

**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE****Annual Report on Competition Policy Developments in Germany****-- 2016 --****5-6 December 2017**

This report is submitted by Germany to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-6 December 2017.

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## 1. Executive Summary

### 1.1. Digital economy

1. The growing importance of large internet platforms raises new and different antitrust and economic issues. The Bundeskartellamt has reacted quickly and dedicated more resources to tackle these new challenges. During the last years, the authority has already concluded a large number of "internet cases". For example, it prohibited Amazon Marketplace and well-known hotel booking portals from using their so-called "best price" clauses, which obliged retailers or hotels not to offer products or services cheaper elsewhere. The Bundeskartellamt also examined the standard online banking conditions of banks active in Germany and declared these illegal, as they, in the authority's view, significantly impede the use of non-bank and innovative payment systems for purchases in the Internet. The Bundeskartellamt has also no objection to the planned addition of a new payment function to the online payment system 'paydirekt'. Following the Bundeskartellamt's investigation, the company Lego introduced fair conditions for retailers wishing to sell Lego products online. The authority also conducted important merger control proceedings to examine mergers between internet platforms such as real estate and dating portals. It also investigated the online ticket retailer CTS Eventim and has opened proceedings against Facebook. In the latter case, the Bundeskartellamt is following up suspicions that, by violating data protection rules, Facebook is abusing its possibly dominant position in the market for social networks.

### 1.2. Action against anticompetitive practices

2. Cartel prosecution remains a key area of focus of the Bundeskartellamt's work. In the period covered by the report, the Bundeskartellamt imposed several fines totalling approximately EUR 54 million. The proceedings concerned various sectors, such as e.g. automotive parts manufacturers, mattress manufacturers, providers of container transport services, manufacturers of prefabricated garages, sanitary wholesale, the toy industry or TV studios, as well as vertical price-fixing agreements between food manufacturers and food retailers.

### 1.3. Merger control

3. Around 1,200 merger projects were notified to the Bundeskartellamt in 2016.<sup>1</sup> Ten cases were closely examined in second phase proceedings. In four of these cases, the parties to the merger withdrew their notification themselves after the Bundeskartellamt had expressed considerable concern about the planned mergers. One case was cleared subject to conditions. Five cases were cleared without conditions and obligations.

4. As in 2015, the food retail sector played a significant role. The Bundeskartellamt cleared REWE's acquisition of the food retailer Coop subject to the condition that outlets would be sold to an independent third party. Following the ministerial authorisation granted in the EDEKA/Kaiser's Tengelmann case, the Bundeskartellamt also examined the divestment of EDEKA outlets to REWE, which was agreed out of court by the companies to settle their legal dispute about the ministerial authorisation.

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<sup>1</sup> Merger control statistics are only available for the calendar year and not for the period covered by the report (July 2016-June 2017).

## 2. Changes to competition laws and policies

5. The 9th Amendment to the German Competition Act entered into force on 8 June 2017. The Amendment implements the EU directive on antitrust damages, closes loopholes in the system of liability for administrative fines and adapts the current competition law regime to the increasing digitalisation of markets.

6. The Amendment clarifies that a market can be defined without monetary payments. The Amendment introduces a list of factors that can be taken into account to establish market power in digital markets, e.g. network effects, single-homing vs. multi-homing, access to data, and tipping. Furthermore, the Amendment provides for a new merger control threshold based on the transaction value: A transaction will be notifiable if the value exceeds EUR 400 million and the target has significant activities in Germany.<sup>2</sup> Finally, the Amendment allows for far-reaching cooperation between press companies and publishers, in order to make possible for them to compete with new communication media.

7. With the 9<sup>th</sup> Amendment, the Bundeskartellamt has been given new competences in the area of consumer protection. From now on, the Bundeskartellamt can launch a sector inquiry when there is a reasonable suspicion that consumer law provisions have been severely violated. Furthermore, the authority will be able to act as *amicus curiae* before the courts in consumer protection cases.

8. On 2 June 2017, the German Parliament (Bundestag) passed an act introducing a register for competition in public procurement. In future, serious violations which could lead to the exclusion of companies from the award of public contracts for several years will be recorded in a central federal register. This electronic register will be kept at the Bundeskartellamt.

