



# The European, Middle Eastern and African Antitrust Review 2018

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Published by Global Competition Review in association with

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# Germany: Federal Cartel Office



**Andreas Mundt**  
President

Digitalisation and globalisation are triggering an enormous transformation process that is challenging not only for the business community but also for competition authorities, which have to deal with new markets, new players and new business models. The task of the competition authorities is not changing, but the focus is. The Federal Cartel Office is very well positioned to deal with this.

One focus of our case work will be to keep markets open in the face of powerful or dominant companies. In this respect, and due to the internal growth of some digital players, the control of abusive practices – the Mount Everest of competition law – will probably become more and more important. Another area of focus is merger control. Here, the competition authorities need to assess the specific characteristics of digital and data-driven markets.

The Federal Cartel Office has addressed the new challenges in conceptual projects and in its case work. As regards conceptual work, it was one of the first competition authorities to address questions on how to deal with the phenomena of digital markets, such as network effects or “big data”. The authority has established a working group to develop concepts and tools, which in 2016 published a key policy paper on the market power of internet platforms. The Federal Cartel Office, with colleagues from the French Competition Authority, also conducted a study on the interrelation between big data and competition law; its findings were also published in 2016.

As regards enforcement activities in digital markets, the Federal Cartel Office became active very early. It was among the first authorities to initiate proceedings in cases of best price clauses, which were used by hotel booking platforms such as HRS and Booking.com. Another example of effective intervention was against the price parity clause of Amazon Marketplace. Audible and Apple recently abandoned a long-term exclusivity agreement in the area of audio-books once the Federal Cartel Office and the European Commission had started investigations. Furthermore, the Federal Cartel Office initiated a proceeding against Facebook. Facebook’s terms and conditions on the use of user data may constitute an exploitative abuse. Another important ongoing proceeding is an abuse proceeding against the ticket retailer CTS Eventim, in which the authority is examining whether certain business practices of the company are admissible under competition law.

With the amendment to the German Competition Act (Act against Restraints of Competition (GWB)) in 2017, the Federal Cartel Office will be able to conduct proceedings in the field of the digital economy more quickly and efficiently. Due to the authority’s advocacy efforts, the amendment contains several adjustments in this area. Criteria such as network effects, access to data, multi- and single-homing will be explicitly taken into account as important factors in the assessment of market power under German law. The amendment also clarifies that a market may be assumed to exist even in cases where no monetary payments occur. Especially in two-sided markets, this conclusion is already part of the competition authority’s practice, but until now has not been explicitly provided in German competition law. The amendment also contains

important adjustments with regard to the notification of merger cases that do not meet the established turnover thresholds. Cases concerning the acquisition of companies that did not achieve high turnovers in the past may also appear important in terms of their economic and competitive value for the purchaser. In those cases, the company’s economic potential can often be better expressed by the purchase price. A new transaction volume threshold has therefore been introduced into German competition law. This means that even if the company to be acquired does not have a high turnover in Germany, the merger can still be assessed if the transaction volume is high and the target company has significant activities in Germany. All in all, Germany is one of the first countries in the world with its own competition law rules for the digital economy.

Of course, the Federal Cartel Office has to safeguard functioning markets not only in the internet economy but in all sectors. It does so by way of cartel prosecution, merger control and the control of abusive practices. In recent years, the modernisation of its investigation methods, the integration of complex economic and econometric analysis in its case work and structural reforms have further improved the effectiveness of the authority’s work. The Federal Cartel Office will be working on numerous proceedings and projects across all sectors in 2017. Sectoral priorities are mainly set by the Decision Divisions on the basis of the latest developments in the relevant markets.

The Federal Cartel Office gives high priority to the prosecution and punishment of cartels. In 2017, the authority will conclude some important cartel cases. It has also received many tip-offs about further competition law infringements and has opened several new investigations. For example, in 2016, with the assistance of the criminal investigation departments and public prosecutors, the Federal Cartel Office carried out 17 dawn raids at a total of 91 companies and five private homes.

