

V Trento Antitrust Conference

at the Trento Faculty of Law and the Antitrust Observatory
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PANEL 1 – GLOBAL-LOCAL COMPETITION LAW ENFORCEMENT:
RIGHTS PROTECTION, CHALLENGES AND OPPORTUNITIES

Local Cases – Global Legal Problems. The Example of the Brandenburg State Cartel Authority

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Antitrust aspects, monopoly situations and further issues dealt with by the Brandenburg State Cartel Authority

Content of Presentation:

1. Legal Foundations in German Competition Law
2. Responsibilities and Competencies of State Cartel Authorities in Germany
3. Specific Tasks of the Brandenburg Cartel Authority
4. Example of sector inquiries

1. Legal Foundations in German Competition Law

- Basis is the application of the German Law Against Restraints on Competition (= Gesetz gegen Wettbewerbsbeschränkungen – GWB);
- Basic provision: Enforcement of cartel ban, § 1 GWB (comparable to Article 101 TFEU)
- Invigilation of prohibition of abuses of dominant positions by undertakings, § 19, § 20, § 29 and § 31 sec. 4 GWB (comparable to Art 102 TFEU)
- Interventions to other infringements against GWB, for example:
 - offer of products below market price, § 20 para 4;
 - request to boycott products, § 21 GWB

1. Legal Foundations in German Competition Law, #3

- Action for fighting „Restricting competition through agreements in the context of public bids“ – provided in various legal acts

Criminal Action:

- section 298 German Criminal Code – possible punishment: imprisonment of up to five years or a fine (law became effective in 1998),
 - falls under the jurisdiction of prosecution and criminal courts only (Cartel Authorities to give expert opinions; in Brandenburg made in 2013)

Anticompetitive Action:

- section 82, 81 GWB – imposition of fines because of an administrative offence
 - Cartel Authorities may initiate parallel proceedings with prosecution (independent from each other; see also separate presentation) but also close their case and ask the prosecution to take over

Please note: New discussions again on the fact whether also in Germany anti-competitive behaviours should be criminalised and the Criminal Code should be altered accordingly!

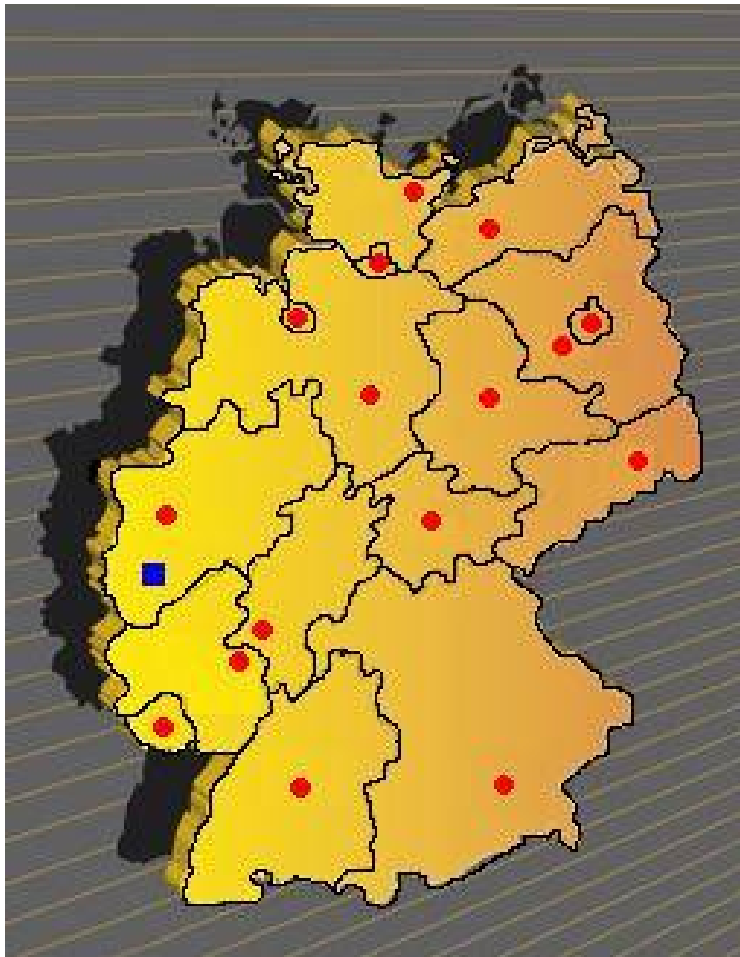
2. Responsibilities and Competencies of State Cartel Authorities in Germany

