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The Handbook of Competition Economics 2019

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The Handbook of Competition Economics 2019

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Global Competition Review is delighted to publish this twelfth annual edition of *The Handbook of Competition Economics*.

With economics at the centre of competition law, this handbook identifies the issues that antitrust economists are tackling today. The book's comprehensive format provides contact details for competition agencies' economists in 77 jurisdictions. A Q&A format illustrates how the advisers are organised and their input into the regulation and enforcement process.

Much of the information has been provided by the agencies themselves and we are, as ever, grateful for all their cooperation.

The Handbook of Competition Economics is one of five special reports included in a *Global Competition Review* subscription, alongside nine issues of the magazine and two signature surveys, 'Rating Enforcement' and 'The GCR 100', each year.

We would like to thank all those who have worked on the research and production of this publication.

The information listed is correct as of October 2018.

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Overview

Hans W Friederiszick, Simone Kohnz and Rainer Nitsche

E.CA Economics

German competition policy enforcement is under ongoing reform: economic analysis is becoming increasingly relevant in case work; enforcement activity in digital markets is high; there are new rights regarding consumer protection for the German competition authority; and the EU private enforcement directive, which will bring broader disclosure rights to German court proceedings, has been implemented.

Economic analysis professionalises and becomes a more common element of case work

The relevance of economic analysis has increased in recent years. At least three critical cases in recent years were based not on market dominance criterion but on significant impediment of competition criterion (SIEC) logic: *EDEKA/Kaiser's Tengelmann* was prohibited (a decision that was recently upheld by the appeals court); *REWE/Coop* was cleared with remedies; and *Ahlstrom Glassfibre Oy/Owens Corning* was withdrawn after the statement of objections was submitted.

Within a SIEC environment, product overlap analysis and measures like upward pricing pressure become more relevant than traditional market share analysis. Accordingly, the Federal Cartel Office (FCO) stepped up its effort in this field. For instance, the FCO invested in methods to match data sets on the product and customer level. This data allows overlap and switching analysis or – more generally – econometric analysis. Equally, consumer-centred regional analysis is becoming a more prominent feature of regional market definition (recent examples include the patient stream analysis in hospital mergers, the *Schwenk/OPTERRA* merger in the cement industry and the *EnBW/MVV Energie* share purchase affecting, inter alia, the markets for refuse incineration). While work on large data sets and the application of econometric analysis were already a normal part of sector inquiries (currently, sector inquiries are open in the hospital sector and waste collection as well as on smart TVs and online portals. The latter two inquiries are run by the newly formed consumer protection unit), they have now become more prominent in individual competition cases, too. In addition, end customer surveys,

carried out by external marketing agencies on behalf of the FCO, are increasingly used to fill data gaps.

The FCO's chief economist team is typically involved in all Phase II merger cases and all other important competition cases except cartels. With a newly formed working group on competition economics, the FCO strengthened its ties to academia.

Enforcement activity in digital markets remains high

The online sector remains a priority in German competition policy, with several high-profile interventions by the FCO. The Ninth Amendment to the German Competition Act, which came into force in summer 2017, introduced specific criteria for the assessment of platform markets. In particular, the amendment clarified that markets with no monetary payments are relevant antitrust markets open for investigations and introduced a new threshold for merger notification based on transaction value (an initiative triggered by the *WhatsApp/Facebook* merger, a significant transaction that was almost overlooked by the authorities). The 2016 staff paper, by the newly formed internet working group of the FCO, has initiated a discussion for an analytically sound competition assessment on platform markets. In parallel, in a joint paper by the German and French competition authorities, the agencies contributed to the debate on big data issues in competition policy. Additionally, the coalition contract of the newly formed German government foresees further reforms of the competition law regarding digital markets in the future.

These policy initiatives are accompanied and based on several high-profile cases pursued by the FCO related to digital markets.

