



# The European, Middle Eastern and African Antitrust Review 2019

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A Global Competition Review Special Report

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This article was first published in August 2018  
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The European, Middle Eastern and African Antitrust Review 2019

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ISBN: 978-1-78915-104-6

Printed and distributed by Encompass Print Solutions  
Tel: 0844 2480 112

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*Global Competition Review* is delighted to publish 2019 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world’s increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

**Global Competition Review**

London

June 2018



# Germany: Federal Cartel Office



**Andreas Mundt**  
President

This year the Federal Cartel Office (Bundeskartellamt) celebrates its 60th Anniversary. During these 60 years, the authority has undergone constant change, progressively refining its toolbox to protect competition. In 1958 the Bundeskartellamt took up the prosecution of cartels and abuse of market power. Since 1973 it has also examined mergers. In 1999 it gained competences in the area of public procurement law. Since 2017 the authority can also carry out sector inquiries into consumer protection issues. The Bundeskartellamt has always proved able to overcome even great changes.

This agility and spirit help us to deal with the challenges we face today and in the coming years. Digitalisation and globalisation are triggering an enormous transformation process. The digital economy has long become a cross-cutting issue for all the divisions of the Bundeskartellamt. Nevertheless cases relating to the internet and platforms continue to raise new issues. For example, traditional cartel and abuse proceedings often deal with price-fixing agreements or excessive prices. In the digital economy it is often not money but data that are traded like currency. In addition, increasing attention is being paid to the terms and conditions under which users of platforms are obliged to agree to the use of their personal or business data by these platforms. We have to come up with new concepts for these new business models and business relationships.

That is the reason why our *Facebook* proceeding is one of the most important cases we are currently working on. In this proceeding we are exploring in-depth for the first time the connection between free services in the internet, personal data and market power. In December 2017, we informed Facebook of our preliminary legal assessment in this case. Based on the current stage of the proceedings, we assume that Facebook is dominant on the German market for social networks and is imposing unfair and abusive terms and conditions. At this stage the proceeding does not concern the collection and use of user data on the Facebook network itself and it is open whether this also constitutes the abuse of a dominant position. We are aware of the fact that a social network needs an efficient data-based product design to prosper. Users can expect a certain processing of their data if they use a free service. But we are concerned about the collection of data outside Facebook's social network and the merging of this data into a user's Facebook account. Via interfaces, data is transmitted to Facebook and is collected and processed by Facebook even when a Facebook user visits other websites. Users are unaware of this. We want to quickly press on with this important proceeding and come to results in a few months.

Another important step towards gaining a better understanding of the complex mechanism of the digital economy and the competition issues which arise in this area is a new sector inquiry into the online advertising sector, which the Bundeskartellamt launched in February 2018. Today online advertising is a complex system of very different forms of advertising, and is highly technical. One example of this is the fully automated real-time trade in advertising space. At the same time large companies with considerable market relevance like Google or Facebook have emerged which, in the view of some

market players, have been able to set up closed 'walled gardens' systems. The issue of access to and the processing of data is also highly relevant from a competition point of view.

Our *Facebook* proceeding and the sector inquiry into the online advertising sector are only two examples of many cases and initiatives of the Bundeskartellamt in the digital area. We have concluded proceedings in cases concerning best price clauses, which were used by Amazon Marketplace, and hotel booking platforms like HRS and Booking.com. In our *ASICS* decision we took a closer look at the prohibition of price comparison engines, sales via third-party platforms and the use of brand names. Another important case was an abuse proceeding against the ticket retailer CTS Eventim in which we prohibited exclusive contracts between CTS Eventim and event organisers and advance booking offices. In 2017, we also prohibited a merger between CTS Eventim and the event agency Four Artists.

These cases in the digital area give the companies indications of what is allowed under competition law and what is not. It is very helpful that the lawmaker already clarified several important questions regarding the digital economy with the ninth amendment to the German Competition Act (GWB) in the summer of 2017. Network effects can lead to large companies becoming bigger and bigger. Access to data also plays a key role. The question of multi- and single-homing is an important one. All these parameters go far beyond former criteria developed for traditional off-line markets. These parameters are now incorporated into German law and casework. The amendment also clarified that a market may also be assumed where no monetary payments occur. This conclusion – especially in two-sided markets – had already been adopted in the competition authority's practice but until now had not been explicitly provided for in the German competition law.

The lawmaker has also implemented a new additional threshold for merger filings. The existing turnover thresholds turned out to be insufficient to cover all relevant mergers and acquisitions in the digital economy and other innovative sectors. Therefore, a new transaction value threshold amounting to €400 million has been introduced. The Bundeskartellamt can now also examine acquisitions of companies which only achieve marginal turnover but for which a relatively high purchase price was paid. This is often the case with start-ups and other innovative assets. In such acquisitions, the high purchase price is often indicative of an innovative business idea with a high competitive potential. In November 2017, Austria introduced a similar transaction threshold. The Bundeskartellamt and the Austrian competition authority have recently published for public consultation a joint draft guidance paper on how these new legal provisions are to be interpreted.

