without the merger, of the company's customers increasingly switching to WECO, the market leader.

- Component suppliers to the aerospace industry - Acquisition of Permaswage Holding SAS, France, by Precision Castparts Corporation, USA

In October 2013 the Bundeskartellamt cleared the acquisition of Permaswage Holding SAS, France, by Precision Castparts Corporation, USA, in second phase proceedings. Both companies

are component suppliers to the aerospace industry. The merger project concerned the manufacture and sale of fluid fittings used to secure tube and piping systems in aircraft. Every year a turnover of between 200 and 300 million Euros is achieved from the sale of fluid fittings and the trend is growing. In addition to the parties to the merger, the companies Aerofit, Alcoa, Allan Aircraft, Eaton and Parker Hannifin, among others, also supply fluid fittings. Although Precision Castparts will become the leader on the world market for fluid fittings as a result of the merger, its competitors will still be in a position to compete with the company. There are no significant barriers to market entry. Furthermore, the major buyers of fluid fittings, in particular aircraft manufacturers and their component suppliers, will be able to control the scope of activity of the parties as they can switch supplier or support new manufacturers. The merger was also examined and cleared by the US Department of Justice.¹⁰

- Springer/Funke: Takeover of regional newspapers and women's magazines

In December 2013 the Bundeskartellamt cleared the takeover of two regional dailies (Hamburger Abendblatt and Berliner Morgenpost), several advertising newspapers and the women's magazines segment of Axel Springer AG by the media group Funke Mediengruppe. As Funke Mediengruppe had so far not been active on the newspaper markets in Berlin and Hamburg the merger did not raise any competition concerns on these markets. In the women's magazines segment, Funke Mediengruppe will increase its market shares on the reader and advertising markets with the takeover of the Springer magazines, but will still be exposed to substantial competition.

- Acquisition of N24 by Axel Springer

In February 2014 the Bundeskartellamt cleared the acquisition of N24 Media GmbH by the Axel Springer publishing house. N24 Media operates the news and documentary channel N24. The takeover was unproblematic under competition law as N24 is a specialised channel with a limited range of audience and a relatively low share of the TV market."

- Acquisition of a minority share in the sports channel Sport1 by SkyDeutschland

In February 2014 the Bundeskartellamt cleared the acquisition of a minority share in the sports channel Sport1 by SkyDeutschland. The transaction also involved the acquisition of a minority share in Constantin Sport Marketing GmbH (CSM) and the takeover of Plazamedia GmbH TV- und Filmproduktion. The seller in each case was the Constantin Medien Gruppe. Sport1 mainly operates the free TV channel Sport1 and the online portal Sport1.de. In addition it offers several small sports-related pay TV channels that are distributed by Sky and other platforms. CSM markets TV advertising time and online advertising space, mainly for Sport1 but also for third parties. Plazamedia is predominantly active as a producer of sports programmes. The merger project did not give any substantial cause for concern. Although Sky had a paramount market position in the pay TV sector, this was not materially strengthened by the planned acquisition.

- Acquisition by Helios of clinics and medical care centres operated by Rhön

In February 2014 the Bundeskartellamt cleared plans by the Helios clinics, which belong to the Fresenius group, to acquire control of a total of 40 clinics and 13 medical care centres operated

¹⁰ See case summary B6-46/12 (German): B9-92/13: <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2013/B9-92-13.html>

by Rhön-Klinikum AG. In October 2013 the European Commission had referred the merger project to the Bundeskartellamt. In light of the competition concerns expressed by the authority about four regional hospital markets, the parties scaled back their original plans. Helios's announced intention to conclude a network agreement with Rhön and further hospital operators was left out of the merger control proceedings.

In its examination the Bundeskartellamt looked closely at Helios's market position vis-à-vis the health insurance funds. For its hospital and medical care services the operator receives payment from the statutory health insurance funds and the private health insurance companies. Ultimately, the planned merger was not expected to significantly impede effective competition on these markets. On the one hand Helios's position in negotiations on funding in the individual federal states will remain limited even post merger. On the other hand rates of funding are not freely negotiated but are subject to special statutory regulations which restrict market power, allowing in particular the possibility of the health insurance funds to consult an independent ombudsman.

The project was also not problematic in terms of other hospitals' dependence on Fresenius products because here too there were sufficient procurement alternatives in the market. There would also be no incentive for Fresenius to foreclose the market because such measures would seem unprofitable in view of the expected loss of turnover. The extensive investigations in the main examination proceedings also focused on supply markets for outpatient medical care, outpatient dialysis, inpatient psychiatric treatment and inpatient rehabilitation and preventive care. Here there were only minimal and unproblematic overlaps in care provision.