- Responsible for the execution of the GWB are the Bundeskartellamt and the Cartel Authorities of the 16 Länder, § 48 GWB
- General rule of § 48 GWB: in cases where the responsibility cannot clearly be attributed to the institutions by GWB the Bundeskartellamt is the correct authority to act
- Bundeskartellamt is typically responsible for cases where the probable infringement takes place in more than one federal state (cross-border effect) – comparable to the division of competencies between EU Commission and Member States
- Bundeskartellamt in addition is exclusively responsible for mergers and also serves as first instance on the control of the outcome of public bids of the federal government level

2. Responsibilities and Competencies of State Cartel Authorities in Germany #2

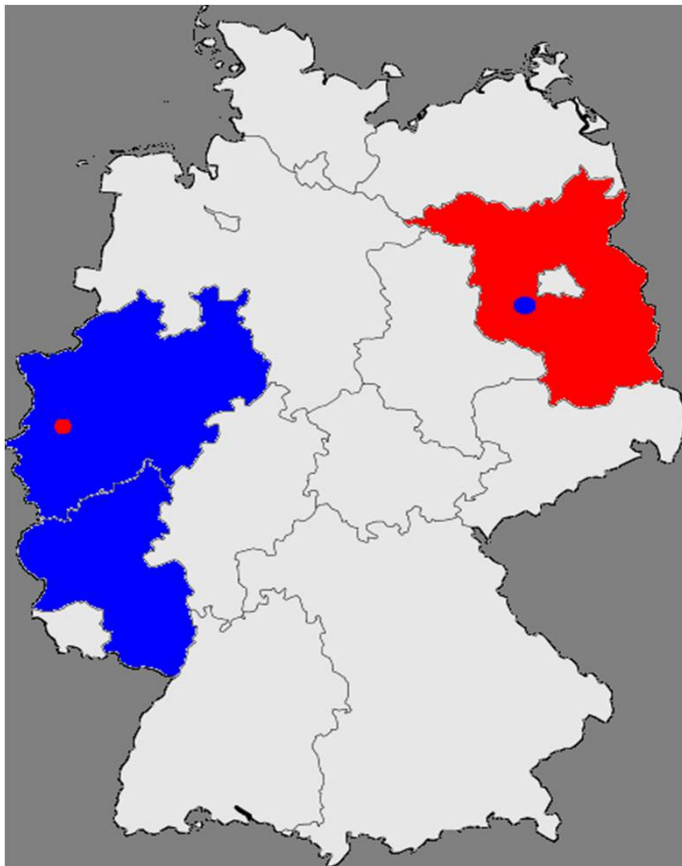
- NCA network as a platform for Member States vis-a-vis DG Competition and biannual meeting series between Bundeskartellamt and the 16 German regional cartel authorities as to – for both levels – discuss case attribution and also exchange legal views on common issues
- Staffing of competition authorities decreases from top level (DG COMP) to low level (e.g., Brandenburg State Cartel Authority)

Competition Authority	EU Commission, DG Competition	Bundeskartellamt, DE	Bundeswettbewerbsbehörde, AT	Brandenburg State Cartel Authority
Number of staff	810	330	40	5



In Germany exist seventeen
Cartel Authorities:

- sixteen State Cartel
Authorities and
- one Federal Cartel Authority
(= Bundeskartellamt) placed
in Bonn



Examples:

- Infringement one (red) occurs only in Brandenburg – jurisdiction of the Brandenburg State Cartel Authority placed in Potsdam (blue dot)
- Infringement two (blue) occurs in more than Federal State (here: Rhinland Palatinate and North Rhine-Westphalia) – jurisdiction of the Bundeskartellamt in Bonn (red dot)

3. Specific Tasks of the Brandenburg Cartel Authority

a. Main tasks of the Brandenburg State Cartel Authority and **sector inquiries**

→ Invigilation of prohibition of abuses of dominant positions by undertakings, mainly in the energy sectors, i.e. central heating and water sector, where market is typically regional

Pre-conditions:

1) Dominant position

a. Definition of market

b. Existence of **monopoly situation** or determination of market share of the undertaking in question

c. Assumption of dominant position of an undertaking in the respective market in cases of shares of at least 1/3 (§ 19 sec. 3)

2) **Abuse of the dominant position** (through **exorbitant prices**; examination via sector inquiries with the help of the so-called market comparison concept: → aim is the simulation of market conditions; use of benchmarks)

