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# Germany Overview

Hans W Friederiszick, Thomas Hildebrand,  
Simone Kohnz and Rainer Nitsche  
E.CA Economics

JANUARY 2021

**GCR INSIGHT**

## Introduction

Competition law enforcement kept its high activity level in Germany over the past year and led to important court victories for the Federal Cartel Office (FCO). In digital markets, the Facebook decision has been endorsed by the highest German court, the Amazon case has been closed successfully, the last battle in one of the first 2SM abuse cases, the case against CTS Eventim, was finally won by the FCO in the courtroom. Furthermore, the cases Vodafone/Unitymedia and Deutsche Telekom/EWE will have a strong impact on the German broadband infrastructure: in both cases the incentives to invest into optical fibre were central concerns. Policy papers on digital markets, the latest report drafted in collaboration with the French Competition Authority on “Pricing Algorithms”, demonstrate the FCO’s appetite to shape the debate in this field; with the 10th Amendment of the German Competition Act in implementation, the FCO’s initiatives will be grounded in an antitrust law tailored towards digital markets.

But also in traditional industries the intervention rate stays high and innovative. The prohibition decision of the Remondis/Duales System Deutschland (DSD) takeover was decided on mostly vertical grounds. The decision was appealed by the parties but the court sided with the FCO. With the prohibition of a proposed merger in the cash-handling industry, the Ziemann/Loomis merger, the FCO delivered a significant impediment of effective competition prohibition case. The ministerial approval of the MIBA/Zollern joint venture highlights, on the one hand, the commitment of the German government to support the German Mittelstand. The approval decision of the proposed takeover of Vossloh Locomotives by a Chinese rival, on the other hand, proved the independence of the FCO from political lobbying.

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.

## Facebook, fibre-optic deployment and digital markets

In February 2019, the 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, first, services owned by Facebook such as WhatsApp or Instagram and, second, 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 section 19, paragraph 1 of the German Competition Act. In a judgment from August 2019, the Higher Regional Court of Dusseldorf sided with Facebook and suspended the decision of the FCO, expressing doubts that the conduct infringed competition rules. A decision by the Federal Court of Justice of June 2020 annulled the decision of the Higher Regional Court, though, and rejected the request to order the suspensive effect of the appeal. The Federal Court rather sided with the FCO and went even beyond the position held by the FCO: independent of whether there is a violation of the General Data Protection Regulation, the lack of options for users to choose the degree of privacy exploits users in a manner that is relevant under competition law since – due to Facebook’s dominant position – competition is no longer able to effectively exercise its controlling function. Based on the FCO’s findings, a considerable number of private Facebook users wishes to disclose less personal data. If competition on the market for social networks were effective, so the argumentation of the Federal Court, this option could be expected to be available.

Two decisions that may shape the digital landscape in Germany relate 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 German FCO – raised serious doubts due to horizontal overlaps between Vodafone’s retail DSL 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 as regards TV broadcasters. The transaction will have a substantial impact on the rollout of high-speed internet infrastructure in Germany. Several parties challenged the decision at the European courts.

Another decision was taken by the FCO in relation to a cooperation agreement or joint venture between Deutsche Telekom, the national telecom incumbent, and EWE, a regional network operator. The cooperation or joint venture was assessed both under Section 1 German Competition Act or article 101 TFEU and the German merger regulation. Focus of the competition concerns was the likely effect of the cooperation on the incentives to invest in fibre rollout. According to the FCO, the joint venture could have had a negative effect on the investment incentives of the parties in particular in metropolitan areas where network duplication is economically feasible. Interestingly, based on the section 1 German Competition Act or article 101 TFEU assessment, the parties agreed to upgrade more connections than was originally planned by each of them individually and also agreed to grant access to third-parties on non-discriminatory terms. The parties also agreed to remain competitors in tenders of fibre rollout in rural areas. Based on these commitments due to antitrust proceedings, the FCO approved also the proposed joint venture. This procedural “peculiarity” allowed the clearance of a concentration based on a market outcome remedy normally not accepted by the FCO within merger proceedings.

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 looked at in a parallel proceeding at the European Commission, though, and were hence not addressed in these proceedings. Issues related to Amazon’s own sales were also not looked at.

