

July–August 2020

# German Competition Law Newsletter

---

## Monopolies Commission Biennial Report XXIII “Competition 2020”

On July 29, 2020, the Monopolies Commission published its Biennial Report XXIII. The Monopolies Commission makes three main recommendations to strengthen the German and European competition regimes.<sup>1</sup>

First, during the COVID-19 crisis, substantive competition law should uncompromisingly continue to apply. If the German State provides rescue packages that might distort the market, it should also apply measures to promote competition. For example, financial aid to Deutsche Bahn AG (“DB”) might harm competition in the transportation sector if the aid does not also benefit competitors, *e.g.* by using it to improve rail infrastructure. Temporary cooperation between companies during the time of the crisis might be appropriate, such as between hospitals or medical suppliers, but the report warns that mergers being approved during the crisis that may create dominant players could negatively impact competition and consumers long after the crisis ends. Merger control review period extensions based on COVID-19 should continue until the end of 2020.

Second, the European Commission should regulate large digital platforms at the European level to limit abuses of market power. A Platform Regulation at European level should include, for example, the obligation to refrain

from self-preferencing and instead support interoperability and portability. Procedural obligations to cooperate with authorities’ investigations should also become more stringent.

Third, to reduce competition distortion in the internal market, the Monopolies Commission proposes introducing a European instrument applicable to third-country subsidies, such as from China. The instrument should cover all subsidies which would violate Art. 107(1) TFEU if they were provided by a Member State and allow a compensatory levy in case of violations to reap benefits of third-country subsidies. The report further recommends suspending aid pending the examination of any third-country aid to avoid passing on subsidies to third parties.

In addition to these main recommendations, the report notes that the Monopolies Commission has not found any alarming trends in the concentration of companies in Germany, but recommends observing cross-sectoral company concentration and sales-weighted price mark-ups in manufacturing. The report further provides a review of competition decisions and judgments to recommend future actions legislators and competition authorities should take.

---

<sup>1</sup> Monopolkommission, Wettbewerb 2020, XXIII. Hauptgutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 1 GWB, full report available is only available in German [here](#); English summary available [here](#); press release in German available [here](#); press release in English available [here](#).

## News

### FCO

#### ***FCO Initiates Sector Inquiry Into Electric Vehicle Charging Infrastructure***

On July 9, 2020, the Federal Cartel Office (“FCO”) launched a sector inquiry on the provision and marketing of public charging infrastructure for electric vehicles.<sup>2</sup> While the market is still in its early phase and emerging, the FCO received multiple complaints about prices and conditions at charging stations.

In an effort to rein in transport emissions and to promote the use of electric cars, the German government is rolling out a nationwide charging infrastructure to be in place by 2030. The construction and operation of charging stations is not subject to the comprehensive regulation of power grids. Given that the electric vehicle sector is characterized by vertical integration, the FCO considers non-discriminatory access to suitable locations for charging stations as well as the specific terms and conditions applying at these locations, of key importance to ensure effective competition and the successful expansion of e-mobility.

Accordingly, the FCO’s sector inquiry will not only look into prices at public charging stations but further examine how cities and municipalities provide access to suitable charging locations and how their approaches affect competition between charging station operators. In addition,

the FCO will look at the framework conditions for installing charging stations on motorways. In a second phase, the FCO also plans to analyze the conditions that both e-mobility service providers as well as charging customers must abide by to access charging stations. The FCO will publish its findings and conclusions in a report. If the sector inquiry indicates anticompetitive practices, the FCO may also initiate separate proceedings against individual companies.

#### ***FCO Approves Acquisition Of Lovoo By Parship And Elite Partner***

On July 6, 2020, the FCO approved the acquisition of online dating platform provider The Meet Group Inc. (USA), active on the German market through its mobile dating app Lovoo GmbH (“Lovoo”), by the ProSiebenSat.1 Media SE (“ProSiebenSat.1”) group, which owns online dating platforms from Parship and Elite Partner.<sup>3</sup>

The FCO concluded that despite the parties’ relatively high combined shares and a further concentration in the online dating market,<sup>4</sup> the acquisition would not significantly impede competition. The FCO found that the online dating market is characterized by dynamic growth, which particularly applies to the mobile dating app segment, market entries, and vital competition with numerous alternative providers. In addition, users tend to rely on several platforms and barriers to entry are relatively low.