### 2.1. Government proposals for new legislation

### 2.2. Working Papers and Reports

#### *2.2.1. Information brochure "Effective cartel prosecution - Benefits for the economy and consumers"*

9. In February 2017 the Bundeskartellamt published a new edition of its information brochure "Effective cartel prosecution - Benefits for the economy and consumers". The brochure gives an insight into the case practice and investigative activities of the Bundeskartellamt. It explains key elements such as the revised leniency programme, the newly established anonymous whistle-blowing system and how fines are set. The brochure also deals with the opportunities and risks of private cartel enforcement through damages actions and addresses the issue of compliance programmes.

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<sup>2</sup> The Bundeskartellamt, in cooperation with the Austrian competition authority BWB that also introduced a threshold based on the value of the transaction, is working on a guidance document on the new threshold.

### ***2.2.2. Publication of guidance note on the prohibition of vertical price fixing in the food retail sector - public consultation***

10. In January 2017 the Bundeskartellamt published a draft guidance note on vertical price fixing in the brick-and-mortar food retail sector. The guidance note aims to explain to undertakings in the sector, also with the help of practical examples, the background, purpose and scope of the prohibition of vertical price fixing in the brick-and-mortar food retail sector. The information is intended for small and medium-sized undertakings, in particular, which do not have easy access to antitrust advice. The Bundeskartellamt's guidance note complements the European Commission's guidelines on vertical restraints by adding specific advice with regard to practices used in the brick-and-mortar food retail sector.

### ***2.2.3. Annual Report of Market Transparency Unit for Fuels***

11. In February 2017 the Bundeskartellamt published its third annual report on the work of the Market Transparency Unit for Fuels. In the report the Bundeskartellamt evaluated fuel prices throughout Germany (E5, E10 and diesel) for the period from 1 December 2015 to 31 May 2016. The report provides more detailed price analyses for the cities of Berlin, Dresden, Frankfurt am Main, Hamburg, Cologne, Leipzig, Munich and Stuttgart.

### ***2.2.4. Guidance document on merger remedies***

12. In May 2017 the Bundeskartellamt published a guidance document on remedies in merger control cases.<sup>3</sup> The guidance document explains which requirements remedies have to fulfil in order to eliminate the identified impediment to competition and thus enable clearance of the merger subject to conditions and obligations. Additionally, the guidance document describes the procedure for the proposal and implementation of remedies. It also deals in detail with the tasks of trustees, which often play an important role in the implementation of remedies.

## **3. Enforcement of competition laws and policies**

### **3.1. Action against anticompetitive 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 45 leniency applications in the period covered by the report. It conducted 11 dawn raids relating to its own proceedings and three inspections on behalf of the European Commission. In the period covered by the report, the Bundeskartellamt imposed several fines totalling approximately EUR 54 million.

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<sup>3</sup> Guidance on Remedies in Merger Control, May 2017, at: <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.html>

### 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.

#### *Agreements*

##### Hardcore restrictions

- Information exchange between TV studio operators

15. In July 2016 the Bundeskartellamt imposed fines amounting to a total of approximately EUR 3.1 million on Studio Berlin Adlershof (SBA) GmbH, its affiliate Studio Berlin Broadcast GmbH (both located in Berlin) and Bavaria Studios & Production Services GmbH, based in Grünwald near Munich, on account of their participation in an anti-competitive information exchange.

- Fine proceedings because of internal restructuring measures

16. In October 2016 and June 2017 the Bundeskartellamt closed fine proceedings against several sausage manufacturers who tried to escape cartel fines by using internal restructuring measures. The companies were able to make use of a legal loophole which existed until recently: With the 9th Amendment of the GWB, the responsibility for competition law violations committed by companies extends to the legal and commercial successors of the company originally responsible and its controlling parent company.

- Price-fixing agreement between manufacturers of industrial batteries

17. In June 2017 the Bundeskartellamt imposed fines totalling around EUR 28 million on two manufacturers of industrial batteries and their representatives for agreeing between them to levy the so-called "lead surcharge" as a key price component of lead batteries. The proceeding was initiated with a sector-wide dawn raid in April 2014 following an application for leniency by Exide Technologies GmbH, Büdingen, upon which no fine was imposed in accordance with the Bundeskartellamt's leniency programme.

