

# Restraints of trade and dominance in Germany: overview

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Country Q&A | Law stated as at 01-Jul-2017 | Germany

A Q&A guide to restraints of trade and dominance in Germany.

The Q&A gives a succinct overview of restraints of trade, monopolies and abuses of market power in Germany. In particular, it covers the regulatory authorities and the regulatory framework, the scope of rules, exemptions, exclusions, statutes of limitation, notification, investigations, penalties and enforcement, third party damages claims, EU law, joint ventures and proposals for reform.

For information on merger control, regulatory framework and regulatory authorities, relevant triggering events and thresholds in Germany, visit [Merger control in Germany: overview](#).

This Q&A is part of the global guide to competition and cartel leniency. For a full list of jurisdictional Restraints of Trade and Dominance Q&As visit [www.practicallaw.com/restraintsoftrade-guide](http://www.practicallaw.com/restraintsoftrade-guide). For a full list of jurisdictional Merger Control Q&As visit [www.practicallaw.com/mergercontrol-guide](http://www.practicallaw.com/mergercontrol-guide).

For a full list of jurisdictional Cartel Leniency Q&As, which provide a succinct overview of leniency and immunity, the applicable procedure and the regulatory authorities in multiple jurisdictions, visit [www.practicallaw.com/leniency-guide](http://www.practicallaw.com/leniency-guide).

## Restraints of trade

### Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

### Regulatory framework

The prohibition of restrictive agreements and concerted practices (and the applicable exemptions) are set out in sections 1 to 3 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (ARC). Sections 1 and 2 of the ARC closely resemble the EU rules on restrictive agreements and concerted practices set out in Articles 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU). Section 3 of the ARC contains an additional exemption for certain cartel agreements involving small and medium-sized enterprises.

Section 1 of the ARC prohibits agreements between companies, decisions by associations of companies or concerted practices, which have as their object or effect, the prevention, restriction or distortion of competition. In particular, this covers:

- Price-fixing.
- Bid rigging.
- Allocation of markets or customers.
- Non-compete agreements.
- Exchange of strategic information relating to, for example, prices, customers, costs or capacities.
- Exclusivity agreements.
- Resale price maintenance agreements.

### **Regulatory authority**

The enforcement of German competition law primarily lies with the Federal Cartel Office (*Bundeskartellamt*) (FCO) ([www.bundeskartellamt.de](http://www.bundeskartellamt.de)). In the case of restrictive agreements or concerted practices with only local or regional effect, the enforcement lies with the respective regional competition authorities (*Landeskartellbehörden*).

Only bid rigging constitutes a criminal offence, which may result in criminal sanctions imposed on the responsible individuals (see *Question 13, Personal liability*), but not on companies. Cases involving bid rigging must be partly referred (as regards the responsible individuals) to the public prosecutor by the FCO or the regional competition authorities.

See box, *The regulatory authority*.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

The regulations cover all kinds of agreements and concerted practices (including horizontal agreements between competitors and distribution agreements) that may have an appreciable adverse impact on the parameters of competition on the market.

### **Exemptions**

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

There are a number of exemptions from the prohibition of restrictive agreements and concerted practices.

Section 2 of the Act against Restraints of Competition (ARC) contains a general exemption for agreements and concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains), provided that all of the following conditions are met:

- Consumers receive a fair share of the resulting benefits.
- The restrictions are indispensable to the attainment of the asserted efficiency gains.
- The agreement does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The EU block exemption regulations issued under Article 101(3) of the TFEU apply *mutatis mutandis*.

Further exemptions exist with respect to:

- Certain cartel agreements between small and medium-sized companies (*section 3, ARC*).
- Certain agreements in the agricultural sector (*section 28, ARC*).
- Resale price maintenance agreements in the publishing sector (*section 30, ARC*).
- Certain agreements in the water economy sector (*section 31, ARC*).

### Exclusions and statutes of limitation

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

### Exclusions

According to the Federal Cartel Office's (FCO's) Notice No. 18/2007 on the Non-Prosecution of Cooperation Agreements of Minor Importance (*de minimis* Notice), the FCO generally refrains from investigating infringements of German or EU competition rules if both of the following conditions are met:

- The undertakings' combined market share in the affected markets does not exceed:
  - 10% (horizontal agreement); or
  - 15% (vertical agreement).
- The agreement does not contain a hard-core restriction, such as price-fixing or market sharing.