<sup>2</sup> FCO Press Release, July 9, 2020, available in English [here](#).

<sup>3</sup> FCO Press Release, July 6, 2020, available in English [here](#). FCO Case Summary (B6-29/20), July 13, 2020, only available in German [here](#).

<sup>4</sup> On October 22, 2015, the FCO had already approved the acquisition of all of the shares in EliteMedianet GmbH by Oakley Capital Limited which, at the time, belonged to Germany’s largest online dating platform providers (in particular active through the platforms elitepartner.de, academicpartner.de, and parhip.de), see FCO Press Release, October 22, 2015, available in English [here](#); see also National Competition Report October – December 2015, p. 19, available in English [here](#).

## Courts

### ***Dortmund Regional Court On Group Liability For Cartel Damages***

On July 8, 2020, the Dortmund Regional Court for the first time considered a group liability of all companies forming an economic unit for cartel damages.<sup>5</sup> The court concluded—in line with the Court of Justice of the European Union’s (“CJEU”) recent case law—that the broader notion of an “undertaking” (in the sense of the economic unit) under EU law also applies in damages actions under national law. In *Skanska*<sup>6</sup>, the CJEU recently held that if an entity had acquired all shares and continued the economic activity of an entity involved in the cartel, the acquiring entity will also be liable for civil damages caused by the cartel. In the past, German courts have not adhered to this reasoning and rejected the liability of entities belonging to the same “undertaking” within the meaning under EU law.<sup>7</sup> Under the German principle of personal responsibility, an entity is only liable for its individual conduct and, in principle, German law does not allow for the allocation of liability from another entity’s infringement.

The Dortmund Regional Court—although only in an *obiter dictum*—noted that the EU “undertaking” doctrine also applies in competition damages actions and thus argued in favor of a general group liability for entities that form part of a single economic entity. Even though the court ultimately dismissed the case, it considered the question sufficiently important to take a position on group liability in cartel damages cases.

### ***FCJ Rules On FRAND Defense***

On May 5, 2020, the Federal Court of Justice (“FCJ”)<sup>8</sup> granted Sisvel International S.A (“Sisvel”) an injunction against the Chinese mobile phone manufacturer Haier Group Corporation (“Haier”) to stop infringing one of Sisvel’s standard essential patents (“SEP”). In its first application of the Court of Justice of the European Union’s (“CJEU”) *Huawei/ZTE* judgment,<sup>9</sup> the FCJ clarified the requirement of the patent user’s willingness to license.

SEP owners may be obliged under competition law to grant licenses. In its *Huawei/ZTE* judgment, the CJEU detailed that such an obligation prevents a patent holder from obtaining an injunction against users of the patent (i) that are willing to license, unless (ii) the patent holder has made a fair-reasonable and non-discriminatory (“FRAND”) offer and the patent user (iii) has failed to diligently respond to the offer.<sup>10</sup> In patent injunction proceedings, the defendant can invoke non-compliance with these steps as so-called FRAND defense.

Sisvel owned a SEP for a mobile telecommunication standard (“the Patent”). Haier offered mobile phones and tablets in Germany using technology protected by the Patent. Sisvel contacted Haier about the Patent at the end of 2012, but Haier indicated its willingness to negotiate a license only at the end of 2013. Following fruitless negotiations, Sisvel sued Haier for infringing the Patent. The companies continued to negotiate in parallel to the proceedings. Notably, Sisvel made a few offers to which Haier made counteroffers subject to the condition that the Patent would be found valid and infringed in a court decision.

<sup>5</sup> Dortmund Regional Court judgment (8 O 75/19) of July 8, 2020 is only available in German [here](#).

<sup>6</sup> CJEU judgment of March 14, 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others* (C-724/17), available in English [here](#).

<sup>7</sup> Regional Court of Mannheim judgment (14 O 117/18 Kart) of April 24, 2019, not yet published. See Regional Court of Munich I judgment (37 O 6039/18) of June 7, 2019, only available in German [here](#).

<sup>8</sup> *FRAND-Einwand* (KZR 36/17), FCJ judgment of May 5, 2020, available in German [here](#); an English convenience translation is available [here](#). For a detailed commentary on the decision, please see Cleary Gottlieb’s alert memorandum of July 23, 2020, available [here](#).

<sup>9</sup> *Huawei/ZTE* (C-170/13), CJEU judgment of July 16, 2015, available in English [here](#).