- Fine proceedings for vertical price fixing in the German food retail sector

18. In December 2016 the Bundeskartellamt concluded its last three pending proceedings concerning vertical price fixing in the food retail sector. The authority imposed fines totalling EUR 18.3 million on EDEKA Handelsgesellschaft Nord mbH, Neumünster, and EDEKA Handelsgesellschaft Hessenring mbH, Melsungen, for price fixing agreements on the shop prices for beer products. The series of proceedings on vertical price fixing in the food retail sector was one of the most extensive in the Bundeskartellamt's case practice. All in all, 38 individual fines were imposed on 27 companies. The total amount of the fines imposed was EUR 260.5 million.

- Vertical price fixing in the sale of furniture

19. In January 2017 the Bundeskartellamt concluded its cartel proceedings against furniture manufacturers for enforcing resale price maintenance on retailers. The proceedings were initiated due to complaints by retailers. Fines totalling EUR 4.43 million were imposed on the five manufacturers aeris GmbH, hülsta-werke Hüls GmbH & Co. KG, Heinz Kettler GmbH, Rolf Benz AG & Co. KG and Zebra Nord GmbH as well as on four managers involved.

### Non-hardcore horizontal restrictions

- No objections to savings banks' offer of app-based current account and "Kwitt" payment function

20. In 2016 the Bundeskartellamt examined two joint projects of German saving banks. One project concerned the development of a joint app under the project name "Yomo" ("Your Money"), which would allow a customer to open and operate an account via a mobile telephone. The Bundeskartellamt also examined the project for the joint development of the "Kwitt" payment function, by which savings banks customers in Germany would be able to transfer money from one mobile phone to another. In both cases, the Bundeskartellamt concluded that the cooperation would not raise competition issues and decided not to initiate proceedings.

- Restrictions of online payment services by German banking industry illegal

21. In July 2016 the Bundeskartellamt declared certain rules in the online banking conditions of the German Banking Industry Committee (Deutsche Kreditwirtschaft) as illegal. According to these rules, online banking customers could not use their PIN and TAN in non-bank payment systems to allow access to third party systems, which include so-called payment initiation services. These rules had significantly hindered the use of non-bank and innovative payment solutions for the purchase of goods or services in the Internet.

### Vertical restraints

- Fairer conditions for online sales of LEGO toys

22. After the Bundeskartellamt had initiated proceedings against LEGO, in July 2016 the toys manufacturer agreed to change its discount system in such a way that online retailers would be able to obtain the same level of discount as brick-and-mortar retailers. According to LEGO's previous discount system, retailers could only obtain the highest number of discount points through sales in offline stores because several criteria applied exclusively to the brick-and-mortar trade, e.g. number of metres of available shelf space.

- Bundeskartellamt closes proceedings against Audible/Amazon and Apple

23. In January 2017 the Bundeskartellamt closed its administrative proceedings against Audible.com – a subsidiary of Amazon – and Apple Computer Inc. Following a complaint by the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels), the Bundeskartellamt and the European Commission had examined a long term agreement between the two companies in the area of audiobooks. The investigations focused on the exclusive purchase of digital audiobooks by Apple from Audible for sale in Apple's iTunes Store, as well as on the obligation of Audible not to supply digital music platforms other than iTunes. Following the investigation, the parties abandoned the clauses with effect from January 2017.

### *Abuse of a dominant position*

#### Abusive practices in the lease of high altitude mounting surfaces for the installation of antennas

24. In December 2016 the Bundeskartellamt terminated the administrative proceedings against Deutsche Funkturm GmbH, Münster. The authority investigated

suspected abusive practices by Deutsche Funkturm in the lease of high altitude mounting surfaces for the installation of FM antennas on antenna masts and towers. The planned pricing structure of Deutsche Funkturm for the lease of surface area for FM antennas could have discriminated against smaller broadcasting network operators. To address the concerns of the Bundeskartellamt, Deutsche Funkturm adjusted its price structure.

#### Proceeding on abusive pricing by district heating suppliers concluded

25. In February 2017 the Bundeskartellamt concluded its proceedings on abusive pricing against district heating suppliers. In a number of areas, the suppliers offered commitments in response to the authority's concerns about abusively excessive price increases between 2010 and 2012. The suppliers also agreed to reimburse customers with approximately EUR 55 million in total in the form of separate credits in future annual statements.

#### Model for the award of licences for motorway petrol stations

26. In February 2017 the Bundeskartellamt closed its proceeding concerning the 2018 model of Autobahn Tank & Rast GmbH, Bonn, for the award of fuel supply and distribution licences for motorway petrol stations without a formal decision. Originally these licences were exclusively awarded based on the so-called quota model, i.e. in proportion to the market shares held by the oil companies in the off-motorway petrol station business. The Bundeskartellamt saw the danger that the quota system might restrict possible market entries and individual business strategies of the oil companies. With the new award procedure the share of licences allocated according to the quota system will in future only amount to max. 49 %.

