



Germany

– Mark-Oliver Mackenrodt [†]

Situated in Northern Central Europe, Germany is bordering the Baltic Sea and the North Sea in the North, France in the West, Poland in the East, Austria in the South and several other countries.

Following World War II, Germany has been divided into two states for more than forty years, namely the Western Federal Republic of Germany (FRG) and the Eastern German Democratic Republic (GDR), which remained under the influence of the Soviet Union. The decline of the Eastern Bloc and the end of the Cold War allowed for the German reunification in 1990. With reunification, the West German legal and political system – including the Competition Laws – gained validity for whole Germany.

Germany has been one of the six founding members establishing the process of European integration in 1952 and in 1958 respectively. In January 1999, Germany and 10 other EU countries introduced a common European exchange currency, the Euro. After several enlargements the European Union (EU) today is composed of 27 Member States including 500 million inhabitants with 17 of these countries adhering to the Euro monetary system. The EU primary law seeks to establish a common European market with undistorted competition and puts in place supranational European competition rules.

Economy

After German reunification, the West German system of a decentralised free market economy was extended to East Germany, which formerly had been dominated by the model of a centrally planned socialist economy. To bring productivity, infrastructure and wages in former East Germany up to West German standards, Germany has expended considerable efforts and funds and has implemented rigid structural reforms and corporate restructurings.

In a long tradition, Germany has been pursuing export-oriented economic policies, in particular in the fields of

PROFILE	
Population:	81.8 million
GDP (Current US\$):	3.3 trillion
Per Capita Income: (Current US\$)	38,100 (Atlas method) (at PPP.)
Surface Area:	357 sq. km
Life Expectancy:	80 years
Literacy (%):	99 (of ages 15 and above)
HDI Rank:	9*

Sources:

- World Development Indicators Database, World Bank, 2010
* Human Development Report Statistics, UNDP, 2011

mechanical engineering, in automotive and in products related to electrical and chemical sciences. Germany has generally been keen to foster integration and an open trade policy at the European and international levels. Structural reforms after the turn of the century have helped Germany to keep a strong position during the financial crisis.

Germany constitutes the largest market in the EU with a Gross Domestic Product (GDP) of US\$3.3tn in 2011 and a population of 81.8mn people and exhibits a strong landscape of small and medium sized enterprises. Worldwide, Germany is the world's fourth largest economy after the US, China and Japan. Germany is the world's third largest exporter of merchandise products and services. More than 60 percent of all German trade is conducted with other members of the EU. As to foreign direct investments, Germany has worldwide been the second biggest investor in foreign countries after the US in 2010.

Competition Law and Policy

General Features: In Germany, just like in the other Member States of the EU, the supranational European competition rules are directly applicable provided that the

[†] Original paper written (2006-07) & updated (July 2012).

business strategy in question affects more than one Member State. In the field of cartels and of abuses of dominance, European Competition Law is applied alongside the German competition rules. In merger cases, by contrast, either the German or the European Competition Law regime is of exclusive relevance depending on the turnover of the merging companies. If exclusively the market within Germany is affected, solely the German competition rules apply.

The basic provisions of European Competition Law can be found in Articles 101 to 109 of the Treaty on the Functioning of the European Union (TFEU). These provisions have been specified by a set of regulations. Alongside preventing distortions of competition, European Competition Law as a distinctive feature pursues the objective of furthering market integration within the EU. Accordingly, European Competition Law assumes a quite critical stance towards business strategies that have the effect of partitioning the common market.

The German Competition Law regime played a vital role in rebuilding the German economy after World War II and was perceived as an instrument to guarantee economic and individual freedom and to control the unlimited exercise of market power.

Since the late 90's the European Commission – as well as most Member States – has adopted a more economics-based approach 'More Economic Approach'. German and European Competition Law seek to maximise consumer welfare by assuring that the market forces work to the benefit of consumers in particular with regards to lower prices, higher output and more innovations.

According to European jurisprudence and to traditional German academic writing, competition law does not only seek to protect consumers but also competition as an institution. As a consequence of this view which is not undisputed, proving immediate consumer harm is not an indispensable requirement for applying the competition laws as long as harm to the competitive process is shown. This leads to an additional indirect protection of consumers who will be harmed in the medium and long term if the competitive process is distorted.