<sup>10</sup> A more detailed description of the process can be found in Cleary Gottlieb’s alert memorandum of July 23, 2020, p. 2, available [here](#).

The Düsseldorf Regional Court found Haier liable for infringing the Patent.<sup>11</sup> On appeal, the Düsseldorf Court of Appeal (“DCA”) largely reversed the decision.<sup>12</sup> It found that Sisvel had abused its dominant position on the market for the licensing of the Patent by not complying with the *Huawei/ZTE* process. The DCA considered that, while there were some delays, Haier had demonstrated its willingness to license before the initiation of the court proceedings. Sisvel would therefore have been obliged to make a licensing offer on FRAND terms before suing Haier. Further, Sisvel had offered Haier’s competitor, Hisense Group (“Hisense”), significantly better licensing terms which led the DCA to conclude that Sisvel’s offers to Haier were not FRAND.

On Sisvel’s appeal, the FCJ reversed the DCA’s judgment and reinstated the decision of the Düsseldorf Regional Court. The FCJ considered that Haier was not a willing licensee. According to the FCJ, a potential licensee has to clearly and unambiguously declare his unconditional willingness to conclude a license agreement on FRAND terms and contribute to the negotiation process. While the FCJ expressly left open whether Haier could even be seen as a willing licensee in view of the response time of nearly one year, the FCJ held that Haier’s response and counteroffers were not sufficient, particularly since Haier initially had only indicated an intention to conduct negotiations and later made its counteroffers dependent on the Patent being found valid and infringed in a court decision. While not decisive for the case, the FCJ also stated that the DCA had not sufficiently established that Sisvel’s offer was not FRAND. The licensing terms for Hisense were not a suitable indicator, since the terms likely resulted from pressure of the Chinese government to provide beneficial terms to Hisense and were not necessarily indicative of a fair price.

---

<sup>11</sup> Düsseldorf Regional Court judgment (4a O 93/14) of November 3, 2015, only available in German [here](#).

<sup>12</sup> DCA judgment (I-15 U 66/15) of March 30, 2017, only available in German [here](#).

## AUTHORS



**Sylvia DeTar**  
+49 221 80040 117  
[sdetar@cgsh.com](mailto:sdetar@cgsh.com)



**Philipp Kirst**  
+49 221 80040 157  
[pkirst@cgsh.com](mailto:pkirst@cgsh.com)



**Anna Lubberger**  
+49 221 80040 115  
[alubberger@cgsh.com](mailto:alubberger@cgsh.com)



**Friedrich Andreas Konrad**  
+49 221 80040 136  
[fkonrad@cgsh.com](mailto:fkonrad@cgsh.com)

## EDITORS

**Katharina Apel**  
+49 221 80040 133  
[kapel@cgsh.com](mailto:kapel@cgsh.com)

**Janine Discher**  
+49 221 80040 119  
[jdischer@cgsh.com](mailto:jdischer@cgsh.com)

PARTNERS, COUNSEL AND SENIOR ATTORNEYS –  
GERMAN ANTITRUST PRACTICE GROUP

**Dirk Schroeder**  
[dschroeder@cgsh.com](mailto:dschroeder@cgsh.com)

**Till Müller-Ibold**  
[tmuelleribold@cgsh.com](mailto:tmuelleribold@cgsh.com)

**Wolfgang Deselaers**  
[wdeselaers@cgsh.com](mailto:wdeselaers@cgsh.com)

**Rüdiger Harms**  
[rharms@cgsh.com](mailto:rharms@cgsh.com)

**Romina Polley**  
[rpolley@cgsh.com](mailto:rpolley@cgsh.com)

**Niklas Maydell**  
[nmaydell@cgsh.com](mailto:nmaydell@cgsh.com)

**Thomas Graf**  
[tgraf@cgsh.com](mailto:tgraf@cgsh.com)

**Katharina Apel**  
[kapel@cgsh.com](mailto:kapel@cgsh.com)

**Patrick Bock**  
[pbock@cgsh.com](mailto:pbock@cgsh.com)

**Bernd Langeheine**  
[blangeheine@cgsh.com](mailto:blangeheine@cgsh.com)

**Stephan Barthelmess**  
[sbarthelmess@cgsh.com](mailto:sbarthelmess@cgsh.com)

**Lars-Peter Rudolf**  
[lrudolf@cgsh.com](mailto:lrudolf@cgsh.com)