Vertical competition restraints will remain a significant area of activity in 2017 as well. At the beginning of this year, the Federal Cartel Office concluded its cartel proceedings against five furniture manufacturers for enforcing resale price maintenance on retailers. The manufacturers had applied inadmissible pressure on lower-price retailers in order to influence shop prices, in particular by threatening to refuse to supply to them and in some cases by carrying out those threats. Already in 2016, the Federal Cartel Office concluded a major case about vertical price fixing in the food retail sector. Furthermore, the Federal Cartel Office has recently published a draft version of a guidance note on the prohibition of vertical price fixing in the bricks-and-mortar food retail sector. The paper aims to clarify where the line should be drawn between a recommended retail price and price maintenance. The Federal Cartel Office invited interested parties to submit comments on the paper as part of a public consultation. After evaluation of this feedback it will publish the final version of the guidance note.

Also in the area of merger control and abuse of dominance the food retail sector will remain an important sector for the Federal

Cartel Office. The food retail sector in Germany is highly concentrated. The four largest retailers, EDEKA, REWE, ALDI and the Schwarz group (including Lidl), share between them more than 85% of the total market. Therefore, in merger control proceedings the Federal Cartel Office analyses the situation in the affected markets very carefully. In 2016, it cleared REWE's acquisition of the food retailer Coop subject to the condition that some outlets be sold to an independent third party. Following the ministerial authorisation granted in the *EDEKA/Kaiser's Tengelmann* case, the Federal Cartel Office 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. The authority cleared the divestment because following the final and legally binding ministerial authorisation allowing the transfer of all Kaiser's Tengelmann outlets to EDEKA, the divestment of EDEKA outlets to REWE led to a relative improvement in competition. Also in 2017, there are several other merger cases in the retail sector – for example, the Federal Cartel Office has just examined a merger between EDEKA and the drugstore chain Budnikowsky.

Due to growing concentration in this sector, the complaints of manufacturers about the huge market power of the retailers are likely to increase rather than decrease. The food retail sector will therefore definitely remain a priority topic for the Federal Cartel Office, not least because a guiding court decision about the relationship between retailers and manufacturers is still outstanding. It concerns the question of where the borderline is between “tough negotiations” and inadmissible practices used by powerful retail companies. Furthermore, the lawmaker has intensified the control of abusive practices in this sector with the amendment to the German Competition Act.

The Federal Cartel Office also continues to work on its ongoing cases of abuse of dominance in other areas. In the recent past there have been several cases, especially in the provision of public services, energy and water. The authority also has an ongoing proceeding against the German Football Association (DFB). In its sale of tickets for the games of the German national team in the European Football Championship in 2016, the DFB tied the purchase of tickets to a paid membership of the national team's fan club. This kind of tying practice could constitute an exploitative abuse.

Another important tool for the Federal Cartel Office are sector inquiries. They are conducted to gain better insight into the competition situation in certain sectors if there are indications

that competition in these markets is restricted or distorted. Sector inquiries are a very useful basis for case work in merger control and in the control of abusive practices. The Federal Cartel Office has recently concluded a sector inquiry into the submetering of heating and water costs. This market is dominated by a few large companies. In its report the Federal Cartel Office has formulated suggestions for legal measures to stimulate competition in this sector.

Other important ongoing sector inquiries include one into the hospital sector, which serves, among other things, to further develop examination criteria for the authority's merger control proceedings, and an inquiry into the waste management sector which will analyse, among other things, the intensity of competition in tenders for waste management services.

A very important topic for the Federal Cartel Office from now on will be consumer protection. The current consumer protection system, which is mainly organised under private law, has some shortcomings and enforcement deficits (eg, with regard to the general terms and conditions of internet companies). As such, the Federal Cartel Office has just been authorised by the legislator to conduct sector inquiries to assess possible consumer protection infringements of overall economic importance. Furthermore, the authority will be able to act as *amicus curiae* before the courts in consumer protection cases. In the Federal Cartel Office's view this is a first important step towards more consumer protection in the digital economy.

#### About the author

Andreas Mundt has been president of the Federal Cartel Office since December 2009. After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, he entered the Federal Ministry of Economics, where he worked from 1991 to 1993. He then joined the staff of the Free Democratic Party in the German parliament from 1993 to 2000, where he was in charge of the portfolio of labour and social law. In 2000, Andreas Mundt joined the Federal Cartel Office as rapporteur, with responsibility for banking and card payment systems issues. He was head of the international section from 2001 to 2005 and director of general policy from 2005 to 2009.

Since 2013, Andreas Mundt has been the steering group chair of the International Competition Network (ICN). Since 2010, he has been a member of the Bureau of the OECD competition committee.



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