#### 3.1.3. Activities of the courts

##### *Düsseldorf Higher Regional Court confirms the Bundeskartellamt's injunction against the State of Baden-Württemberg in the round timber proceedings*

27. In March 2017 the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision of July 2015 that the joint marketing violates competition law provisions. Via its state company Forst BW, Baden-Württemberg had so far marketed wood not only from its own state forest but also from communal and private forests. The decision affirmed by the appeals court prohibited the state of Baden-Württemberg from selling and invoicing wood on behalf of the other forest owners and from carrying out services directly related to the marketing of timber. The Court agreed that the joint marketing constituted a distribution cartel which restricted the timber market.

##### *Düsseldorf Higher Regional Court confirms the Bundeskartellamt's decision of principle against the running shoes manufacturer Asics*

28. In April 2017 the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision according to which the general prohibition of the use of price comparison engines by retailers implemented through a (selective) distribution system violates competition law and is illegal.

29. The court stated that the case law of the European Court of Justice (Pierre Fabre) was clear on this matter. The prohibition deprived the retailers of an advertising and sales possibility. The appeals court also stated that the prohibition could not be justified on the

grounds of protecting the company's brand image and pre-sale services because consumers of running shoes did not necessarily need or want such services or if so, could inform themselves on the Internet. The prohibition was a hardcore restriction which did not meet the requirements for exemption under European competition law.

30. The court left open whether Asics's earlier distribution system was also anticompetitive because of its ban on the use of Google AdWords and on sales via online marketplaces.<sup>4</sup>

*Düsseldorf Higher Regional Court confirmed and to some extent even increased the Bundeskartellamt's fines against four sweets manufacturers and an industrial association*

31. The Bundeskartellamt had imposed the fines in early 2013 and mid 2014 because the companies involved had exchanged information over several years on the state of negotiations with major food retail chains and to some extent on envisaged list price increases.

32. The four companies Bahlsen GmbH & Co. KG, Griesson de Beukelaer GmbH & Co. KG, CFP Brands Süßwarenhandels GmbH & Co. KG and Feodora Chocolate GmbH & Co. KG as well as the BDSI, which together were fined approx. 14 million euros, had appealed against the authority's decision. In January 2017 the Higher Regional Court confirmed the fines and in some cases increased them by in total around seven million euros to just over 21 million euros.

*Federal Court of Justice has granted leave to appeal the Higher Regional Court's decision regarding EDEKA's abuse of its buyer power*

33. In 2015 the Düsseldorf Higher Regional Court had reversed a decision by the Bundeskartellamt in which the authority had stated that Germany's largest retailer EDEKA had abused its buyer power. With the appealed decision the authority had objected to a number of demands made by EDEKA on its suppliers. On the motion of the Bundeskartellamt, the Federal Court of Justice granted leave in November 2016 to appeal the Higher Regional Court's decision. A decision on the merits can be expected at the end of January 2018.

## 3.2. Mergers and acquisitions

### 3.2.1. Statistics

34. In 2016 1,229 mergers were notified to the Bundeskartellamt. No merger was prohibited, five were cleared after a second phase investigation, one of them subject to conditions and obligations. Four cases were withdrawn during the second phase proceedings. One in-depth investigation was still ongoing at the end of 2016 and was cleared in January 2017.

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<sup>4</sup> The ruling of the Court of Justice on the permissibility of restrictions on the use of third-party platforms in selective distribution systems (Coty case) is expected for December 2017.

### 3.2.2. Summary of significant cases

#### *Demerger proceedings*

35. None

#### *Prohibition of mergers*

36. None<sup>5</sup>

#### *Clearance of mergers*

37. The list of cases described below does not represent an exhaustive list of mergers cleared by the Bundeskartellamt in the period covered by this report, but rather focuses on cases that were subject to an in-depth investigation (first and second phase).