First, best-price clauses implemented by online platforms are considered anticompetitive, both in their broad and narrow variations. Free-rider effects, which could potentially justify those clauses despite potential competition hampering effects, were not considered significant by the agency for the cases under review. Having concluded the *HRS Hotel Booking* case, parallel investigations have been brought against *Booking.com* (currently under appeal; additional analysis has been

requested from the appeals court from the FCO, including customer surveys). Expedia, however, won a court ruling allowing it to maintain broad and narrow best-price clauses given its low market share and, hence, being block exempted.

Second, in the case against Asics involving sales and advertising restrictions with regard to third-party platforms (such as eBay or Amazon) and restrictions to support online search platforms (such as Google), the FCO maintained a strict position, finding that such restrictions are anticompetitive. This decision was upheld by the German courts in a recent ruling. Equally, the FCO intervened internet standards imposed by Ford, Opel and PSA Peugeot Citroen regarding internet car sales. How the recent, more liberal judgment of the Court of Justice in the *Coty* case affects the FCO's position remains to be seen.

Third, the FCO applied some insights from its recent working paper on digital platforms in a ticketing industry case (*CTS Eventim/FKP Scorpio* merger). A ticketing platform serves on the one hand event organisers and, on the other, ticket agencies. Despite high market shares, the merger was cleared. More recently, the subsequent takeover of Four Artists events agency by CTS Eventim was prohibited. And, in parallel, an abuse of dominance case was concluded, prohibiting the exclusivity provisions of CTS Eventim, the leading ticketing system in Germany, with various parties. Both cases are under appeal.

Finally, in December 2017 the FCO informed Facebook of its preliminary legal assessment, considering Facebook to be dominant on the German market for social networks. The authority holds the view that Facebook is abusing this dominant position by making the use of its social network conditional on it being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user's Facebook account. These third-party sites include, firstly, services owned by Facebook such as WhatsApp or Instagram and, secondly, websites and apps of other operators with embedded Facebook application programming interfaces.

New rights regarding consumer protection for the FCO

The FCO received new responsibilities in the field of consumer protection. A new unit was created that holds the right to run sector inquiries with a focus on consumer protection and to support parties in

case proceedings on consumer protection law via an *amicus curiae* provision. Although equipped with less powerful legal instruments than other agencies holding dual responsibility (like Dutch, UK or US competition authorities), it marks the start of Germany introducing an administrative consumer protection enforcement policy (rather than relying on private enforcement alone).

Cartel enforcement and the implementation of the EU private enforcement directive

Administrative procedures have led to fines totalling over €208 million in 2015, €125 million in 2016 and €66 million in 2017. This is a significant reduction compared to the record fine level in 2014 of over €1 billion, bringing it back to the levels of earlier years. This declining trend in administrative fines may come to a halt in 2018: most recently, the FCO imposed fines totalling approximately €205 million on six special steel companies, a trade association and 10 individuals for concluding price-fixing agreements and exchanging competitively sensitive information.

Regarding private enforcement, Germany continues to be one of the preferred jurisdictions for private litigation cases within Europe, leading to complex empirical work by economists in the quantification of damages. With 120 companies applying for access to the decision division's files, the *Sugar* cartel case has become one of the most intensively litigated private damages cases in Germany. Equally, the *Truck* cartels case has come under broad litigation. A wave of cases has also been triggered by the liquidators of the victims, which went bankrupt in the meantime: the liquidator of Schlecker, a drugstore that went bankrupt in 2012, is claiming total damages of more than €300 million from its suppliers. However, a recent judgment, dismissing the claim owing to insufficiently specified foreign turnover and elapsed limitation periods, brought this action to a temporary hold. With a multibillion-euro claim pending at German courts in the *Air Cargo* cartel case and upcoming litigation relating to the above-mentioned hotel booking cases, Germany has cemented its position in Europe as a central litigation hub. Within the Ninth Amendment to the German Competition Act implementing the EU's Damages Directive, the position of victims to sue for compensation in Germany will be further strengthened. Specifically, the extended disclosure right will mark a substantial change to current practice



Hans W Friederiszick
E.CA Economics

Dr Hans W Friederiszick is a director of E.CA Economics and one of the founders of E.CA Economics. He represented the parties in the multibillion *Euro Holcim/Lafarge* merger as well as in the eye-catching German *EDEKA/Kaiser's Tengelmann* case (which was resolved in a ministerial approval). In private litigation, his work in the *Synthetic Rubber* cartel, *Air Cargo* and *Credit Card* cases (plaintiff side) and on *Smart Card Chips* and *FMCG* (defendant side) has been widely recognised.

