

# COMPETITION ENFORCEMENT AGENCIES

## HANDBOOK 2019

Published in association with:

Atsumi & Sakai

Bowmans

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ELIG Gürkaynak Attorneys-at-Law

Lapidot, Melchior, Abramovich & Co

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# Competition Enforcement Agencies Handbook 2019

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A Global Competition Review Special Report

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*Global Competition Review's* 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

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## Overview

### Cooperation

The Federal Cartel Office (FCO), known in German as the Bundeskartellamt, cooperates closely with other competition authorities in Europe and worldwide. Andreas Mundt has been chairman of the International Competition Network (ICN) since 2013. He is also a long-standing member of the Bureau of the Organisation for Economic Co-operation and Development (OECD) Competition Committee. At the European level, the FCO is very active in the European Competition Network. Notably with regard to the exchange of information, as well as mutual assistance in cartel investigations, the European Competition Network (ECN) has significantly enhanced cooperation with the European Commission and among national competition authorities. Furthermore, the FCO is actively involved in the work of international organisations such as the OECD, United Nations Conference on Trade and Development and World Trade Organization.

### Other competition bodies

While the FCO has exclusive jurisdiction over mergers, the competition authorities of the various states are competent in cases where the restrictive effect of a cartel or abusive practice is limited to a single state. In addition, the Federal Network Agency has certain competition powers but is primarily responsible for safeguarding non-discriminatory access to essential facilities in the electricity, gas, telecommunications, postal services and railway sectors. Finally, in very exceptional circumstances, and after a thorough procedure that ensures public scrutiny and political accountability, the Federal Minister for Economic Affairs and Energy may authorise mergers that have been blocked by the FCO on grounds of public interest.

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## Questions and answers

### How long is the head of agency's term of office?

The president of the FCO is appointed by the federal government for an indefinite period of time.

### When is he or she due for reappointment?

Andreas Mundt has been the president of the FCO since 2009.

### Which posts within the organisation are political appointments?

There are no political appointments within the FCO. Case handlers and senior staff members are lifetime civil servants.

### What is the agency's annual budget?

The annual budget for 2019 is €40.3 million.

**How many staff are employed by the agency?**

In 2018, 358 people were employed by the FCO.

**To whom does the head of the agency report?**

The FCO is an independent higher federal authority assigned to the Federal Ministry for Economic Affairs and Energy. It is independent in its decision-making and applies solely competition criteria. The FCO reports biennially to the German parliament on its activities.

**Do any industry-specific regulators have competition powers?**

On the basis of sector-specific laws, the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway is responsible for sector-specific regulation. However, general competition law remains applicable and is enforced by the FCO insofar as the relevant markets are competitively organised, such as electricity generation.

**If so, how do these relate to your agency's role?**

The FCO liaises with the Federal Network Agency in matters of market definition and market position. Nevertheless, the German Act against Restraints of Competition (German Competition Act), as well as European competition law, are applied exclusively by the FCO.

**May politicians overrule or disregard the authority's decisions? If they have ever exercised this right, describe the most recent example.**

There is no possibility to overrule the decisions of the FCO, with one exception: the 'ministerial authorisation' in merger cases. The Federal Minister for Economic Affairs and Energy may overrule the decision of the FCO to block a transaction and authorise a merger if: the negative effects on competition identified by the FCO are outweighed by positive effects on the economy as a whole; or the concentration is justified by an overriding public interest. The exception is applied very restrictively, and since the introduction of merger control in 1973, only nine concentrations have been approved – six of them subject to conditions – by ministerial authorisation. The most recent example is the acquisition of Kaiser's Tengelmann outlets by EDEKA in the food retail sector. The FCO prohibited the acquisition in 2015, but the Minister approved the merger, provided that the companies fulfilled several conditions aimed at preserving the jobs of Kaiser's Tengelmann employees.

**Does the law allow non-competition aims to be considered when your agency makes decisions?**

The German Competition Act does not provide for non-competition aims to be considered by the FCO in its decision-making process. The sole exception is the ministerial authorisation procedure mentioned above.

**Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?**

Appeals against decisions of the FCO are heard by specialised competition divisions at the Court of First Instance (Düsseldorf Higher Regional Court). Decisions of the Düsseldorf Higher Regional Court can be appealed to the Federal Court of Justice on grounds of law. During the past few years, the FCO's decisions have only been overturned in a few cases.

