

COMPETITION ECONOMICS HANDBOOK 2020

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Cornerstone Research

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Competition Economics Handbook 2020

A Global Competition Review Special Report

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CONTENTS

Albania.....	1	Estonia.....	43
Algeria	3	Emmi Martikainen and Anssi Kohonen	
Argentina.....	4	Copenhagen Economics	
Armenia	6	European Union	46
Australia	11	Claus Kastberg Nielsen, Adina Claiaci and	
Austria	14	Federico De Michiel	
Azerbaijan	16	Copenhagen Economics	
Barbados.....	17	Fiji.....	53
Belgium	18	Finland.....	54
Bosnia and Herzegovina	20	Emmi Martikainen, Anssi Kohonen and Kalle Kantanen	
Brazil.....	21	Copenhagen Economics	
Bulgaria	24	France.....	58
Canada	26	Germany	60
Channel Islands.....	29	Hans W Friederiszick, Simone Kohnz and	
Colombia	30	Rainer Nitsche	
Croatia	32	E.CA Economics	
Cyprus.....	34	Greece	67
Czech Republic.....	35	Hungary.....	68
Denmark.....	36	Iceland.....	70
Henrik Ballebye Okholm and Torben Thorø Pedersen		India	71
Copenhagen Economics		Indonesia.....	72
Egypt.....	41	Ireland.....	74
El Salvador	42	Israel	76
		Italy	78
		Jamaica.....	79
		Japan.....	81
		Kenya.....	83

Korea	86	Russia	123
Latvia	87	Serbia.....	126
Emmi Martikainen and Mindaugas Cerpickis Copenhagen Economics		Seychelles	128
Lithuania	91	Singapore	130
Mindaugas Cerpickis and Emmi Martikainen Copenhagen Economics		Slovakia	131
Luxembourg.....	94	Slovenia	133
Malaysia	95	South Africa	134
Malta.....	97	Spain.....	136
Mauritius	98	Swaziland	138
Mexico	100	Sweden.....	139
Montenegro	102	Karl Lundvall and Mattias Almqvist Copenhagen Economics	
Netherlands	103	Switzerland	144
New Zealand.....	105	Tunisia	146
North Macedonia	107	Turkey	147
Norway	109	Ukraine	150
Henrik Ballebye Okholm and Erik Lindén Copenhagen Economics		United Kingdom	152
Pakistan	114	Peter Davis, Vivek Mani, Can Celiktemur and Vikram Kumar	
Peru	115	Cornerstone Research	
Philippines	117	United States.....	160
Poland	118	Henry J Kahwaty and Cleve B Tyler Berkeley Research Group	
Portugal.....	120	Zambia.....	166
Romania	121	Zimbabwe	168

Global Competition Review is delighted to publish this thirteenth annual edition of the *Competition Economics Handbook*.

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 over 70 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 *Competition Economics Handbook 2020* is one of five special reports included in a *Global Competition Review* subscription each year, alongside four issues of the magazine, a survey on a four-year rotation (*Corporate Counsel* published in January 2019 and *40 Under 40*, to be published in January 2020) and two signature surveys, *Rating Enforcement* and *The GCR 100*.

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 2019.

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Overview

Hans W Friederiszick, Simone Kohnz and Rainer Nitsche

E.CA Economics

German competition policy enforcement has stepped into the limelight of political debate with several high profile cases and important policy initiatives characterising the past year. In particular, in digital markets enforcement activity remains high, with the *Facebook* decision being delivered and the *Amazon* case being closed. Furthermore, the telecommunication case *Vodafone/Unitymedia*, while being decided by the EU Commission, will have a strong impact on the German market. However, also in traditional industries the intervention rate stays high. The prohibition decision of the *Remondis/Duales System Deutschland* takeover was decided on mostly vertical grounds and featured prominently in the press due to its impact on German citizens. Equally, and in response to the failed *Alstom/Siemens* merger, the ministerial approval of the *MIBA/Zollern* joint venture highlights the commitment of the German government to support small and medium-sized German enterprises. In the cartel area, administrative fines have increased again to its second highest level over the past 10 years.