- Acquisition of "bäderwelt" by Cordes & Graefe

In March 2014 the Bundeskartellamt cleared the acquisition of the "bäderwelt" business division of Praetner GmbH & Co. Handels KG by Cordes & Graefe KG. "bäderwelt" is active in the wholesale of sanitary, heating and air conditioning installations. Cordes & Graefe is the leading wholesaler in Germany in this product area.

Cordes & Graefe, together with its purchasing cooperation GC Großhandels Contor GmbH ("GC-Gruppe"), is the only wholesaler for sanitary, heating and air conditioning installations active in the whole of Germany with over 800 locations and around 180 exhibitions for bathroom solutions. In size it has a clear lead over the number two company in this sector, Richter + Frenzel, which is primarily active in south Germany. The sales markets in the sanitary product range are regional markets. The authority examined several markets within a 30 km to 100 km radius of "bäderwelt". In spite of the high market shares in all the variants examined, the acquisition project raised no competition concerns because around 20 other wholesalers and, in particular, Richter + Frenzel were strong competitors on these markets.

There are indications that Cordes & Graefe is also the market leader on the German-wide procurement side. However, its acquisition of "bäderwelt" will not significantly increase Cordes & Graefe's relative bargaining power vis-à-vis manufacturers in this product area. The increase in purchase volumes gained by the acquisition could be estimated as being in the lowest single digit percentage range only. Distribution within this sector mainly takes place at three different levels (manufacturer - wholesale - installer). Although building supply stores and internet dealers have as yet only had an indirect influence on competition, they represent alternative sales channels for manufacturers. In the investigations carried out by the authority, manufacturers, wholesalers and installers of sanitary, heating and air conditioning installations as well as building supply stores and internet dealers were questioned in detail about their comments on the acquisition. Many market participants expressed concern not so much about the merger project as Cordes & Graefe's general growth strategy.

3.2.3 *Activities of the courts*

21. In the Lenzing/Kelheim case the Federal Court of Justice rejected appeals brought by the parties to the proposed merger and thereby confirmed the decision of the Düsseldorf Higher Regional Court which had upheld the Bundeskartellamt's prohibition order. Both, the Düsseldorf Higher Regional Court and the Federal Court of Justice confirmed the Bundeskartellamt's view that all turnover from the supply of goods within Germany is to be included when calculating the domestic turnover for the application of the minor market clause. In particular, the Federal Court of Justice confirmed that the place of contract is irrelevant, because it is the actual consignments that determine the domestic competition situation.

22. In the Xella/H+H case the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's prohibition of the proposed merger and consequently rejected appeals brought by the parties. In this case, the Düsseldorf Higher Regional Court applied for the first time the SIEC test which was introduced to the German Competition Act in June 2013. It held that - as a general rule - the creation or strengthening of a dominant market position amounts to a significant impediment of effective competition. The decision is final as the Federal Court of Justice rejected the parties' appeal against the Düsseldorf Higher Regional Court's decision not to grant leave to appeal on the merits of the case.

23. The Düsseldorf Higher Regional Court revoked the Bundeskartellamt's clearance decision in the Liberty/KBW case upon appeals by the third parties to the proceedings DTAG and NetCologne. The Court adopted a stricter approach than the Bundeskartellamt in respect of both, market definition and competitive assessment of the case. In particular, the Court held that the remedies which the merging parties had proposed and subject to which the Bundeskartellamt had cleared the merger were not sufficient to remedy the Court's competitive concerns. The decision is not yet final.

3.3 *Sector inquiries*

24. In the reporting period the Bundeskartellamt finalized a sector inquiry into buyer power in the food retail sector. The inquiry focuses on the conditions of competition between the food retail companies on the one hand and their suppliers on the other. The Bundeskartellamt presented the report on 24 September 2014 and will outline the key messages in the OECD Annual Report 2014/15.¹¹

25. The sector inquiries on refineries and oil wholesale and the ready mixed concrete sector are ongoing.

4. **The role of competition authorities in the formulation and implementation of other policies**

4.1 *International Competition Network (ICN)*

26. In September 2013 the Bundeskartellamt's President, Andreas Mundt, was elected as the new Steering Group Chair of the ICN. He is supported by the Vice Chairs Bruno Lasserre, President of the French Autorité de la concurrence, and Vinicius Marques de Carvalho, President of the Brazilian Administrative Council for Economic Defense. In addition the Bundeskartellamt, together with the U.S. Department of Justice and the Netherlands Authority for Consumers and Markets co-chaired the ICN Cartel Working Group.