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 event organisers on the one hand and ticket agencies on the other. 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. While the prohibition was confirmed by the Higher Regional Court in 2019, now in 2020 the German Supreme Court dismissed the company’s appeal of the lower court’s refusal to allow an appeal. Specifically, it rejected the parties claim that an “as-efficient-competitor test” is an appropriate methodology to rebut competition concerns due to exclusivity agreements – according to the court the relevance of the test is limited to rebates, not to exclusive contracts.

A joint paper with the French Competition Authority on “Pricing Algorithms” demonstrates the FCO’s appetite to shape the policy debate in this field. In their study, the two authorities focused in particular on pricing algorithms and collusion, but also considered potential interdependencies between algorithms and the market power of the companies using them as well as practical challenges when investigating algorithms. Equally, the 10th Amendment of the German Competition Act strengthens the enforcement power and speed of the German FCO. It establishes the concept of “market power of an intermediary” to address the specific role of a platform in multisided markets, strengthening of the “essential facility doctrine” with respect to access to data, and singles out problematic behaviour of larger platforms, like self-preferencing and suppression of multi-homing or data portability. It also lowers the legal requirements for interim measures by the FCO.

While being heavy-handed on dominance and abusive behaviour in digital markets, the FCO seems to be leaning towards a more light-handed approach in the merger arena as far as special-interest platforms are concerned: after the clearance decision of the merger between Immonet and Immowelt in spring 2015, the second and third-largest real estate portals in Germany, the German competition authority also cleared, in second-phase proceedings, the merger of the two leading online dating platforms Elitepartner and Parship – a merger that could be considered a 2 to 1 merger under a more narrow market definition. This decision was based besides others on the relevance of new customer acquisition in this industry and new entrants in the mobile segments. Also, the most recent concentration in the German dating platform market where the mother company of Elitepartner and Parship took over another dating platform in Germany, Lovoo, was approved: the ongoing dynamics with new platforms entering, mobile platforms striving and customer multi-homing extensively enabled the positive decision.

### **Remondis and vertical merger**

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 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. While relying on the standard prognosis horizon in merger proceedings of three to five years, it considered a horizon of up to 10 years 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. In a decision from April 2020, the Higher Regional Court in Düsseldorf dismissed the appeal and upheld the decision by the FCO. However, in its decision the court did not rule on the vertical dimensions of the case but relied on horizontal overlaps in some affected markets.

## Ministerial approval and political independence

The ministerial approval of the MIBA/Zollern joint venture highlights the commitment of the German government to support the German Mittelstand. 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 Energiewende and sustainability goals. This decision was taken by the ministry despite the fact that the German Monopoly Commission advised against such an approval.

The approval decision of the proposed takeover of Vossloh Locomotives, the market leader for the manufacture of diesel-powered shunters in the European Economic Area and in Switzerland, by CRRC ZELC, a subsidiary of China Railway Rolling Stock Corporation, Ltd. and the world's largest manufacturer of rolling stock, was brought despite political pushback in the aftermath of the prohibited Siemens/Alstom merger. The FCO approved the entry of the Chinese player in the European market. Vossloh Locomotives' competitiveness has suffered considerably over the last few years, according to the FCO. Established rail technology manufacturers such as Alstom, Stadler and Toshiba have entered the European market. The market for rolling stock technology is changing towards hybrid traction systems and dual mode locomotives that can be powered by both diesel engine and electricity from overhead wires. The target company Vossloh Locomotives does not offer such locomotives and has lost competitive strength as a result. Despite the approval, the decision offers some guidance on how to assess a takeover from a state-owned company and the interaction to FDI provisions. The German Federal Ministry for Economic Affairs and Energy had cleared the FDI matter earlier, also following an in-depth review of the case.

## Economic analysis in German competition cases

While scope and depth of economic analysis is still behind DG COMP's level on most accounts, the FCO's Chief Economist Team, headed by Arno Rasek and equipped with a team of eight to nine economists has been involved in all Phase II merger cases and all other important competition cases, except cartels. This increasing involvement corresponds to a high number of external economic reports: more than 11 economic testimonies have been submitted by external consultancies in 2019 in merger proceedings alone. This compares to an average of five in the years 2011 to 2014.

## 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 fine in 2018 to the second highest level over the past 10 years to €376 million. In 2019, the FCO imposed fines in cartel proceedings totalling approximately €848 million. In 2019, steel manufacturers again received the largest fine. They had to pay approximately €646 million for agreeing on prices of quarto plates.

