



Germany is situated in Central Europe bordering the Baltic Sea and the North Sea, between the Netherlands and Poland, south of Denmark. Following World War II, Germany was divided into two states, namely the Western Federal Republic of Germany (FRG) and the Eastern German Democratic Republic (GDR), which remained under the influence of USSR

Germany is a founder member of the EU.

The decline of the USSR and the end of the Cold War allowed for German unification in 1990. Since then, Germany has expended considerable funds to bring productivity and wages up in former East Germany to West German standards. In January 1999, Germany and 10 other EU countries introduced a common European exchange currency, the Euro.

### Economy

After integration, Germany has enhanced its position as the largest market in the EU with a GDP of €2269.2bn in 2001 and a population of 82.3 million people. Germany is the world's third largest economy after the US and Japan and the world's second largest exporter of merchandise products.

Germany has pursued export-oriented economic policies since World War II and has generally been keen to foster further integration at the European and international levels. Within the EU, it has been a promoter of an open common external trade policy.

The high degree of regional integration is reflected in the fact that about half of all trade is conducted with other members of the EU. Similarly, about half of German investment abroad is undertaken in EU countries and the share of other EU members in all foreign investment in Germany even exceeds 60 percent.

PROFILE	
Population:	82.5 million***
GDP (Current US\$):	2.4 trillion***
Per Capita Income: (Current US\$)	25,270 (Atlas method)*** 27,100 (at PPP)**
Surface Area:	357 thousand sq. km
Life Expectancy:	78.2 years**
Literacy (%):	99 (of ages 15 and above)
HDI Rank:	19***
<i>Sources:</i> - World Development Indicators Database, World Bank, 2004 - Human Development Report Statistics, UNDP, 2004 (**) For the year 2002 (***) For the year 2003	

Corporate restructuring and growing capital markets are setting the foundations that could allow Germany to meet the long-term challenges of European economic integration and globalisation, particularly if labour market rigidities are further addressed. In the short run, however, the fall in government revenues and the rise in expenditures have raised the deficit above the EU's 3.0 percent limit.

### Competition Evolution and Environment

The enactment of a competition law regime played a vital role in rebuilding the German economy after World War II. Competition was perceived as an instrument to guarantee the economic freedom for market participants and, at the same time, to control the unlimited exercise of economic power.

The German competition law seeks to maximise consumer welfare by assuring that consumers are not deprived of the benefits of competition namely lower prices, higher output and more innovations. Both German and European competition law are directly applicable in Germany. Further

\* Original paper submitted in November 2004. Revised in August 2005 & January 2006.

**Box 75.1: Competition Law Applies to Public Entities Engaging in Economic Activities, Like Private Actors**

In one case, a government had set up an employment agency. The European Court of Justice ruled that arranging employment for the public is not an activity genuinely intertwined with the exercise of State Sovereignty, but could well be pursued by private actors. Consequently, competition from a private employment agency could not be restricted on the grounds that the government agency would not be subject to the competition laws.

the German Act against Unfair Competition protects consumers from manipulation and deception. Additionally, regulatory rules have been enacted for industry sectors like the recently liberalised telecommunications sector, aiming at introducing effective competition into these industries. Finally there is a set of consumer protection rules in place providing for strict product liability and special rights for consumers to revoke contracts.

### Competition Law and Policy

#### *The German Law Against Restraints of Competition*

The German Law against Restraints of Competition (*Competition Act*) was first enacted in 1958, and has subsequently been amended several times to account for new insights in economic theory, for changes in the industry structure in general, and for new developments in European competition law. The 7<sup>th</sup> amendment of the German Competition Act entered into force in 2005.

The German Competition Act expressly clarifies that the competition rules do not only apply to private enterprises but also to public entities, if they engage in economic activity and if they do not act merely in virtue of their exercising sovereignty rights, but in a way like any other private actor could. The same principle is valid under European competition law.

The competition law regime in Germany is based on three classical pillars: the interdiction of multilateral restraints of competition through agreements; the prohibition of unilateral restraints of competition based on an abuse of a dominant position; and third, on merger control:

*Agreements to Restrain Competition:* According to the German competition law, agreements are *ipso iure* void if they restrain or intend to restrain competition.