¹¹ The report (German) and a summary (English) are available at the Bundeskartellamt's website: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Summary_Sector_Inquiry_food_retail_sector.html?nn=4143316

27. The Bundeskartellamt actively participated inter alia in the Cartel Working Group Workshop "Tackling Road Blocks to Effective Cartel Enforcement" held in Cape Town on 15-18 October 2013, the Advocacy Working Group Workshop "Advocacy: a driver for change" held in Rome on 12-13 December 2013, and the Roundtable on Investigative Process, hosted by the U.S. Federal Trade Commission and U.S. Department of Justice on 25 March 2014 in Washington which aimed at deepening the discussion of how different investigative practices can enhance the effectiveness of agencies' decision-making and ensure the protection of procedural rights.

28. The Bundeskartellamt also actively participated in the 13th ICN Annual Conference in Marrakech, Morocco, including the Pre-ICN Forum which was jointly organized by the Africa Competition Forum (with the support of the International Development Research Centre), the Regional Competition Centre for Latin America and the World Bank Group.

4.2 ECN/ECA

29. In 2014 the competition authorities of the EU continued their successful cooperation within the European Competition Network (ECN).

30. By the end of June 2014, a total of 1739 cases were posted on the competition authorities' joint intranet, 182 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 Austrian 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 104 new proceedings initiated by the national competition authorities (NCAs), 13 of which were Bundeskartellamt cases.

31. 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 further harmonization of the EU Member States' national procedural frameworks for implementing the EU antitrust rules, following the EU Commission's Communication on the 10th anniversary of Regulation 1/2003. Other horizontal ECN Working Groups, in particular the Cartels and Fines Working Groups, are also currently dealing with issues of procedural harmonization.

32. 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. Within the Sectoral Subgroup Food, the Bundeskartellamt reported on its proceedings regarding abusive behavior in the food retail sector. The Edeka case on wedding rebates met with the interest of the subgroup members especially in the context of ongoing discussions regarding buyer power. The German proceedings were based on a national provision which prohibits a retailer from inducing a supplier to grant it certain benefits without any objective justification if the supplier is dependant on the retailer. Within the Sectoral Subgroup Banking and Payments, the Bundeskartellamt reported on its commitment decision in the electronic cash case, which dealt with fees imposed by banks on retailers for card-based payments in the electronic cash system. The

case attracted ECN-wide attention due to the EU's on-going legislative procedure concerning the regulation of interchange fees.

33. 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.

34. This year the annual Directors General meeting of the ECA forum (European Competition Authorities) took place in Prague/Czech Republic. The issues discussed at the meeting included the coordination of regulatory and competition functions within a single authority, and the use of commitment decisions in antitrust and merger control cases.

4.3 Annual Meeting of the Working Group on Competition Law

35. On 10 October 2013 the Working Group on Competition Law met in Bonn at the invitation of the Bundeskartellamt. At this year's meeting more than 100 competition law experts from the judiciary, ministries, universities and competition authorities discussed the topic "Vertical Restraints in the Internet Economy". The Working Group on Competition Law meets once a year to discuss fundamental issues of competition policy. This year's meeting was again attended by many university professors from law and economics faculties, high-ranking representatives of national and international competition authorities and ministries, as well as judges from the antitrust divisions of the Düsseldorf Higher Regional Court and the Federal Court of Justice.¹²

4.4 International Conference on Competition

36. The Bundeskartellamt's 17th International Conference on Competition (ICC) in Berlin will take place 25 – 27 March 2015. The conference has been held every other year since 1982. It is one of the most internationally renowned events dealing with competition law issues. On this occasion, the heads of competition authorities, antitrust lawyers, academics, politicians, prominent representatives of internationally active companies and other high-ranking participants discuss current and internationally relevant issues of competition policy and competition law. More than 300 participants from about 50 countries are expected.

5. Resources of Competition Authorities

5.1 Annual budget (in EUR and USD)

Budget 2014	Change over 2013
EUR 30.1 million	+1 million
USD ¹³ 41.11 million	+ 3,05 million

¹² The working paper which formed the basis for discussion and the individual statements of the conference participants are available on the Bundeskartellamt's website. http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Vertikale%20Beschr%C3%A4nkungen%20in%20der%20Internet%C3%B6konomie.pdf?__blob=publicationFile&v=2

¹³ European Central Bank: Exchange rate as of 30 June 2014: 1 EUR = 1.3658 USD <http://www.ecb.int/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html>

5.2 Number of employees

	2014*	Change over 2013
Economists	50	-4
Lawyers	85	+8
Other experts	13	+2
Support staff	160	+2
Total	308	+8

Updated: 30 June 2014

*Full-time equivalent.

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