One important issue we will have to focus on in the future is the role of hybrid platforms in e-commerce. Many platforms such as Amazon offer their own products and services. At the same time, other traders can use these platforms to offer their products and services. This leads to a situation where a digital platform offers its infrastructure to third parties of which it is also a competitor. With

increasing market power of the platform, this can result in conflicts of interest and abusive business practices. Important constellations in this respect are the dependencies of small firms on large platforms or self-favouring, both of which are especially relevant in the context of e-commerce. The European competition authorities have been aware of this issue for quite a while, with the most prominent example being the EU Commission's *Google Shopping* case. But we will have to pay even greater attention to this issue in the future.

Recently the Bundeskartellamt has also increasingly dealt with cooperations in the industrial sector. Often these cooperations focus on platforms designed to improve digital connectivity for market participants (Internet of Things). This can concern business-to-business activities on the markets affected or endeavours to automatise supply and distribution relations with suppliers and customers. The Bundeskartellamt generally supports cooperations that aim to improve products and production processes, and offers to help partners in a cooperation project design their cooperation in such a way that it does not infringe antitrust law.

An important issue on our agenda is the further improvement of our technical understanding, for example, with regard to price algorithms and their impact on competition. We also need to solve the conflict between fast-moving markets and the due process of law. If we conduct our proceedings too slowly, our decisions could be too late. For example, in the meantime a dominant company could have already forced its competitors out of the market. So we have to find the right balance between procedural efficiency and thoroughness. One option could be preliminary injunctions. But even this is by no means a cure-all, not least because it could involve huge liability risks. The rules on abuse of dominance are flexible enough to also cover issues raised by the digital economy. Nevertheless, a certain fine-tuning might be needed. In addition, there are areas where the intervention thresholds could be lowered in specific situations, eg, to prevent the monopolisation of a platform market and to better capture existing dependencies. Another possibility would be easier proof that the conditions for intervention are met. These are all aspects which we need to discuss.

With the amendment to the GWB in 2017, the Bundeskartellamt also gained new competences in the area of consumer protection. We are now authorised to conduct sector inquiries if we suspect certain infringements of consumer law which are likely to harm a large number of consumers. We immediately set up a division dedicated to this new task and have started two sector inquiries. The Bundeskartellamt wants to know how objectively and transparently price comparison websites operate and is examining what data is collected and processed by smart TVs. These are two examples of areas in which the traditional, private enforcement of consumer protection could reach its limits and public law enforcement might be an important complementary means of enforcement. Depending on the results of the sector inquiries, the reports will be able to indicate how the Bundeskartellamt, provided it was granted the relevant enforcement powers, could help to enforce consumer rights in Germany.

Another huge task for the Bundeskartellamt in the next years will be to establish a so-called Competition Register. In summer 2017 the Act on the Establishment of a Competition Register for Public Procurement at the Bundeskartellamt entered into force. The background for this is that companies which commit serious economic offences should not benefit from public contracts and concessions. The Competition Register will enable contracting authorities to check in a single nationwide electronic search whether a company has committed relevant violations of law. Therefore, the

register can play an important role in combating economic crime and competition law violations. With this new transparency the competition register should significantly increase the preventive effect of criminal and competition law. The Act intends that the electronic register will be operational in 2020.

Although the Bundeskartellamt has all these new competences, the core assignment of our authority remains to safeguard functioning markets in all sectors by way of cartel prosecution, merger control and the control of abusive practices. The Bundeskartellamt has continued to intensify its work in these areas. 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.

In particular, the Bundeskartellamt still gives high priority to the prosecution and punishment of cartels. In the recent past, a liability loophole in German competition law made it possible for some companies to avoid fines by carrying out restructuring measures. This loophole was finally closed with the amendment to the German Competition Act in the middle of 2017. Now corporate liability will apply, in line with provisions at European level. Controlling parent companies will also be responsible for paying fines. This will guarantee the effectiveness of penalties against large companies and prevent the avoidance of payment.

With the amendment to the GWB, the EU directive governing actions for damages for infringements of competition law (Directive 2014/104/EU) was also implemented into German law. This will further improve the conditions for the assertion of antitrust damages. The number of damages actions following cartel proceedings by the Bundeskartellamt or the European Commission (follow-on claims) has already significantly increased in recent years. The actions concerned a variety of product areas such as sugar, freight vehicles, rails, chipboard panels, detergents, drugstore products, television tubes, coffee, cement, mattresses or power transformers.

The sugar cartel is a good example of the significance of follow-on actions. After the antitrust proceedings, numerous buyers of sugar brought damages actions before several regional courts. The damages claims known to the Bundeskartellamt amount to over €660 million. The actual sum could well be higher. Some of the courts have informed the Bundeskartellamt of further actions that seek to establish an – as yet unquantified – liability for damages incurred.

All in all, over its long history the Bundeskartellamt has always had to keep pace with new developments in the economy. These days the digital economy raises many new competition law issues. In numerous cases relating to the internet and platforms the Bundeskartellamt has set new guiding principles of competition law and thus assumed a pioneer role in developing international standards. With its new investigative powers for consumer protection the Bundeskartellamt also aims to provide valuable assistance in this area. Despite all these changes, our aim will always stay the same: to protect fair competition for the well-being of consumers and the 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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