Facebook, Vodafone/Unitymedia and digital markets

In February 2019, the Federal Cartel Office (FCO) delivered its final legal assessment on the Facebook abuse case, considering Facebook to be dominant on the German market for social networks for private users, with a market share of 95 per cent of daily active users. 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. This behaviour of Facebook is, according to the assessment of the FCO, in violation of the General Data Protection Regulation and is considered to be an exploitative abuse based on § 19(1) of the German Competition Act. In a judgment from August 2019, the Higher Court of Dusseldorf sided

with Facebook and suspended the decision of the FCO, expressing doubts that the conduct infringed competition rules. The FCO announced its commitment to appeal this decision.

Another decision that may shape the digital landscape in Germany relates to the German broadband infrastructure. In July 2019, Vodafone won approval to take over Liberty's cable business in Germany and in several Eastern European countries. This transaction will reunite the regionally separated nationwide cable network and thereby allow infrastructure-based competition between Deutsche Telekom and Vodafone on a national scale. As the European Commission – in close consultation with the FCO – raised serious doubts due to horizontal overlaps between Vodafone's retail digital subscriber line business and Liberty Global's cable footprint, the merger was approved only in Phase II with remedies. Telefónica, one of the leading mobile operators in Germany, received exclusive access to cable wholesale products for a specified period, thereby enabling cable wholesale access for the first time in Germany. Additional remedies were imposed to limit the bargaining power of the new entity vis-à-vis TV broadcasters. The transaction will have a substantial impact on the rollout of high-speed internet infrastructure in Germany.

On the whole, Germany remains very active in shaping the European policy agenda on digital markets. The proceedings against Amazon came to an end in July 2019 after Amazon agreed to change its general terms and conditions, and to strengthen the rights of third-party suppliers on Amazon's open market place in relation to liability, cancellation rights and mandatory publication rights of product descriptions. The decision will affect Amazon's practice across the globe. Provisions related to access to and usage of information on sales of open market place suppliers, ranking issues or issues related to Amazon's Buy Box are being looked at in a parallel proceeding at the European Commission and were, as a result, not addressed in these proceedings. Issues related to Amazon's own sales were also not looked at.

Remondis and vertical mergers

In another landmark case, the takeover attempt of Duales System Holding GmbH & Co KG (DSD) by Remondis, the FCO prohibited a by-and-large vertical merger in the German waste collection industry. DSD, a former state owned monopolist who is by now exposed to fierce competition, is active in the market of 'dual systems'. DSD organises the collection and disposal of packaging waste, including plastic, glass and paper waste. Remondis is one of the leading waste collectors in Germany, thereby providing services to DSD. The FCO was expecting foreclosure both of rivals of DSD as well as of Remondis, relying in its prohibition decision on raising rivals' costs and customer foreclosure strategies. In contrast to the standard prognosis horizon in merger proceedings of three to five years, it considered a horizon of up to 10 years appropriate due to institution setting in this industry. Despite remedies being offered by the parties, the case ended with a prohibition, a decision that came meanwhile under appeal.

Miba and ministerial approval

An earlier prohibition decision by the FCO was thwarted by the German Economic Minister Peter Altmaier. The deal between the bearings makers Miba and Zollern was overturned by the minister, using his - rarely used - ministerial right to overrule the FCO's decision. This ministerial approval is based on the condition that the parties commit to a €50 million investment, spread over four years, in research and innovation in green energy technology, supporting the German energy transition and sustainability goals. This decision was taken by the ministry despite the fact that the German Monopoly Commission advised against such an approval.

Cartel enforcement

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. In 2018, this declining trend in administrative fines came to a halt: 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, bringing the total fines in 2018 to the second highest level over the past 10 years at €376 million.