##### Lufthansa leasing of aircraft from Air Berlin

38. In January 2017 the Bundeskartellamt cleared the wet-lease agreement on passenger aircraft between Lufthansa and Air Berlin. With the wet-lease agreement Air Berlin will lease 38 aircraft of the types Airbus A319 and A320, including cockpit and cabin crews, to Lufthansa and its subsidiaries Eurowings and Austrian Airlines. Several competitors of Lufthansa submitted comments in which they opposed the wet-lease agreement. However, the majority of customers and travel agents interviewed did not express any serious competition concerns. The Bundeskartellamt also held intense talks with the Airport Coordinator Germany. The investigations showed that the wet-lease agreement would not have affected the re-allocation of slots that were returned by Air Berlin.

##### Merger between waste management companies

39. In July 2016 the Bundeskartellamt cleared the acquisition of the Bördner group, Limburg, by REMONDIS GmbH & Co. KG, Region Südwest, Mannheim. In addition to determining the market shares of the companies, the Bundeskartellamt examined in particular the results of calls for tender of public waste management authorities and compliance schemes for the collection of household waste, as well as how the merger would affect competitors' access to waste incineration and recycling plants.

##### Acquisition by hearing aid manufacturer Sonova of retail outlet operator Audio Nova

40. In July 2016 the Bundeskartellamt cleared the acquisition of AudioNova International B.V., Rotterdam (the Netherlands), by Sonova AG, Stäfa (Switzerland), the leading hearing aid manufacturer in Germany. With the acquisition, the Sonova group would have become one of the largest hearing aid retail chains in Germany. However, the merger was not expected to foreclose the affected markets to the detriment of other manufacturers or other hearing aid dispensers, nor to cause competition concerns from the perspective of final customers.

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<sup>5</sup> In 2016 four mergers were withdrawn after notification: Medien Union/Dr. Haas (subscription dailies); DSGF/Sparkassen-Marktservice (financial services); Owens Corning/Ahlstrom (glass fibre nonwoven), Cordes & Graefe/Wilhelm Gienger (heating equipment).

### Merger of savings banks in Lower Saxony

41. In August 2016 the Bundeskartellamt cleared the merger between the savings banks Sparkasse Hildesheim, Sparkasse Goslar/Harz and Kreissparkasse Peine in Lower Saxony. The investigations revealed that there were no overlaps in the relevant business areas of the parties, and therefore no addition of market shares.

### Merger in the transport of frozen goods

42. In August 2016 the Bundeskartellamt cleared the acquisition of MUK Beteiligung GmbH, which operates coldstores throughout Germany and also provides services for the transport of frozen foods, by companies of the Nagel Group, Versmold, which mainly provide logistics services for fresh and frozen products. The authority concluded that the merged company's largest competitor along with other companies would have provided sufficient alternatives as logistics providers for frozen foods.

### Merger between savings banks in Bavaria

43. In September 2016 the Bundeskartellamt cleared the merger between the savings banks Sparkasse Ingolstadt and Sparkasse Eichstätt. The investigations revealed that there were no relevant overlaps in the respective business areas of the parties and therefore no addition of market shares.

### Merger of titanium dioxide companies

44. In November 2016 the Bundeskartellamt cleared the acquisition of Sierra Rutile Limited by Iluka Resources Limited. Both companies are active in opencast mining in Australia and Sierra Leone and achieve a joint turnover in the three digit million range with the worldwide sale of the extracted raw materials. The acquisition had to be notified to the Bundeskartellamt because the companies also sell the raw materials to well-known pigment manufacturers with business locations in Germany and achieve significant turnover here.

### Merger in the food retail sector –Rewe/Edeka

45. In December 2016 the Bundeskartellamt cleared the divestment from EDEKA to REWE of 63 food retail outlets in Berlin and two outlets each in North Rhine-Westphalia and the greater area of Munich. The Bundeskartellamt's assessment of the divestment followed after REWE had withdrawn its appeal against the ministerial authorisation according to which EDEKA could acquire the company Kaiser's Tengelmann. Following the acquisition, EDEKA is the market leader in all the market areas affected. According to the authority's assessment, the divestment of the outlets to REWE would therefore not worsen conditions of competition but even lead to structural improvements. On this basis the divestment to REWE could be cleared.

### Merger between pharmaceutical wholesalers

46. In December 2016 the Bundeskartellamt cleared the acquisition of the regionally active pharmaceutical wholesaler Ebert+Jacobi GmbH & Co. KG by the cooperative Noweda, which is active as a pharmaceutical wholesaler throughout Germany. The Bundeskartellamt concluded that pharmacies would still have had several pharmaceutical wholesalers as alternative suppliers after the merger, both at a regional and national level.