Until recently German competition law expressly distinguished between horizontal and vertical agreements, as the latter are typically less harmful for competition: Vertical agreements may reduce intra-brand competition, but at the same time, they regularly increase inter-brand competition. However, the 7<sup>th</sup> amendment as entered into

force in 2005, which more closely adjusts the German Competition Act to the European competition law, no longer contains this distinction in its wording. Nevertheless, it still remains more difficult to qualify for a justification, if agreements restrain competition in a horizontal context.

To be justified, agreements in restraint of competition have to meet four conditions, which are identical under German and European competition law: First, the agreement has to contribute to an improvement in production 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 regulations, which are directly applicable in Germany by means of a legal referral in the German Competition Act. The regulations state, for example, that if the parties have a market share of less than 20 percent in a horizontal context, or less than 30 percent in a vertical context, there is little competition concern warranted if the agreement does not contain certain core restrictions of competition, like minimum price fixing.

There is one regulation on vertical agreements in general, one on vertical agreements in the automobile industry, and one on technology transfer agreements. Concerning horizontal cooperation, there is one regulation on specialisation agreements and one with regards to agreements on research and development (R&D).

*Abuses of a Dominant Position:* In the field of unilateral restraints, German competition law interdicts abuses of market power. If an abuse is found, the competition agency can intervene. Further, no prior administrative action is necessary for private parties to be allowed to sue for civil damages or to seek a court injunction.

As to unilateral restraints of competition, the German Competition Act is stricter than the European competition rules in that it, in particular, protects small businesses from large enterprises that abuse a paramount market position. A paramount market position is conceptualised as a category of market power that conveys a special negotiation power due to, for example, extraordinary financial resources and privileged access to certain supply markets.

Further, enterprises possessing relative market power *vis-à-vis* small enterprises are prohibited from unreasonably discriminating between different small enterprises, and from unreasonably impeding small enterprises in their economic freedom. This provision applies, for example, where small enterprises depend on a particular branded product that is delivered by a single large company.

*Merger Control:* With the second amendment of the German Competition Act in 1973, a merger control regime was enacted in Germany. Mergers meeting certain thresholds have to be notified to the competition authority before they are consummated and they will be prohibited if they lead to the creation or strengthening of a dominant position. This dominance test in German law is currently hotly debated as, on a European level, the pure dominance test has been replaced by a ‘significant impediment of effective competition’ test.

### ***European Competition Law as Directly Applicable in Germany***

In Germany, European competition law is directly applicable alongside the German Competition Act if more than one Member State of the EU is affected by a restraint of competition. A recent reform has fundamentally changed the competition law regime in the European Community and the recent seventh amendment of the German Competition Act envisions an even closer alignment of the two sets of legislation.

*Market Integration within the EU:* Alongside preventing distortions of competition, European competition law pursues the aim of furthering market integration within the European Community by eliminating cross-border restraints of competition between the Member States.

The basic provisions of European competition law are Article 81 and Article 82 of the European Community Treaty (EC-Treaty), which have been specified by a set of regulations. The provisions are directly applicable in the Member States. The European competition law regime has been substantially transformed by a set of new regulations, which entered into force in May 2004. In particular, the EC now adopts a more economics-based approach.

*Agreements to restrain competition* are void *ipso iure* under European competition law, and can only be justified if the above-described four criteria are met, which are specified in several regulations. Formerly, to qualify for justification, agreements in restraint of competition had to be declared, for approval by the EC, which enjoyed an EU-wide monopoly to grant exemptions. In addition, block exemptions were issued by the EC to exempt certain kinds of agreements without individual notification.

To alleviate the high administrative burden on the EC, a new regulation now provides that, if the criteria for an exemption are met, the agreement is valid without prior notification or administrative approval by the EC. Consequently, national courts and agencies will directly apply the legal exemptions.

However, in a system in which prior administrative exemption for a restrictive agreement is mandatory the

competition authorities obtain a wider knowledge of what kinds of competition restrictions are practised in markets and which practices might be considered reasonable. Such a system might be of advantage in market economies where the competition authorities are keen on gaining more experience and where there is only little private enforcement.

*Abuse of a Dominant Position:* Further, under European Law, abuses of a dominant position are prohibited if they have a negative effect on the trade between Member States. Like under German competition law, 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. However, a business strategy that is not competitive on its own merit is prohibited.

*Merger Control:* As to merger control, the EC shall prohibit a concentration that would significantly impede effective competition in particular as a result of the creation or strengthening of a dominant position. Formerly, the Commission had applied a dominance test in its merger proceedings.