Anti-competitive agreements

Cartels: According to European and German Competition Law, anti-competitive agreements for example with regard to prices, quantities, geographic areas or customer groups are prohibited and ipso jure void. With respect to anti-competitive agreements which affect more than one Member State, Member States are not allowed to apply national competition rules, which are stricter than the applicable European competition rules. The German rules prohibiting cartels are modelled after the European provisions. Accordingly, a similar standard applies

irrespective of whether a cartel affects only the German market or the markets of several Member States.

An agreement which restrains competition can be justified and exempt from the cartel provision if it meets four conditions: first, the agreement has to contribute to an improvement in production or distribution of goods or promote technical or economic progress; second, consumers have to be allowed a fair share of the resulting benefit; third, the agreement has to be indispensable for the attainment of these benefits and, lastly the agreement shall not eliminate competition in respect of a substantial part of the products in question. These four criteria are further specified by a set of European block exemption regulations, which are directly applicable in Germany by means of a legal referral in the German Competition Act. For example, there are regulations on vertical agreements in general, on technology transfer and regulations concerning the insurance sector and the car industry. Concerning horizontal cooperation, there is one regulation on specialisation agreements and one with regards to agreements on research and development (R&D).

If restrictive agreements meet the above mentioned four criteria or the requirements of a regulation the agreement is automatically justified. As the law does not provide for an administrative notification or approval, companies have to make a self-assessment. Formerly, such agreements had to be notified and approved by the competition authorities. The old system offered more legal security for companies and provided the authorities with more information about market behaviour but also created a high workload for the authorities.

Through leniency programmes the competition authorities can grant cartel participants a reduction of or an exemption from fines if they have contributed to detecting a prohibited agreement.

Abuse of a dominant position: Further, under European and German Competition Law, abuses of a dominant position are prohibited. However, market power alone does not justify intervention by the competition authorities as the dominant position may well have been attained through superior products or business acumen. Rather, a detailed examination is required whether the strategy is abusive. Generally speaking, an abuse can be found if without any objective justification competitors, customers or suppliers are hindered or discriminated in a way that would not be possible if effective competitive pressure existed in the market.

As regards abuses of dominance, the Member States are allowed to apply national competition laws which are stricter than the European rules. The German rules on unilateral restraints of competition are in several respects stricter or more specific: For example, there is a legal

presumption, according to which a company with a market share of at least one third is treated as dominant. Further, to show dominance, it is sufficient that a company holds a paramount market position in relation to its competitors due to, for example, extraordinary financial resources and privileged access to certain supply markets. In addition, discrimination, unfair hindrance and boycotts are expressly prohibited. In particular, small and medium enterprises are protected against discrimination and unfair hindrance if they as purchasers or suppliers depend on another undertaking in a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist.

Merger Control: As to merger control, there is an exclusive application of either the European Merger Regulation and the relevant Guidelines by the European Commission or of the German provisions by the German Anti-Cartel Office (Bundeskartellamt). Generally, the European rules apply exclusively if the joint turnover of the companies exceeds €5bn worldwide and €250mn within the EU unless two-thirds of this turnover occurs in a single Member State. The German merger regime is exclusively applicable if the aggregate worldwide turnover exceeds €500mn and if within Germany one company achieves a turnover of €25mn and a further company €5mn. Mergers exceeding these thresholds have to be notified to the relevant authority and shall not be consummated prior to their clearance which can be subject to obligations or conditions.

The European Commission will prohibit a concentration, which would significantly impede effective competition in particular as a result of the creation or strengthening of a dominant position. Merger efficiencies will only be taken into account under quite narrow conditions. The German Bundeskartellamt interdicts a merger, which is expected to create or strengthen a dominant position.

In order to deal with public interest considerations transparently and institutionally separate from competition considerations, German merger law has a specific feature the provides for a two stage procedure. If the Bundeskartellamt has prohibited a merger on competition grounds the parties might claim that the restraints to competition would be outweighed by advantages for the economy as a whole and justified by an overriding public interest. On the basis on these arguments, only the Ministry of Economics can approve the merger. Through this mechanism the Bundeskartellamt is better protected in its independence from political pressure and the Ministry has to publicly take over responsibility. In nearly 40 years only 8 mergers have been approved on these grounds.