### Merger between CTS Eventim and FKP Scorpio

47. In January 2017 the Bundeskartellamt cleared the acquisition of the concert and festival organiser FKP Scorpio Konzertproduktionen GmbH by CTS Eventim AG & Co. KGaA, which is known particularly for its ticket online shop "Eventim.de". The company also provides ticketing services for event organisers and advance booking offices and organises events itself. The acquisition would not have resulted in a relevant change of conditions in the market.

### Acquisition of "tolino" e-book platform by Rakuten

48. In January 2017 the Bundeskartellamt cleared the acquisition by the Japanese online retailer Rakuten Inc. of the assets for the technical operation of the "tolino" e-book platform. The merger primarily affected the technical level of the market, i.e. the operation of digital platforms for media content, including the sale of reading devices. However, the Bundeskartellamt also examined its effects on the markets for the retail sale of electronic books. The acquisition was not expected to raise any competition problems. Although Rakuten is an important global player, it had so far been a comparatively small competitor in the e-book market in Germany.

### Acquisition of minority holdings in HERE mapping service

49. In January 2017 the Bundeskartellamt cleared the parallel acquisition of minority holdings in HERE by Intel and a consortium consisting of the Chinese companies NavInfo and Tencent and the state-owned investment fund GIC (Singapore). HERE provides digital mapping databases. In 2015 a consortium of German car manufacturers (BMW, Daimler, Audi) acquired HERE to jointly develop mapping databases for the future autonomous driving market. It was not expected that other car manufacturers would be foreclosed from technologies which are essential for autonomous driving. There was no overlap in HERE's and NavInfo's activities either, due to their different geographical range.

### Acquisition of minority holdings in Carl Zeiss SMT

50. In January 2017 the Bundeskartellamt cleared the planned minority holding of ASML Holding N.V., the Netherlands, in Carl Zeiss SMT Holding GmbH & Co. KG, Germany. Both companies are internationally active producers of equipment for the manufacture of semiconductors (chips).

### Joint venture "Retail Trade Group"

51. In April 2017 the Bundeskartellamt declared that it had no objection to the planned cooperation between the food retailers Bartels-Langness, Bunting, Georg Jos. Kaes, Klaas & Kock, Netto ApS (Netto Nord) and Real in the newly formed RTG Retail Trade Group. The joint venture is to perform services for the parties in the areas of purchasing, e-commerce, logistics and administration.

### Bundeskartellamt clears EDEKA/Budnikowsky cooperation

52. In May 2017 the Bundeskartellamt cleared the launch of a joint venture between EDEKA, the largest food retailer in Germany, and Budnikowsky, a drugstore company with 181 outlets in the Hamburg metropolitan area. The two companies plan to hive off

Budnikowsky's procurement, IT, e-commerce, administrative and logistic activities in a separate new company in which EDEKA will also have a share.

#### Bundeskartellamt clears takeover of Drillisch by United Internet

53. In June 2017 the Bundeskartellamt cleared the takeover of the mobile telecommunications provider Drillisch AG by United Internet AG. Drillisch is a mobile virtual network operator and does not have a mobile telecommunications network of its own. However, Drillisch has access to up to 30 per cent of the capacities used in the merged Telefónica/E-Plus mobile telecommunications networks. With the takeover of Drillisch, United Internet will gain access to these network capacities.

#### *Clearance with remedies*

#### Merger in the food retail sector – Coop/Rewe

54. In October 2016 the Bundeskartellamt cleared the acquisition of the northern German food retailer Coop eG, Kiel, by REWE Markt GmbH, Cologne, subject to conditions. Coop operated around 200 supermarkets in the federal states of Schleswig-Holstein, Mecklenburg-Western Pomerania, Brandenburg and Hamburg under the brand name "Sky". The authority's investigations showed that the takeover would have restricted competition in eight of the 45 regional markets examined, as well as two districts in Hamburg. The Bundeskartellamt cleared the merger after the merging parties decided to divest 11 branches.