### **Statutes of limitation**

The limitation period for violations of section 1 of the Act against Restraints of Competition (ARC) is five years from the termination of the infringement. The limitation period is suspended if a German competition authority, the EU Commission or the competition authority of any EU member state opens an investigation with respect to that agreement or concerted practice (*section 81(8), ARC*).

### **Notification**

5. What are the notification requirements for restrictive agreements and practices?

### **Notification**

It is not possible to notify an agreement or a concerted practice to the Federal Cartel Office (FCO) or the competent regional competition authority with a view to obtaining an exemption. Companies need to assess themselves whether a specific agreement or concerted practice may qualify for an exemption. This corresponds to EU competition law (see *Regulation no. 1/2003*)

While companies can ask the FCO or the competent regional competition authority to adopt a formal decision stating that, on the basis of the information provided, there are no grounds to take action (*section 32c, ARC*), the issuance of the formal decision is at the competition authority's sole discretion.

### **Informal guidance/opinion**

Companies can ask the FCO or the competent regional competition authority for informal guidance (for example, by way of informal letter).

### **Responsibility for notification**

It is not possible to notify an agreement or a concerted practice to the FCO (see above, [Notification](#)).

### **Relevant authority**

It is not possible to notify an agreement or a concerted practice to the FCO (see above, [Notification](#)).

### **Form of notification**

It is not possible to notify an agreement or a concerted practice to the FCO (see above, [Notification](#)).

### **Filing fee**

It is not possible to notify an agreement or a concerted practice to the FCO (see above, [Notification](#)). In the case of section 32c decisions, the FCO or the competent regional competition authority can impose a fee of up to EUR25,000 on the applicant.

## Investigations

6. Who can start an investigation into a restrictive agreement or practice?

### Regulators

The Federal Cartel Office (FCO) and any competent regional competition authority can start an investigation on their own initiative (for example, following third party complaints).

The regulators can choose between two types of procedure when investigating alleged infringements of German or EU competition rules: an administrative procedure and a fining procedure. In practice, the competent competition authority usually decides to start a fining procedure in cases of an alleged hard-core cartel or another serious infringement of German or EU competition rules. The fining procedure aims at the imposition of fines against the companies and individuals involved. Consequently, the level of protection of the rights of defence granted under the applicable procedural rules is higher than in the context of an administrative procedure that merely purports to prohibit an alleged infringement of German or EU competition rules.

### Third parties

Third parties can try to prompt an investigation by lodging a complaint. Unlike under EU rules, there are no formal requirements or a special form for complaints. It is at the discretion of the FCO or the competent regional competition authority to decide whether an investigation will be started following such a complaint. The FCO focuses on cartels as well as on retail price maintenance and other vertical restraints. For a couple of years now, the FCO has been investigating alleged restrictions on online sales.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

### Representations

In the context of fining proceedings, third parties do not have any rights to make representations. In the context of administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party can make representations. To be admitted to join proceedings, the third party must show that its competitive interests have been affected significantly. However, it is at the discretion of the FCO to decide whether the third party is admitted to the proceedings.

### **Document access**

During fining proceedings, third parties do not have any rights to document access. During administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party are entitled to access the competition authority's files.

### **Be heard**

In relation to fining proceedings, third parties do not have any rights to be heard. During administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party are entitled to be heard.

8. What are the stages of the investigation and timetable?

There is no specific timetable for conducting an investigation into alleged violations of German competition rules, neither in the case of a fining procedure nor in the case of an administrative procedure (*see Question 6*). In practice, the competent competition authority starts with a preliminary assessment of the restrictive agreement or concerted practice. If the preliminary assessment does not reveal (substantial) competition issues, the investigation is closed and the parties are informed accordingly. If, however, the authority considers the evidence obtained to be sufficient, a formal statement of objections is issued setting out the basis of its provisional findings and the evidence relied on. The parties then have the opportunity to make representations and to offer appropriate commitments before the competition authority issues its final decision. The duration of an investigation can vary from a few months to several years. As regards procedure and timetable, there are no differences between proceedings triggered by complaint or by the regulator's own initiative.

### **Publicity and confidentiality**

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

#### **Publicity**

The mere fact that an investigation into potentially restrictive agreements or concerted practices has been started is not made public by the competent German competition authority on a regular basis, but the Federal Cartel Office (FCO) can issue press releases confirming dawn raids (for example, with respect to specific business sectors).