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 Cartel* case has come under broad litigation. A wave of cases have 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 settlements between DB AG and Lufthansa AG in a multibillion-euro claim pending at German courts in the *Air Cargo Cartel* case and a new multimillion claim brought by Idealo against Google in the *Google Shopping* case, Germany has cemented its position in Europe as a central litigation hub.



Hans W Friederiszick
E.CA Economics

Dr Hans W Friederiszick is a director of E.CA Economics and a founder of the firm. He has extensive experience in advising clients in all fields of competition economics (cartels, merger cases, abuse of a dominant position and state aid cases) and has led teams of economists on international antitrust investigations.

His major international engagements in recent years include: winning a framework contract on impact assessments of various state aid regimes (for the EU Commission); the takeover of some assets of Unitymedia by Vodafone, the *Air Berlin/TUI* joint venture, EU Phase I, the *Holcim/Cemex West* transaction, EU Phase II and the *Holcim/Lafarge* transaction, EU Phase I (merger); acting as an economic expert in the *Synthetic Rubber Cartel* case, UK Court proceeding, for a group of European tyre manufacturers (private litigation); the *Visa/MasterCard* litigation regarding interchange fees, UK Court proceeding, for a group of retailers (private litigation); and acting as an economic expert in the *Air Cargo Cartel* case, German Court proceeding, for a group of international freight forwarders (private litigation).

Further engagements comprise the representation of the leading German grocery retailer in various proceedings (sector inquiry, *EDEKA/Kaiser's Tengelmann* merger); economic representation of Infineon in the EU investigation of the smart card chip industry (administrative proceedings and follow-on litigation in the UK); supporting Deutsche Bahn and ÖBB in relation to EU state aid and 102 proceedings in various rail markets; acting in several information exchange cases of branded products (on defence side; drugstore products, confectionery, coffee, cookies, flour). He also supported Asics in the German court proceedings regarding selective distribution systems and supported the parties in the *Audiobooks* case in Germany (Audible).

Hans W Friederiszick is a research fellow at ESMT Berlin. Recent research addresses the economics of regional state aid (Wolters Kluwer), efficiencies in article 102 TFEU cases (*JCLE*), selective distribution systems (*Journal of Antitrust Enforcement*) and the reverse privatization in the German waste industry (*NZKart*).



Rainer Nitsche
E.CA Economics

Dr Rainer Nitsche is a director and founder of E.CA Economics 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 25 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 (transport, telecommunications, postal services and electricity) and has published widely in the field of competition economics. Rainer Nitsche is a research fellow at ESMT Berlin, where he teaches courses on digital platform strategy.

Besides renowned law firms, his clients have also included the European Commission and national competition authorities. Rainer Nitsche has extensive experience as a testifying expert. He has acted as a court expert in over 10 merger and antitrust proceedings. He has served as an economic expert in numerous cartel cases for courts, plaintiffs and defendants from a broad range of industries including the trucks cartel, the elevator cartel, the rail cartel, the cold cut meat cartel, the automotive bearings cartel, the sugar cartel, the district heating tube cartel, the utility vehicle cartel, the gas cartel, the pumpers and turntable ladder cartel, the automotive glass cartel, the LPG cartel, the de-icing salt cartel as well as cartels in several fast-moving consumer goods industries, grocery retail, waste industries and plant construction.

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



Simone Kohnz
E.CA Economics

Dr Simone Kohnz is a director at E.CA Economics. 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.

Simone Kohnz is an expert 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, pumpers and turntable ladders, district heating, fast-moving consumer goods and de-icing salt. In addition, Simone Kohnz has managed the economic analysis in a large number of merger proceedings, including mergers in the fast-moving consumer goods industry (eg, *Rewe/Adeg*), automotive supply (eg, *Knorr/Bremse*), construction (eg, *H+H/Xella*) and cement (eg, *Strabag/Lafarge*). Furthermore, she worked on a number of regulatory cases in telecommunication, transport and pharmaceuticals.

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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.