**Has the authority ever blocked a proposed merger?**

Since the introduction of merger control in Germany in 1973, more than 200 mergers have been prohibited or cleared subject to conditions or obligations. Moreover, many merger projects are terminated or modified following a preliminary examination or pre-notification contacts with the FCO.

In recent years, the FCO has prohibited, for example, the planned merger between Miba and Zollern in the plain bearing production sector, a merger between the online ticket retailer CTS Eventim and the event agency Four Artists and the acquisition of Kaiser's Tengelmann outlets by EDEKA in the food retail sector.

**Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.**

Mergers that raise competition concerns are cleared subject to conditions or obligations if the parties propose suitable commitments that are sufficient to remove the competition problems.

The last merger case in which the FCO imposed conditions on a company concerned the rail transport sector. The FCO cleared the acquisition of CIT Rail Holdings (Europe) SAS by VTG Rail Assets GmbH only subject to the condition that the companies sell a substantial part of the target company to an independent third company before implementing the merger.

Another example is the acquisition of the Coop supermarkets by Rewe, which would have impeded competition in some regional markets. In order to

address these competition problems, Rewe and Coop sold outlets in the regional markets affected to a competitively independent company.

A similar solution was found in a merger case concerning the market for the wholesale distribution of automotive spare parts. The FCO cleared the acquisition of Trost Auto Service Technik SE by Wessels & Müller SE subject to the condition precedent that the parties first of all sell outlets in problematic regional markets to an independent third party.

**Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.**

The FCO examines more than 1,000 merger filings each year. Usually, in 10 to 20 of these cases, the FCO initiates Phase II investigations. In 2018, 1,383 merger filings were notified to the FCO, 12 of which were examined in Phase II proceedings.

Recent examples include:

- *Miba AG/Zollern GmbH & Co KG* (plain bearing production) (prohibition);
- *VTG Rail Assets GmbH/CIT Rail Holdings (Europe) SAS* (rail transport sector) (clearance subject to conditions);
- *Horizon Global Corporation/Brink International BV* (automotive components) (withdrawal);
- *Reinplus Van-Woerden Bunker GmbH/NWB Nord- und Westdeutsche Bunker GmbH* (bunkering services) (withdrawal);
- *Remondis GmbH & Co KG/Helene Müntefering-Gockeln Wertstoffrecycling* (waste management) (clearance); and
- *Aurubis AG/Deutsche Giessdraht GmbH* (metal industry) (clearance).

**Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.**

The FCO can pursue all restraints of competition having an effect in Germany, even if they were caused abroad. In this context, the domicile of a company is irrelevant.

**Do you operate an immunity and a leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?**

The leniency programme of the FCO, as well as guidance on the setting of fines, is published on the website of the FCO at [www.bundeskartellamt.de](http://www.bundeskartellamt.de). Potential

applicants should contact the FCO's Special Unit for Combating Cartels (SKK) at +49 228 9499 386 for further information. The FCO's guidelines on the setting of fines were revised in 2013.

The FCO can grant cartel participants, who by their cooperation contribute to uncovering a cartel, immunity from or a reduction of fines. The fine to be imposed on a cartel participant is waived if he or she is the first to contact the FCO to uncover the cartel and fully cooperates with the authority. Immunity from fines can also be granted after proceedings have been initiated if the FCO is provided with decisive evidence without which the existence of a cartel could not have been proved. The ringleader of the cartel and cartel members who coerced others to participate in the cartel cannot be granted immunity from fines.

The fine can be reduced by up to 50 per cent for all other leniency applicants depending on the value of their contributions to proving the offence. In this respect it is also important to consider at which stage the application for leniency has been made and whether the applicant has contacted the FCO faster than other cartel members.

**Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?**

German competition law only provides for administrative fines for both undertakings and managers, but no criminal sanctions. One exception exists for bid-rigging cases: bid-rigging may be punished by up to five years of imprisonment. The prosecution of bid-rigging is divided between the FCO (fines for undertakings) and the public prosecutor (criminal enforcement concerning individuals).

**Are there any plans to reform the competition law?**

The first discussions on the possible content of a 10th Amendment to the German Competition Act (GWB) are currently taking place. The primary reason for this can be seen in the need to transpose the ECN+ Directive (to empower the competition authorities of the member states to be more effective enforcers) into German law by 4 February 2021.