On termination of an investigation, non-confidential versions of the final decisions and/or case reports are occasionally published on the FCO's website. Moreover, according to a newly implemented provision of the Act

against Restraints of Competition (ARC), for each fining decision the FCO should publish (*section 53(5), ARC, 9th amendment*):

- General information about the main facts.
- The type of infringement and its duration.
- The companies involved.
- The affected markets.
- Notice that any person who may have suffered loss from the cartel can claim for damages.
- If the FCO's fining decision has already become final, notice that its findings of facts are binding in the context of cartel damages claims under section 33b, ARC.

### **Automatic confidentiality**

The FCO and the regional competition authorities have a statutory obligation to keep information relating to individual personal data or to business secrets confidential. However, in the context of fining proceedings, the defendant's lawyer is entitled to full access to the competition authority's files, including to documents containing business secrets or other confidential information. In the context of administrative proceedings, the right to access the competition authority's files may be restricted to those parts of the file that do not constitute business secrets of third parties.

On termination of an investigation, third parties' (for example, potential victims of a cartel) lawyers are entitled to request access to the competition authority's files. However, in practice, the FCO generally refuses such applications insofar as individual personal data, business secrets, leniency applications or evidence provided by the leniency applicants are concerned. To date, this practice has been accepted by the anti-trust courts.

### **Confidentiality on request**

The parties may request that certain information provided to the FCO or the competent regional competition authority should be kept confidential. The competition authorities will accept such requests where possible (*see above, Automatic confidentiality*).

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The Federal Cartel Office (FCO) and the regional competition authorities have extensive powers to investigate potentially restrictive agreements or practices, including powers to:

- Carry out unannounced searches on business or residential premises (dawn raids).
- Seize objects (including documents and IT devices) of potentially probative value for the investigation.

- Request the disclosure of specific documents or information (in administrative proceedings only).

## Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

There are various forms of settlements that may be reached between the competent competition authority and the parties.

In the context of administrative proceedings, the parties may offer commitments to the authority. If the authority finds that the alleged violation of competition law would be terminated by way of those commitments, it may declare such commitments to be binding for the addressee of the decision (*section 32b, Act against Restraints of Competition*) (see [Question 12](#)).

In the context of fining proceedings, the competent competition authority may also agree on a settlement which usually comprises a full or partial admission of the facts by the defendant in exchange for a reduction (10% maximum) of the fine imposed on the defendant or its officers, or both. Unlike in the EU, there is no formal procedure regarding settlements in German law. However, the Federal Cartel Office (FCO) has published an information leaflet as guidance on this matter (see the FCO's website).

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

During administrative proceedings, the parties can offer commitments to the Federal Cartel Office (FCO) or the competent regional competition authority to avoid an infringement decision. If the FCO or the competent regional competition authority considers that the alleged competition concerns would be resolved by way of those commitments, it can declare the commitments binding for the addressee (*section 32b, Act against Restraints of Competition (ARC)*).

In the course of an administrative proceeding, the FCO or the competent regional competition authority must first inform the parties of its preliminary assessment of the case and make clear that it will continue the administrative proceeding with the objective of adopting an infringement decision. The authority can decide when it is appropriate to do so.



After the parties have taken notice of the competent competition authority's assessment in due time and in a reasonable way, they can offer commitments to the authority. The commitments must be able to fully meet the competition concerns expressed by the authority in its preliminary or final assessment of the case. Even if the commitments are suitable for the parties, the authority has discretion to accept or refuse the commitments.

If the FCO or the competent regional competition authority finds that the commitments are sufficient to resolve the competition concerns in a satisfactory manner, the competition authority may accept the proposed commitments and declare those to be binding for the authority and the addressee. In this regard, the FCO or the competent regional competition authority has the discretion to limit the binding effect in time, after which the authority regains the right to re-open its proceedings in the case.

## Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

### Orders

The Federal Cartel Office (FCO) and the competent regional competition authorities can:

- Order the companies to bring a restrictive agreement or concerted practice to an end.
- Impose additional measures that are necessary to effectively bring the infringement to an end.
- Adopt interim measures in urgent cases where there is a risk of serious and irreparable damage to competition.

### Fines

Administrative fines of up to 10% (intentional violations) or up to 5% (negligent violations) of a company's worldwide group turnover in the last business year can be imposed on companies that have participated in restrictive agreements or concerted practices. The FCO has issued detailed guidelines on the calculation of fines (from 25 June 2013). The Act against Restraints of Competition (ARC) provides the power to also impose fines on companies having direct or indirect control over one of the cartelists, even if those companies are not involved in the cartel (*section 81 (3a), ARC, 9th amendment*).