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 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. Another judgment by the Higher Regional Court in Frankfurt dismissed the claim on substance. The judgment, potentially, will have a knock-on effect on parallel litigation on the same matter, putting the multimillion-euro claim under risk of complete loss.

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 and founder of E.CA Economics. He has more than 20 years of experience advising clients across the competition economics field (including cartels, mergers, and abuse of a dominant position and State aid cases) and has led teams of economists engaged in international antitrust investigations. He has been retained as an economic expert in German, UK and other European courts, and has been named in Global Competition Review's (GCR) Who's Who as one of the field's leading competition economists. According to WWL's 2019 client survey he is "by far the best economist in Germany and the most sought-after". Hans was part of the first Chief Economist Team of DG COMP (2003 to 2006) and was a member of the steering committee of the Association of Competition Economics (2016 to 2018). Recent publications address Regional State Aid (in Werner/Verouden: EU State Aid Control. Law and Economics), the economic analysis in European competition law (NOMOS Kommentar, Europäisches Wettbewerbsrecht) and cartel litigation activity (Journal of Antitrust Enforcement).

## **Simone Kohnz**

E.CA Economics

Dr Simone Kohnz is a director at E.CA Economics in Berlin. She has 15 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, she has specialised in the quantification of damages in private litigation cases. She has advised clients and drafted expert witness reports for European-wide, 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 regularly testifies as an economic expert in private litigation court cases. Furthermore, Simone has considerable experience in mergers; she has managed the economic analysis in a large number of proceedings; including mergers in the fast-moving consumer goods industry (e.g. Rewe/Adeg), automotive supply (e.g. Knorr/Bremse), construction (e.g. H+H/Xella) and cement (e.g. Strabag/Lafarge). Furthermore, she has worked on a number of regulatory cases in telecommunication, transport and pharmaceuticals sectors.

## **Thomas Hildebrand**

E.CA Economics

Dr Thomas Hildebrand is a director in the Berlin office. He has extensive experience supporting clients across various competition-economics fields, with a particular focus on cartel cases (e.g. trucks, the air cargo and synthetic rubber cartel matters), merger proceedings (e.g. RHI/Magnesita, HeidelbergCement/Italcementi and Immonet/Immowelt) and abuse of dominance cases. Thomas' industry experience spans a broad variety of fields including grocery retailing, fast-moving consumer goods, chemicals, cement, refractories, automotive parts, freight forwarding, print/television/online advertising and digital markets. He has worked on cases brought before the European Commission, the German Bundeskartellamt and the Swiss Competition Commission (WEKO) as well as on private litigation matters. Thanks to his empirically informed background, Thomas has particular expertise in applying statistical and econometric methods to cartel cases and merger proceedings.

## **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 many national competition authorities, including those in Germany, Austria, the UK and the Netherlands. He has more than 25 years of experience in supporting clients in all fields of competition policy enforcement, including cartel and abuse of a dominant position cases and merger control. In addition, he has advised undertakings on a variety of regulation issues in network industries, as well as the European Commission and national competition authorities and state aid recipients in state aid control proceedings. He regularly testifies as a court expert of the Austrian Cartel Court on merger and litigation cases and in arbitration proceedings. His merger experience covers many sectors, including Phase I and II EU merger cases in automotive supply (e.g. ZF/WABCO), cement (e.g. Heidelberg Cement/Italcementi) as well as telecoms (e.g. Telefónica/E-Plus). He is named in GCR's Who's Who as one of the leading competition economists.

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Schlossplatz 1  
10178 Berlin, Germany  
Phone: +49 30 21231 7000

Avenue Louise 500  
1050 Brussels, Belgium  
Phone: +32 2 210 0000

Pestalozzistrasse 32  
80469 Muenchen, Germany  
Phone: +49 89 69313 8211

[www.e-ca.com](http://www.e-ca.com)

**Hans W Friederiszick**  
[friederiszick@e-ca.com](mailto:friederiszick@e-ca.com)

**Thomas Hildebrand**  
[hildebrand@e-ca.com](mailto:hildebrand@e-ca.com)

**Simone Kohnz**  
[kohnz@e-ca.com](mailto:kohnz@e-ca.com)

**Rainer Nitsche**  
[nitsche@e-ca.com](mailto:nitsche@e-ca.com)