3) **No factual justification**

3. Specific Tasks of the Brandenburg Cartel Authority #2

- Many other cases are dealt with by the Brandenburg State Cartel Authority following citizen complaints which require investigations but do not end with a formal closing decision, instead with an informal letter and/ or negotiations
- Investigations, in general, start
 - due to contacts from outside the Authority, such as complaints filed by citizens or competitors or through hints and comments made by TV stations, press; or
 - Ex officio, through the Authorities' own initiative (see especially sector inquiries)
- Leniency programme mechanism available on state level as well as on federal level; state authorities make use of anonymised whistle-blower system of the Bundeskartellamt which was introduced in 2012

3. Specific Tasks of the Brandenburg Cartel Authority #3

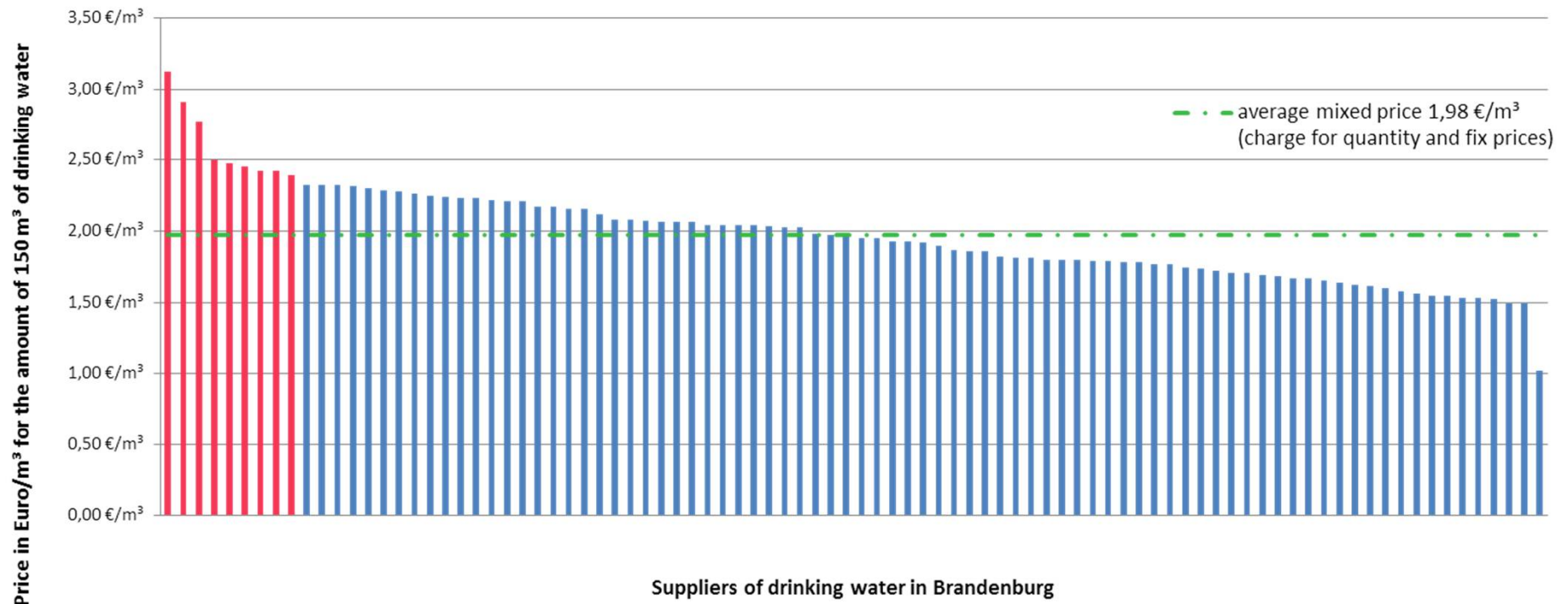
	Sector inquiries	Single cases (closed through formal proceedings/ decision)
2012	none	One case each on abuse of dominant position and a vertical cartel agreement
2013	Drinking water, central heating	One case on abuse of dominant position
2014	Drinking water, central heating (continued)	Three cases on anticompetitive agreements in the context of public bids
2015	Central heating (continued)	One case on anticompetitive agreements in the context of public bids as well as one case on abuse of dominant position

4. Example of sector inquiries

Method for identification of abusive action on the example of drinking water distributors (who in general are natural monopolists – one area = one provider):