### Personal liability

Administrative fines of up to EUR1 million (intentional violations) or up to EUR500,000 (negligent violations) can be imposed on officers who have participated in restrictive agreements or concerted practices. Bid rigging constitutes a criminal offence and can be punished by imprisonment for up to five years or the imposition of a criminal fine on the respective officer (*sections 263 and 298, German Criminal Code*) (*Strafgesetzbuch*).

### **Immunity/leniency**

Immunity from and reduction of administrative fines are available to individuals and corporate entities under the FCO's 2006 Leniency Notice. However, in case of bid rigging, the Leniency Notice is not binding on the public prosecutor and the criminal courts. (For more details, see [Cartel leniency in Germany: overview](#)).

### **Impact on agreements**

The provisions of an agreement which violate applicable competition rules are null and void. In the absence of an appropriate severability clause, this may result in the entire contract being void.

### **Third party damages claims and appeals**

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

### **Third party damages**

Third parties (in particular, direct or indirect buyers) can claim damages for losses resulting from intentional or negligent violations of German or EU competition rules (*section 33a, Act against Restraints of Competition (ARC)*, 9th amendment). The 9th amendment to ARC, which implements Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) in German law, provides detailed rules for damage claims, that is, for pass-on, joint and several liability, limited liability of leniency applicants, settlements between claimants and cartelists, information disclosure, and limitation (*sections 33a to 33h, ARC*).

### **Special procedures/rules**

Designated district courts (*Landgerichte*) have jurisdiction to rule on cartel damages actions, irrespective of the amount of damages claimed. In follow-on actions, the courts are bound by the finding that an infringement of competition rules has occurred to the extent that such a finding was made in a final decision by the Federal Cartel Office (FCO), the EU Commission or a competition authority in any EU member state. The 9th amendment to ARC provides detailed procedural rules for claims, which are contained in sections 89b to 89e.

### **Collective/class actions**

German law does not provide for class actions. This is still true after the 9th amendment of ARC. However, potential claimants can transfer their claims to a third party who may then bring an action based on such bundled claims in its own name and at its own expense. In the German cement cartel case, such a bundling of claims was deemed admissible by the Federal Supreme Court (*Bundesgerichtshof*). However, the district court (*Düsseldorf*) subsequently dismissed the claims as unfounded. The district court deemed the transfers of the claims as illegal in the present case, since the third party would not be capable to pay the procedural costs, due to its limited share capital. The higher regional court (*Düsseldorf*) has confirmed the judgement and denied permission to file a further appeal.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

### **Rights of appeal and procedure**

Decisions of the FCO and the regional competition authorities are subject to appeal to the competent Higher Regional Courts. An appeal must be addressed to the respective competition authority within two weeks (fining proceedings) or one month (administrative proceedings) following the date on which the decision has been notified to the appellant.

### **Third party rights of appeal**

In the context of fining proceedings, third parties do not have any rights of appeal. In the context of administrative proceedings, only third parties who have been admitted to join the proceedings as intervening party have the right to appeal decisions of the competition authority.

## **Monopolies and abuses of market power**

### **Scope of rules**

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

### **Regulatory framework**

The relevant provisions regulating the abuse of market power are contained in sections 18 to 20 and 29 of the Act against Restraints of Competition (ARC):

- Section 18 provides the definition of a dominant position.
- Section 19 prohibits the abusive exploitation of a dominant position by one or several undertakings (for example, through unfair hindrance or discriminatory behaviour). Section 19 mirrors Article 102 of the TFEU.
- Section 20 prohibits unfair hindrances and discriminatory behaviour by undertakings with relative or superior market power including, for example, discriminatory conduct towards small and medium-sized companies.

- Section 29 sets out a special rule in relation to energy supply companies, which prohibits the abusive exploitation of a dominant position by such a company when setting consumer prices.

### **Regulatory authority**

The enforcement of German competition law primarily lies with the Federal Cartel Office (FCO). In the case of abusive behaviour with only local or regional effect, the enforcement lies with the respective regional competition authorities.

17. How is dominance/market power determined?

An undertaking is dominant if:

- It has no competitors or is not exposed to any substantial competition.
- It has a paramount market position in relation to its competitors.

Two or more companies are dominant, if both of the following apply:

- No substantial competition exists between them with respect to certain kinds of goods or commercial services.
- They jointly satisfy the conditions for dominance outlined above.