*Public Entities:* European competition law, as directly applicable in Germany, particularly deals with restraints of competition initiated by member state governments or by public entities. Four instruments intend to foil distortions of competition through state action:

First, the European Court of Justice has pronounced that member states are not allowed to take measures that encourage restraint of competition by private entities.

Second, the EC Treaty states that state monopolies are subject to the general competition rules and have to meet three criteria: State monopolies have to be limited to services of general economic interest. Second, the provision of these general public services would have to be undermined if competition rules were fully applied; and finally, the restraint must be necessary to achieve general economic (public) interest.

In addition, the EC issues directives to liberalise former state monopolies. Liberalisation directives have been enacted for the telecommunications sector, postal services and for the gas and the electricity sector.

*State Aid:* Third, European competition law mandates member states like Germany to declare public subsidies, for approval, to the EC. Public subsidies, for example, in the form of tax cuts and public guarantees, in favour of certain undertakings distort competition between member states and, to be approved, have to meet certain criteria like, for example, making good the damage caused by

**Box 75.2: National Laws are Not Applicable if they further Restrain Competition by Private Entities**

In one case, a national law created a duty for all producers of matches in a country to join a professional association. Through the association the state intended to prevent the distribution of matches by match producers who did not belong to the association, to set selling prices and to allocate production quotas.

The European Court declared the law to be inapplicable as it furthered the creation and enforcement of a private price cartel and a market allocation by the association as a private entity.

natural disasters or they have to be of a specific social character.

*Public Procurement:* Fourth, member states are obliged to enact rules governing public procurement if certain thresholds are met. In Germany, provisions on public procurement were introduced into the Competition Act in 1999.

**Institutions and its Competencies**

The *European Commission* applies the European competition rules. Decisions of the EC are subject to appeal to the European Court of First Instance.

The *German Anti-Cartel Office* applies both European and German competition laws. It is an independent quasi-judicial body headed by a President. The eleven chambers, which issue decisions and injunctions, are organised by economic sectors. Of the 300 officers employed, about one half are lawyers and one half are economists. Revenues generated from fees and fines go to the federal budget. Decisions of the Anti-Cartel Office are subject to court appeal.

Consequently, European competition law is applied by both the European Commission and by the national German competition authorities and Courts. A *European Competition Network* (ECN) has been put in place by the European Commission to coordinate the interaction between the various national competition authorities and to improve cooperation between the EC and national competition authorities.

With respect to agreements that restrain competition, the Member States are not allowed to apply stricter national competition laws if more than one Member State is affected. By contrast, as regards unilateral restraints of competition the Member States are allowed to apply stricter national competition laws.

In the field of merger control, European competition law is exclusively applicable if certain thresholds are met i.e. if a certain amount of the turnover is generated in more than one Member State. Exclusive authority belongs to either the EC or to the national authorities to review mergers, so as to lower transaction costs of mergers and to avoid diverging decisions.

German competition law further provides for a *Monopoly Commission*, an independent body of five members, which issues a biennial report on the state of competition and the degree of concentration, in the various markets, by industries. The Monopoly Commission has a purely advisory role and has no enforcement powers.

**The German Act against Unfair Competition**

The German Act against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb – UWG*) seeks to protect consumers, competitors and other market players from unfair methods of competition. In 2004, the Act was considerably liberalised to implement various European directives and because some provisions were perceived as quite patronising towards consumers.

To be prohibited, it is not sufficient that a method of competition is merely deemed to be unfair. Rather a method of competition must be deemed as considerably impeding the competitive process to the disadvantage of competitors, consumers or other market players. For example, it is considered against the law if the freedom of consumers to make a decision is being unduly influenced through manipulation or deception.

**Box 75.3: Advertisements Have to be Transparent When Stating the Price**

In one case, 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 a consumer would incur due to the service contract.

If 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. In this case, the consumer would need information on the duration of the contract, about the basic fee structure and about other fees they would have to bear.

Advertisements are considered unfair if they are misleading consumers. In particular, it is perceived as unfair if imitations of a product are offered, which leads consumers into confusing the product with those of competitors. Further an advertisement is considered unfair if it exploits the good reputation of a competitor.

Comparative advertising is forbidden if competitors are denigrated, or if the comparison does not relate to relevant, significant and verifiable features of a product.