#### 3.2.3. *Activities of the court*

#### *Courts confirmed the authority's prohibition of a joint buying cooperation between the merging parties EDEKA/Tengelmann*

55. In the EDEKA/Tengelmann merger control proceedings the Bundeskartellamt saw the need to prevent some measures being undertaken by the parties which, in the authority's view, would have violated the prohibition of implementing a merger before clearance ("gun jumping"). The prohibition was part of the authority's final decision on the merger in March 2015. In its ruling on that decision in October 2016, the Düsseldorf Higher Regional Court confirmed the prohibition of a joint buying cooperation between the merging parties. The Higher Regional Court's decision was recently upheld by the Federal Court of Justice.

#### *Federal Court of Justice allows further review of the Higher Regional Court's decision regarding a preliminary injunction in the EDEKA/Tengelmann proceedings*

56. The abovementioned decision of the authority had been preceded by a preliminary injunction issued by the authority in December 2014. This preliminary injunction was annulled by the Düsseldorf Higher Regional Court for lack of urgency. The Court did not grant further appeal to the Federal Court of Justice. On the motion of the Bundeskartellamt, the Federal Court of Justice granted further appeal in a decision of July 2017 and will decide on the merits of the case.

### 3.3. Sector inquiries

57. In June 2016 the Bundeskartellamt published a report on the framework conditions of drinking water supply and the control of fees charged by water suppliers in Germany. An extensive empirical part of the report illustrates the differences between the individual structural conditions of the water suppliers in comparison with their price levels. One chapter of the report focuses exclusively on the effects of the amendment to the German Competition Act of 2013, which excluded water charges levied by a public law entity from abuse control under competition law.

58. In December 2016 the Bundeskartellamt launched an inquiry into the household waste collection sector. The sector inquiry will focus on the competition conditions on the regional markets for the collection and transport of household waste.

59. In May 2017 the Bundeskartellamt published the final report on its sector inquiry into submetering. Submetering services cover the consumption-based metering and billing of costs for heating and water supplied to individual dwelling units within buildings as well as the provision of the necessary metering equipment such as heat cost allocators or water and heat meters. The Bundeskartellamt's sector inquiry revealed that there are strong indications of the existence of an uncompetitive oligopoly consisting of at least the two market leaders and possibly some or all of the five major providers.

## 4. Cooperation in international fora

### 4.1. International Competition Network (ICN)

60. The ICN is the most important network of competition authorities worldwide. It comprises more than 130 competition agencies from approx. 120 jurisdictions. Andreas Mundt, President of the German Bundeskartellamt, has been the ICN Steering Group Chair since September 2013 and was re-elected by the Steering Group for a third term in May 2017.

61. The Bundeskartellamt played an active role in all ICN Working Groups in 2016 and took part in several workshops, e.g. the Cartel Workshop in Madrid, Spain, from 2-5 October 2016, the Advocacy Workshop in Mexico City, Mexico, from 3-4 November 2016 and the Merger Workshop in Washington DC, USA, from 15-16 February 2017. Furthermore, the Bundeskartellamt actively participated in the Annual ICN Conference that was held in Porto, Portugal, from 10 May to 12 May 2017. Approximately 600 participants from almost 100 jurisdictions, including approximately 240 representatives and stakeholders from the business, legal and economic communities, as well as international organisations and academics, attended this year's conference. At the Annual Conference, the past year's work products were approved, including the updated Recommended Practices on defining transactions for notification, notification thresholds, merger remedies, and the role of efficiencies in merger analysis; the Analytical Framework for evaluating exclusionary conduct; and the new Good Practices Report on cartel fines along with a checklist for effective leniency programs.

### 4.2. ECN/ECA

62. In 2016-2017 the competition authorities of the EU continued their successful cooperation within the European Competition Network (ECN).

63. By mid-October 2017 a total of 2,342 cases were posted on the competition authorities' joint intranet; 224 of these were Bundeskartellamt cases. The competition authorities also made use of the opportunities for information exchange and assistance in investigations 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 with investigatory measures. For example, the Bundeskartellamt assisted the French Competition Authority in obtaining a written witness testimony for an ongoing fines proceeding in the construction sector. In the period from July 2016 to June 2017, the European Commission was informed about 141 new proceedings initiated by the national competition authorities (NCAs) under Article 11(3) of Regulation 1/2003, 14 of which were Bundeskartellamt cases.