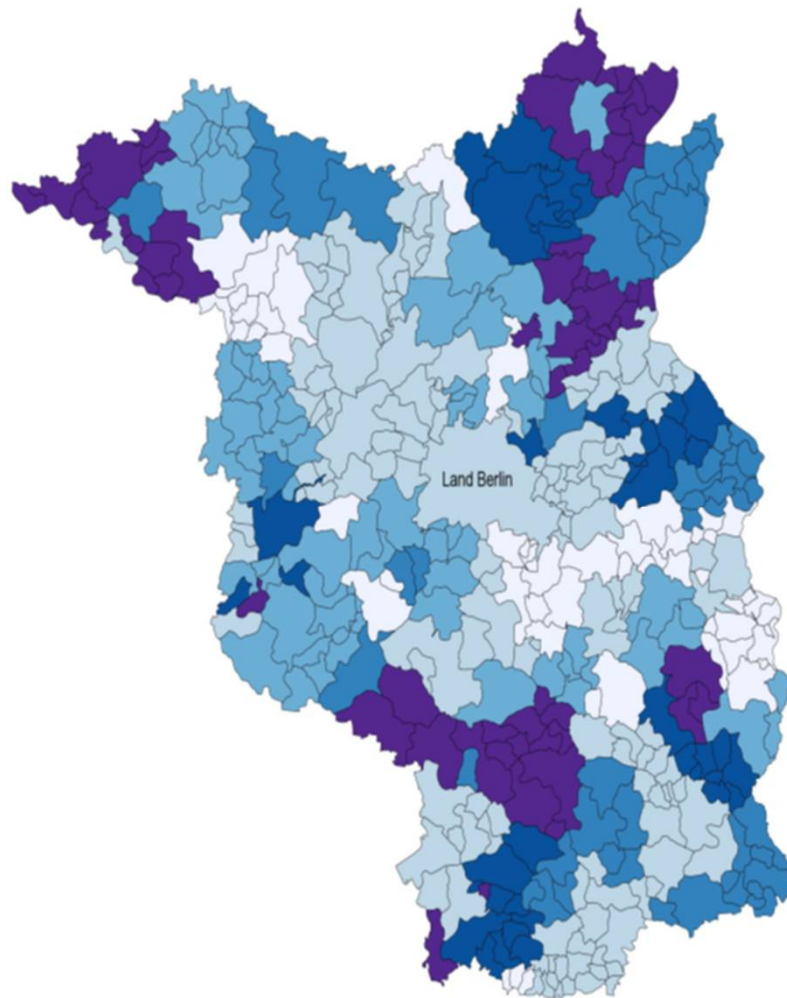
1. Collection of data from distributors including current prices, customer information and cost structure using typical categories for purchase quantities, such as
 - 80 m³/a (2 persons household),
 - 150 m³/a (single family house, 4 persons),
 - 400 m³/a (5 housing units),
 - 1.300 m³/a (15 housing units).
2. Assumption of abusive character of dominant position in case price is 20 % or more higher than average price in at least two of the four categories
3. Application of market comparison concept (benchmarking) in the way that the Authority compares **only** water suppliers of **similar** size and with **similar** numbers of customers to the suspected supplier
4. Suspect supplier may give justifications in arguing that prices are justified, for example through disadvantageous geographical situation (higher costs for water production) or low population density (higher fix costs)

Example of drinking water price-ranking in Brandenburg in 2013/2014



4. Example of sector inquiries #3

- As a result of the two sector inquiries on drinking water in 2010/11 and again in 2013/14 prices were reduced by 5 and 4 suppliers, respectively.
- Example: one reduction achieved amounts to annually 42 € (or 0,23 € per m³) from 367 € in the case of an annual consumption of 150 m³ (standard family of four) where average price was 296 € (= no more abusive character of prices)
- Brandenburg State Cartel Authority has also issued an interactive regional atlas in the drinking water sector in October 2013 along with a report summarising the basic content of the inquiry and outlining the next steps the Authority will follow (only available in DE):
<http://www.strukturatlas.brandenburg.de/> and
<http://www.mwe.brandenburg.de/sixcms/detail.php/bb1.c.343041.de>



Capital Region Berlin- Brandenburg

Net prices for drinking water (Netto)
for 80 m³ (cubic meter), in 10/2013

Price levels per year in Euro:

below 160

160 until below 180

180 until below 200

200 until below 220

220 until below 240

240 and more

Annual average price in the State of
Brandenburg: 194,88 EUR

Source: State Office for Construction,
Traffic and Regional Observation and
Ministry of Economics and European
Affairs; *Maps:* BKG

End of presentation – Contact details

Thank you for your attention!!!

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