Public Procurement: The German ARC provides for public procurement rules which govern the award of public contracts. Public contracts, which meet certain minimum thresholds have to be awarded under competitive conditions and through a non-discriminatory and

transparent procedure. Bidders have to meet certain requirements as to expertise, reliability and efficiency. Participants in an award procedure can file an application for review with the public procurement tribunals located at the Bundeskartellamt. In Germany, bid rigging constitutes a criminal offence.

State Aid: European Competition Law contains a state aid regime. There is a concern that state aid by Member States like for example direct payments to enterprises or public guarantees in favour of certain undertakings might distort competition between Member States. Accordingly, Member States like Germany are obliged to declare public subsidies to the European Commission for prior approval. The European Commission will approve state aid measures if they meet certain criteria like, for example, remedying a serious disturbance of the economy in a Member State or aiding to promote economic development of areas where the standard of living is abnormally low. If state aid has been granted without the required prior approval it has to be revoked.

Institutions and its Competencies

The public enforcement of competition law rests with the European Commission and – on the Member State level – with the German Bundeskartellamt. In addition, each German Federal State has its own competition authority dealing with regional issues concerning its respective territory. The authorities can conduct investigations, take interim measures, issue decisions, impose fines and authorise mergers. Decisions of the European Commission are subject to appeal to the Court of Justice of the European Union. Measures of the German Bundeskartellamt can be reviewed by the German courts.

In the fields of cartels and abuses of dominance the European Commission applies the European competition rules. In addition, the authorities and courts of the Member States are also authorised to apply European competition rules alongside national competition law if more than one Member State is affected. The enforcement activities of the European Commission and of the various authorities on the Member State level are coordinated within the European Competition Network (ECN).

In the field of merger control, European Competition Law is exclusively applied by the European Commission if a certain amount of the turnover is generated in more than one Member State. Below these thresholds, the German Bundeskartellamt exclusively applies German merger law if the merger involves a certain minimum turnover. Under certain circumstances a transfer of merger cases between the European and the national level is possible.

The German Bundeskartellamt is an independent quasi-judicial body headed by a President and situated in Bonn. The twelve chambers, which issue decisions are organised

by economic sectors and are assisted by several general divisions. Among the 3200 officers employees about one half is qualified as lawyers and one half as or economists.

German Competition Law further provides for a Monopoly Commission, an independent advisory body of five experts from academia and the business field. The Monopoly Commission publishes regular reports to the Government on the state of competition in various sectors of the economy and special opinions and recommendations on specific issues.

As to private enforcement, German courts are authorised to directly apply European and German Competition Law in civil law cases. No prior administrative action is required. As a defence, parties can invoke the invalidity of a contract, which violates Competition Law. Further, plaintiffs can seek an injunction or sue for civil damages.

Other laws for consumer protection and sectoral regulation in Germany, consumer protection and competition regulation are also pursued by other institutions and bodies of law.

There is a Federal Ministry of Food, Agriculture and Consumer Protection to ensure that the consumers' legitimate interests are taken into account at an early stage in all policy fields in particular when it comes to protect consumers from health and safety threats and to safeguard their economic interests. Several consumer protection laws seek to protect consumers from health and safety hazards and to confidence.

The Federal Network Agency is endowed with the authority to regulate the telecommunications industry, the postal services sector, the energy sector and the railway industry. These sectors have seen a liberalisation and privatisation in recent years but still need state intervention as lack effective competition. The agency is in particular concerned with encouraging competition, for example, by setting prices for interconnection or for using the infrastructure of the incumbent enterprise.

Unfair Competition Law: In Germany, the Act against Unfair Competition constitutes a body of law separate from the antitrust law, which is also referred to with the term "Competition Law". The Unfair Competition Act protects consumers, competitors and other market participants against unfair methods of competition like for example advertising and marketing methods which are deceptive, misleading or intrusive. Several provisions of the Unfair Competition Act constitute a transposition of European directives. Under certain conditions consumer associations,

competitors or consumers can seek an injunction in court or sue for damages. In particular, the Unfair Competition Act interdicts misleading advertising and acts that interfere with the freedom of decision of consumers. If, for example, an undertaking advertises the price of one part of a product bundle, to be admissible the advertisement also has to provide complete information on the price of the other part of the product bundle. Otherwise consumers, when evaluating an offer, cannot make an informed judgment.