64. The Bundeskartellamt participates regularly and actively in the Advisory Committees on competition law proceedings and merger control cases of the European Commission in Brussels. An essential part of the ECN's joint work takes place in the various ECN Working Groups (Cooperation Issues, Cartels, Vertical Issues, Horizontals and Abuse, Competition Chief Economists, Forensic IT, and Merger Working Group). The Working Group on Cooperation Issues and Due Process, which Germany has co-chaired since the ECN's inception in 2004, has been instrumental in providing the European Commission with the information needed for the launch of its ECN Plus initiative which aims at making competition enforcement in the Member States more effective by harmonising key features of competition procedures throughout the EU. This initiative has in the meantime resulted in the draft proposal for a directive which is currently going through the legislative process. The Bundeskartellamt was also involved in setting up a new ECN Working Group that will deal with Digital Issues in different sectors.

65. Furthermore, the Bundeskartellamt plays an active role in all ECN sectoral subgroups, where an exchange of practical experience takes place. Between July 2016 and June 2017, Bundeskartellamt representatives attended meetings of the subgroups Food, Insurance, Sports, Telecom, Pharma & Health Services, Environment and Banking & Payments. A particular focus has been on the work of the subgroup Pharma & Health Services, where the Commission and the NCAs have had intensive discussions about excessive pricing and parallel trading.

66. The Bundeskartellamt continued to contribute to the ECN Brief, the official ECN newsletter published since 2010, which informs the interested public (e.g. lawyers and companies) about the ECN's activities and decisions adopted by the NCAs.

67. This year, the Annual Directors General meeting of the ECA forum (European Competition Authorities) took place in Berlin, Germany. The issues discussed at the meeting included consumer protection, competition issues in the food supply chain and the development of new tools for cartel detection.

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

68. On 6 October 2016 the Working Group on Competition Law met in Bonn at the invitation of the Bundeskartellamt. At the conference more than 100 competition law experts discussed and exchanged views on the topic "Competition and Consumer Behaviour - conflict or coherence between consumer protection and competition law?"

Among other topics the Working Group discussed whether the public enforcement of consumer law should be strengthened in Germany. Many of the conference participants were of the opinion that the current consumer protection system, which is mainly organised under private law, has its shortcomings and enforcement deficits, e.g. with regard to the general terms and conditions of internet companies. Chaired by the Bundeskartellamt's Vice President Konrad Ost, the meeting featured introductory statements by and a panel discussion with Prof Dr. Susanne Augenhöfer, Humboldt-Universität zu Berlin, Prof Dr. Justus Haucap, Director of the Düsseldorf Institute for Competition Economics (DICE), Prof Dr. Paul Heidhues, DICE, Prof Dr. Rupprecht Podszun, Heinrich Heine University Düsseldorf and Birgit Krueger, Head of the General Policy Division at the Bundeskartellamt. Bernadette van Buchem, Director of the Consumer Department at the Netherlands competition authority (Autoriteit Consument & Markt), gave a talk on experiences made in the Netherlands with enforcing competition law and consumer law by one and the same public authority.

#### 4.4. 7th Franco-German Competition Day in Paris

69. The Franco-German Competition Day is a biennial conference which since 2004 has been hosted in turn in France and Germany. The 7th Franco-German Competition Day was held in Paris on 14 November 2016. The conference's two panel discussions focussed on "Cooperations and mergers in the retail trade in France and Germany" and "Antitrust analysis of digital platform markets".

#### 4.5. 18th International Conference on Competition (IKK)

70. On 15-17 March, 2017 the 18th International Conference on Competition (IKK) took place in Berlin. Every two years the IKK brings together representatives of competition authorities and other competition experts from all over the world. Almost 400 participants from over 60 countries attended this year's conference.

Keynote speakers of the IKK 2017 were Brigitte Zypries, the Federal Minister for Economic Affairs and Energy, Margrethe Vestager, the European Commissioner for Competition and Dr. Frank Appel, the Chief Executive Officer of Deutsche Post AG and Joe Kaeser, Chief Executive Officer of Siemens AG.

## 5. Resources of the Bundeskartellamt

**Table 1. 1.1 Annual budget**

Budget 2017	Change over 2016
EUR 32.9 million	+0.9 million
USD 38.8 million	+ 2.9 million

**Table 2. Number of employees**

	2017*	Change over 2016
Economists	49	+2
Lawyers	87	-1
Other experts	14	+3
Support staff	160	+8
<b>Total</b>	<b>310</b>	<b>+12</b>
Updated: 30 June 2016		

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

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

**Table 3. Type the title here**

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*Note:* Add the note here. If you do not need a note, please delete this line.

*Source:* Add the source here. If you do not need a source, please delete this line.