Hans is also a research fellow at ESMT Berlin. He has published widely and is a regular speaker at international antitrust conferences. Recent publications address the economics of regional state aid, efficiencies in Article 102 TFEU cases (JCLE) and selective distribution systems (*Journal of Antitrust Enforcement*).

He has been retained as an economic expert in German, UK and other European courts and has been named in *Global Competition Review's Who's Who* as one of the field's leading competition economists. From 2003 to 2006 he has been a member of the Chief Economist Team in the DG Comp at the European Commission. Since 2006 he has been part of the faculty of ESMT Berlin. He is also a member of the steering committee of the Association of Competition Economics.



Simone Kohnz
E.CA Economics

Simone Kohnz is a director at E.CA. She has more than 10 years of experience in economic consulting, advising clients from a wide range of industries, in all fields of competition policy and across a number of jurisdictions including Germany, the European Union, the UK and Austria.

In recent years, Simone has specialised in the quantification of damages in private litigation cases. She has advised clients and drafted expert witness reports for German and Austrian cartel and information exchange cases in a variety of industries, including trucks, payment cards, sugar, bumpers and turntable ladders, district heating, fast moving consumer goods and de-icing salt. Simone also has considerable experience in mergers.

Recently, Simone has worked on a number of merger feasibility studies in the fast moving consumer goods industry as well as asphalt plants. She has also provided assistance in the mergers of *Knorr/Bremse*, *H+H/Xella* and *Strabag/Lafarge*. Furthermore, Simone has worked on a number of regulatory cases in telecommunication, transport and pharmaceuticals.



Rainer Nitsche
E.CA Economics

Rainer Nitsche is a director at E.CA and an expert in providing economic advice in competition and litigation cases before the European Commission and national competition authorities in Germany, Austria, the UK and the Netherlands. He has more than 20 years of experience supporting clients in all fields of competition policy enforcement, including cartel and abuse of dominant position cases and merger control (Phase I and Phase II investigations). In addition, he has advised on a variety of regulation issues in network industries (eg, transport, telecommunications, postal services and electricity) and has been published extensively in the field of competition economics.

Besides renowned law firms, his clients have also included the European Commission and national competition authorities. He has extensive experience

as a testifying expert and has acted as a court expert for the Austrian Cartel Court in more than 10 merger and antitrust proceedings. He has served as an economic expert in numerous cartel cases for plaintiffs and defendants from a broad range of industries, including the *Rail* cartel, the *Cold Cut Meat* cartel, the *Automotive Bearings* cartel, the *Sugar* cartel, the *District Heating Tube* cartel, the *Trucks* cartel, the *Gas* cartel, the *Pumpers* and *Turntable Ladder* cartel, the *Automotive Glass* cartel, the *De-icing Salt* cartel as well as cartels in several FMCG industries, grocery retail, waste industries and plant construction.

Recent Phase I and II EU merger cases include *RHI/Magnesita*, *HC/ITC* and *Telefónica/E-Plus*. He has also advised a number of European national governments and state aid recipients.

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E.CA Economics is working on central topics in the field of competition policy and regulation. These include case-related work on European competition matters, such as merger, antitrust or state aid cases, economic analysis within regulatory procedures and studies for international organisations on competition policy issues. E.CA Economics applies rigorous economic thinking with a unique combination of creativity and robustness in order to meet the highest quality standards of international clients. E.CA has offices in Berlin and Brussels.

E.CA Economics is a partner of ESMT Berlin. As a partner of this international business school, E.CA Economics benefits from in-depth business experience of ESMT's faculty as well as from the exceptional research capabilities of ESMT professors specialised in industrial economics, finance and quantitative methods.

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