The following rebuttable presumptions exist:

- Dominance is presumed to exist if an undertaking holds a market share of at least 40%.
- Dominance by multiple companies is presumed where three or fewer undertakings have a combined market share of at least 50%, or where five or fewer undertakings have a combined market share of at least two-thirds.

However, when assessing the market position of an undertaking, besides its market share, several criteria have to be taken into account, for example its financial power, its access to supplies or markets, or its links with other undertakings. According to the 9th amendment to ARC, further criteria must be taken into account to assess market positions particularly on two-sided markets or in networks.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

The behaviour of a dominant company is typically considered to be abusive if the undertaking, as a supplier or buyer:

- Impairs other undertakings' ability to compete in a manner affecting competition and without any objective justification.
- Demands payment or other business terms, which differ from those that would very likely arise if effective competition existed.
- Demands less favourable payment or other business terms than it demands from similar buyers in comparable markets without any objective justification.
- Refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use, the other company is unable to operate as a competitor on the upstream or downstream market.
- Abuses its market power to invite or to cause other undertakings in business activities to grant it advantages without objective justification.

### Exemptions and exclusions

19. Are there any exemptions or exclusions?

There are no formal exemptions. There are several similar regulatory provisions for the behaviour of dominant undertakings in regulated business sectors (for example, in the energy and telecommunications sectors). To a certain extent, those specific regulations may exclude the application of sections 19 and 20 of the Act against Restraints of Competition (ARC). In addition, these rules are enforced by a special regulatory authority, the Federal Network Agency (*Bundesnetzagentur*) instead of the Federal Cartel Office (FCO).

### Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no formal notification and clearance process. However, it is possible to get informal guidance from the Federal Cartel Office (FCO) and the regional competition authorities.

## Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

The position is the same as for investigations into restrictive agreements and practices (see [Questions 6 to 9](#) and [Questions 11 and 12](#)).

22. What are the regulator's powers of investigation?

See [Question 10](#).

## Penalties and enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

See [Question 13](#).

## Third party damages claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

### **Third party damages**

See [Question 14](#).

### **Special procedures/rules**

See [Question 14](#).

### **Collective/class actions**

See [Question 14](#).

## **EU law**

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

There are no substantial differences between the powers of the Federal Cartel Office (FCO) or the regional competition authorities in relation to cases dealt with under Articles 101 or 102 of the TFEU and those dealt with only under German law.

## **Joint ventures**

26. How are joint ventures analysed under competition law?

The creation of a joint venture or the acquisition of a shareholding in an existing joint venture may qualify as a concentration under German merger control rules if it results in two or more shareholders each holding a share of 25% or more in the joint venture. The same applies if two or more shareholders acquire joint control of the joint venture. In those cases, the acquisition is subject to German merger control if the turnover thresholds are met irrespective of whether the joint venture constitutes a full-function joint venture within the meaning of the Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). In addition, the creation of a joint venture may also be reviewed under the rules regulating restrictive agreements.

## Inter-agency co-operation

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

Section 50a of the Act against Restraints of Competition (ARC) entitles the Federal Cartel Office (FCO) to co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law. In particular, the FCO is authorised to exchange (confidential) information with other regulatory authorities.

The FCO co-operates with the EU Commission and national competition authorities of other EU member states within the framework of the European Competition Network (ECN). The ECN authorities co-operate closely on the basis of both:

- Articles 11, 12 and 13 of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation).
- The ECN Notice.

In addition, the FCO co-operates with other competition authorities on the basis of bilateral agreements, for example, with the US Department of Justice and the Federal Trade Commission, and within the framework of the International Competition Network (ICN).

## Recent cases and trends

28. What are the recent developments, trends or notable recent cases concerning abuse of market power?

Notable recent cases include:

- **The Radio Broadcasting case (B7-27/15).** The Federal Cartel Office (FCO) had investigated suspected abusive practices by Deutsche Funkturm in the lease of high altitude mounting surfaces, but terminated its administrative proceedings after Deutsche Funkturm's price structure adjustment. Deutsche Funkturm is a wholly owned subsidiary of Deutsche Telekom and holds a dominant position on the relevant market. The



FCO suspected that the planned pricing structure could discriminate against smaller broadcasting network operators. However, the FCO found that it was able to terminate the proceedings, after Deutsche Funkturm adjusted its price structure. Broadcasting operators are entrusted by radio stations with the broadcast of their radio programmes. For this purpose they rent space on antenna masts or, alternatively, procure input services of other network operators. Opportunities for competition between network operators were opened up at the beginning of 2016 by way of an amendment to the German Telecommunications Act und market regulation measures by the Federal Network agency. The FCO's proceedings against Deutsche Funkturm were intended to protect the emerging competition.