Further, an advertisement is deemed unfair if it exploits the good reputation of a competitor or if the consumer is induced into confusing the product with those of competitors. Comparative advertising is forbidden if competitors are denigrated, or if the comparison does not relate to relevant, significant and verifiable features of a product. Further, an advertisement is prohibited as being unfair if consumers are harassed. For example, it is considered harassment if advertisements are sent to consumers against their express will or if consumers who did not have business relations with that company before are being called on their telephones without their prior consent.

German Civil Law: General provisions concerning consumer protection are also to be found in the German Civil Code (Bürgerliches Gesetzbuch BGB). For example, vendors have to satisfy certain information obligations. Further, there is a set of consumer protection rules in place providing for product liability and for special rights for consumers to revoke contracts.

Concluding Remarks

Competition policy and consumer protection are ongoing tasks and indispensable for the proper functioning of a market economy. The design and the enforcement of German Competition Law have to account for new insights in economic theory, for changes in the industry structure in general, and for new developments in European Competition Law. In recent years, European and German Competition Law have been inspired by the more economic approach, which puts an emphasis on the effects of a business strategy on the market. Further, there has been decentralisation in the application of European Competition Law which increases the more enforcement responsibility of the authorities and of the courts in the Member States. Finally, there is a growing tendency to file private damage claims in German courts as a consequence of violations of German or European competition rules. Private enforcement constitutes a complement to the public enforcement of competition law by the competition authorities.

Boxes Stories
Box 1 Long-term and high value gas supply contracts prohibited
<p>The Bundeskartellamt initiated cartel and abuse proceedings against the leading gas transmission companies, which had concluded gas supply contracts with municipal utilities who passed the gas on to end consumers. The contracts had very long periods of validity and covered large proportions of the total demand of the municipal utilities. The Bundeskartellamt found that binding distributors by long-term supply contracts has a foreclosure and thus price-raising effect because it prevents the market entry of newcomers and deprives third providers of supply possibilities for years this business strategy significantly deprived the municipal utilities of the possibility to purchase gas from rival suppliers. The Bundeskartellamt as later upheld by the courts for a limited time imposed an obligation upon the transmission companies that the contracts concluded with the municipal utilities shall not run for more than four years if they covered more than 50 percent of the demand and not longer than two years if they covered 80 percent of the demand. In the following years, a revival of competition in the structurally encrusted market for gas supply could be observed and the Bundeskartellamt did not perceive a need for prolonging its measure.</p>
Box 2 A merger of the leading press company with the leading TV company can strengthen a dominant position through the possibility of cross-media promotion.
<p>The German Bundeskartellamt – as later confirmed by the Federal Court of Justice – has prohibited the merger of the leading TV company with the leading media press company. Already before the merger there was an “uncompetitive duopoly” without any substantial competition from outsiders. A dominant position was held by the media press company on the newspaper market and on the advertising market for newspapers and by the TV company on the TV advertising market. The newly formed company would have led to a further assimilation of the corporate structures of the two conglomerates in the neighbouring markets for newspapers and magazines. The newly formed company Further, it would have been in a position to engage in cross-media advertising for group products by advertising in its print media for its TV programmes and vice versa and Further, it could have offered concerted cross-media advertising campaigns. In addition, the competitive pressure of the leading press company on the TV advertising market would have ceased after the merger as for advertisers the press company was the only alternative to the TV advertising market. The Bundeskartellamt concluded that through the possibility of cross-media promotion the conglomerate merger would have even more strengthened the dominant positions in the markets for TV advertising, for newspaper advertising and for newspapers.</p>
Box 3 Advertisements have to be transparent when stating the price
<p>In one case dealing with the Act against Unfair Competition, the German Supreme Court considered an advertisement as unduly influencing the freedom of decision of consumers and, therefore, as unfair in which a mobile phone was advertised for only €1 – (“nearly for free”). Actually the phone was sold exclusively in a bundle with a telecommunications service contract. Whilst claiming that the mobile phone was nearly for free, the advertisement did not fully disclose the considerable cost which a consumer would incur resulting from the telecommunication service contract.</p>

† *Mark-Oliver Mackenrodt works as a Senior Researcher at the Max Planck Institute for Intellectual Property and Competition Law in Munich, Germany. He pursued studies in Law and in Economics at the Universities of Munich, Wuerzburg (Germany) and Geneva (Switzerland). Mackenrodt received a Master of Laws (LL.M.) from New York University and has been a research fellow at Harvard Law School. He is qualified as a lawyer in Germany and has been admitted as an Attorney at Law in New York.*