Finally, an advertisement is prohibited because of being unfair if consumers are harassed. For example, it is considered as a harassment if advertisements are sent to consumers against their will or if consumers who did not have business relations with that company before are being called on their telephones without their prior consent.

The German Unfair Competition Act authorises competitors and consumers to seek an injunction or to sue for damages.

### **Sectoral Regulation**

Sector specific competition rules have been enacted particularly with regard to newly liberalised industries like telecommunications, energy and postal services imposing a regulatory regime in these sectors, which still lack a competitive structure.

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. The agency is in particular concerned with consumer rights in these sectors. The Agency was formerly known as the Regulatory Authority for Telecommunications and Posts until July 2005.

### **Telecommunications Sector**

The liberalisation of the telecommunications sector in Germany was initiated by a set of liberalisation and harmonisation directives of the EC in the late eighties. The German Telecommunications Act was enacted in 1996. As a response to changes in market structure and technology, a new package of European directives was enacted in 2002 entailing substantial amendments to the German Telecommunications Act in 2004.

Basically, ex-post regulation through the general competition rules applies alongside the ex-ante regulation of the Telecommunications Act. The Telecommunications

Act envisions the concept of a 'sunset regulation' meaning that the sector-specific *ex-ante* regulation will phase out once effective competition has been attained in a relevant market. Further, as a rule only those operators are subject to the Telecommunications Act that enjoy significant market power.

Under the Telecommunications Act, the regulatory authority identifies the relevant communications markets, which warrant regulation, i.e. markets with high, non-transitory entry barriers, which do not tend towards effective competition. In these markets, the sole application of the general competition rules would not suffice to protect consumers and to prevent market failures.

The regulatory authority then determines whether there is effective competition in those markets by examining whether an operator has the power to behave appreciably independent of competitors and end-users. The concepts set forth by the Telecommunications Act are identical to the notion of market dominance as used in general competition law.

### **Consumer Protection**

German and European competition rules are based on a strict consumer welfare standard and seek to assure that the market forces work to the benefit of the consumers. The German Act Against Unfair Competition and special consumer protection rules seek to strengthen consumer confidence by giving consumers the information about the quality of the products, that they need for their purchasing decisions. Finally there are strict product liability rules in place, which alleviate the burden of proof to the benefit of consumers in consumer litigation cases.

General provisions concerning consumer protection are also found in the German Civil Code (*Bürgerliches Gesetzbuch* – BGB). For example, vendors have to satisfy certain information obligations. With respect to certain kinds of contracts, such as contracts over the internet, consumers have a right to revoke the contract without reason within a certain time period.

In Germany, 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 when it comes to safeguard the economic interests of consumers. Consumer health and safety protection has to be designed as a forward-looking policy. Further, a market economy to work properly, which needs confident and self-determined consumers.

There is a great deal of development potential for Germany as a quality location. Ranging from food and product safety to real estate financing, the fields of action cover a broad spectrum.

### **Concluding Observations and Future Scenario**

Competition policy and consumer protection are an ongoing task and indispensable for the proper functioning of a market economy.

In the field of general competition law, recent fundamental changes in European and German law have laid the grounds for a more economics-based approach by the competition authorities and the courts. The direct

applicability of European competition law alongside German competition law, by national authorities, will place more responsibility in the hands of national courts and competition agencies with regard to an efficient enforcement of competition law.

The German Act against Unfair Competition is meant to ensure that consumers can base their decisions on transparent information. In the fields of telecommunications, sector specific regulation is designed to be phased out as soon as effective competition is established in the relevant markets. Consumer protection laws seek to protect consumers from health and safety hazards and to strengthen consumer confidence.

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### **Suggested Reading**

Regulatory Reform in Germany: Enhancing Market Openness through Regulatory Reform, *OECD 2004*

#### **✦ German Federal Cartel Office to Regulate Electricity Market**

Germany's Federal Cartel Office will soon have the power to regulate the country's electricity market. Under the new law, which was announced on November 29, 2006, and enters into force in 2007, the Office will have the power to halt 'excessive pricing' in the market for energy generation, as this constitutes an abuse of dominant position.

The new powers will give the Office scope for encouraging competition. For example, it will provide easier access to the electricity grid for new market entrants. But German competition specialists have warned that enforcing low electricity prices on the market may prove to be a disincentive for third parties that are considering opening a power station. The new legislation would extend only to 2012.

*(Source: Global Competition Review, 04.12.06)*

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