- **The district heating supplier case (B8-30/13, B8-31/13).** The FCO has concluded its proceedings against five district heating suppliers. In three cases, no formal decision was issued, but in the other two cases the suppliers have undertaken commitments. Their customers will be reimbursed payments and will benefit from future price reductions. The FCO had expressed concerns about abusive price increases in the past. The FCO considers consumers in the heating sector as particularly vulnerable to abusive pricing, as they do not usually have opportunity to switch to another district heating supplier, and switching to a different energy form involves a high level of cost. In past years, the FCO has concluded proceedings against energy suppliers in other areas of the energy sector after they had undertaken commitments.
- **The Deutsche Bahn ticket sales case (B9-136/13).** The German state owned railway company Deutsche Bahn has committed to make changes to its ticket sales system. As a consequence the FCO terminated proceedings against Deutsche Bahn and declared these commitments binding. Deutsche Bahn had impeded its competitors' ticket sales. The commitments will make it easier for competitors to sell tickets. In particular, commission charges paid by Deutsche Bahn and its competitors for the reciprocal sale of passenger tickets will be standardised and reduced, and competitors of Deutsche Bahn in local passenger rail services will in the future also be able to sell Deutsche Bahn long distance rail tickets. Moreover, competitors will have easier access to Deutsche Bahn passenger tickets for sale in their own shops and more freedom to organise their own ticket sales.

Concerning the abuse of market power, the FCO's priority remains the energy sector, with its often local or regional markets.

## Proposals for reform

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

There are currently no visible proposals to reform restrictive agreements and market dominance. Under the 9th amendment to the Act against Restraints of Competition, which came into effect on 9 June 2017, some additions have been made. These include the acknowledgement of markets with free-of-charge services, and criteria to assess market power in two-sided markets and in networks.

## Online resources

### Federal Cartel Office (Bundeskartellamt) (FCO)

W [www.bundeskartellamt.de](http://www.bundeskartellamt.de)

**Description.** Official website of the FCO which provides information on German and EU competition law, the FCO's activities, the FCO's internal structure, and so on. Some documents are also available in English and French.

## The regulatory authority

### Federal Cartel Office (Bundeskartellamt) (FCO)

**Head.** Andreas Mundt

**Contact details.** Kaiser-Friedrich-Str. 16

D-53113 Bonn

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**Outline structure.** The FCO comprises 12 independent decision-making departments (*Beschlussabteilungen*), nine of which are in charge of competition law enforcement in specific economic sectors (including merger control). The remaining three decision-making departments specialise in the prosecution of hard-core cartels. The decision-making departments are supported by a specialised team of economists, among others.

A detailed organisational chart listing the respective areas of competence is available on the FCO's website.

**Responsibilities.** The FCO is the regulatory authority responsible for the enforcement of German and EU competition law, including the control of concentrations and the investigation and prosecution of anti-competitive agreements and practices, as well as of abuses of market powers.

The FCO is an independent authority which is accountable to the Federal Ministry of Economics and Technology.

**Procedure for obtaining documents.** There is no particular procedure for obtaining documents from the FCO. However, the text of the relevant legal provisions, information leaflets, further guidance

documents as well as decisions issued in individual cases are published on the FCO's website. Most of these documents are in German, but some documents are also available in English and French.

## Contributor profile

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**Professional qualifications.** Germany, Attorney-at-law (*Rechtsanwalt*), 1998

**Areas of practice.** German and EU competition law.

**Non-professional qualifications.** University of Göttingen, Germany, 1993; J.D., 1996

### Recent transactions

Recently advised and represented clients in cartel cases relating to the following goods and markets:

- Fire engines (German investigation).
- Propane gas (German investigation; Supreme Court).
- Automatic doors (German investigation).
- Sausages and meat products (German investigation).
- Sewage duct construction, refractory construction et seq. (bid-riggings, German investigations).

- Metal packaging (German investigation).

**Languages.** German, English

**Professional associations/memberships.** Association of German Anti-trust Lawyers (*Studienvereinigung Kartellrecht e.V.*); Network Compliance (*Netzwerk Compliance e.V.*).

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