However, in addition, the German Ministry for Economic Affairs and Energy has commissioned a study to assess different options to modernise the law on the abuse of market power and to better address the challenges posed by the digital economy. The ideas discussed include broadening the rules on the abuse

of relative market power, with a threshold below actual dominance coming into play. Dependencies on large platforms acting as 'gatekeepers' are not restricted to small and medium-sized enterprises, but can also be a concern for larger firms. In this context, it is also being considered to further emphasise the role of platforms acting as intermediaries when assessing market power. Some of these platforms can act as a gatekeeper vis-à-vis the other market side. Not being represented on such a platform can amount to losing a crucial distribution channel for some companies. The significant role of this intermediation power could be included in the criteria for assessing market power contained in the GWB. Finally, there are also discussions on how to better address certain types of behaviour at an early stage, for example, when a company with particular, unique resources enters a certain market and can be expected to become dominant in the foreseeable future. In this context, possibilities to speed up proceedings are being assessed as well, for example, by refining the rules on interim measures.

Another important topic in regard to the next amendment of the GWB is the competence of the FCO in the area of consumer protection. With the last amendment of the GWB in 2017, the FCO was, for the first time, granted competence in this area. The FCO is now authorised to conduct sector inquiries if it suspects certain infringements of consumer law which are likely to harm a large number of consumers. However, the authority has as not yet been granted powers to intervene in such matters, for example, by cease-and-desist orders or reimbursement orders. The primary focus of the legislator was on analytic and advisory functions. In regard to the next amendment of the GWB, the conferment of additional decision-making competence and powers to impose punitive measures is being discussed.

Furthermore, there are also discussions about some changes in merger control, for example, regarding the question as to which cases are notifiable.

#### **When did the last review of the law occur?**

The 9th Amendment to the GWB entered into force in June 2017. The amendment enables the FCO to react even more effectively than before to developments in the digital economy. Furthermore, the amendment implemented the European Directive on Antitrust Damages Actions into German law and it closed legal loopholes in the imposition of fines, in particular in cases of legal succession. The FCO has also been given new competence in the area of consumer protection.

#### **Do you have a separate economics team? If so please give details.**

The chief economist coordinates the work of two economic units. They mainly focus on conceptual issues relating to the effective integration of economic analysis in competition law enforcement. They also specialise in empirical matters and support our decision-making in the light of increasingly complex processes of data collection and the application of quantitative tools and methods.

#### **Has the authority conducted a dawn raid?**

Every year, the FCO receives new indications of cartel cases and follows these up in dawn raids. In 2018, the FCO conducted dawn raids in nine separate cases with the help of the criminal investigation departments and public prosecutors.

#### **Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.**

The FCO imposes fines on companies and the responsible officers, who often are directors. In 2018, the FCO imposed fines of around €376 million in eight cases on a total of 22 companies and 20 individuals. The sectors concerned included special steel manufacturers, potato and onion packaging companies, newspaper publishers and producers of rolled asphalt.

#### **What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?**

A merger is subject to control where in the last business year preceding the concentration the combined aggregate worldwide turnover of all participating companies was more than €500 million. At least one of the companies must have a turnover of more than €25 million and another of more than €5 million in Germany.

In addition, there are legal exemptions for companies whose size is considered to be of minor importance from a macroeconomic view. This is the case if one of the companies had an annual worldwide turnover of less than €10 million in the last business year preceding the concentration.

With the amendment to the GWB in 2017 a new transaction value threshold (purchase price criterion) amounting to €400 million was introduced into German competition law because the existing turnover thresholds turned out to be insufficient to cover all relevant mergers and acquisitions in the digital economy and other innovative sectors. Sometimes

high purchase prices are paid for companies which up to now have achieved little or hardly any turnover but are of great potential value.

**Are there any restrictions on investments that involve less than a majority stake in the business?**

Along with mergers in the stricter sense and majority holdings, in some cases, the acquisition of a minority interest can also qualify as a concentration within the

meaning of the GWB. This is the case, for example, if at least 25 per cent of the voting rights or capital shares of another company are acquired. Minority participations must also be notified if they enable the acquiring company to exercise a material influence on the other company. The acquisition of significant assets, such as a production site or a business division, can also constitute a concentration within the meaning of the law.

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