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# German Competition Law Newsletter

## Highlights

- FCO Presents Annual Report 2018 With A Focus On The Digital Economy And Consumer Protection
- DCA Finds Narrow MFN Clauses Compatible With Competition Law

## FCO Presents Annual Report 2018 With A Focus On The Digital Economy And Consumer Protection

On June 27, 2019, the German Federal Cartel Office (“FCO”) published its Annual Report 2018 as well as its biennial Activity Report 2017/2018.<sup>1</sup> Andreas Mundt, the President of the FCO, pointed out that the FCO has a clear digital agenda with a focus on the digital economy and the protection of consumer rights, which it will continue to pursue this year.

The reports also provides various enforcement statistics which show that—60 years after the German Act against Restraints of Competition (“ARC”) had come into force and the FCO had begun its work—the FCO continues to be a highly active operator in the area of competition law enforcement in Europe.

### Digital Economy

The FCO emphasized its continued goal to maintain an open market by preventing big tech companies and platforms from abusing dominant positions.

- On February 6, 2019, after an investigation of nearly three years, the FCO found that Facebook’s data collection practices amounted to an exploitative abuse of a dominant position. The decision marks the first time that the FCO considered compliance with data protection rules in its abuse of dominance analysis.<sup>2</sup>
- In 2018, the FCO also initiated proceedings against Amazon’s German marketplace following numerous complaints by smaller retailers regarding Amazon’s allegedly abusive terms and conditions and its behavior *vis-à-vis* the retailers. Only recently in July 2019, the FCO has closed its probe as Amazon agreed to change its marketplace terms and conditions for retailers using the marketplace platform.<sup>3</sup> At the same time, the European Commission has opened a formal probe into Amazon’s use of data and whether Amazon is abusing its dual role as the largest online marketplace operator and the largest retailer.<sup>4</sup>

<sup>1</sup> The Annual Report 2018 is only available in German [here](#). The Activity Report 2017/2018 is only available in German [here](#). The press release is available in English [here](#).

<sup>2</sup> See German Competition Law Newsletter January - February 2019, p. 1 *et seq.*, available [here](#).

<sup>3</sup> A detailed report will be published in the German Competition Law Newsletter July - August 2019.

<sup>4</sup> FCO Press Release, July 17, 2019, available in English [here](#).

In addition, the FCO initiated a—still ongoing—sector inquiry into online advertising, focusing on the technological developments and their impact on the market structure and market opportunities of the various players concerned.<sup>5</sup>

Against the background of the increasing use of algorithms by companies,<sup>6</sup> the FCO, together with the French Competition Authority, is also working on a paper on algorithms and their implications on competition, aiming at analyzing the challenges raised by algorithms and at identifying conceptual approaches to meet them.<sup>7</sup>

## Consumer Protection

As part of the Ninth Amendment of the ARC in 2017, the German legislator granted the FCO the competence to conduct sector inquiries into potential consumer protection issues. This led to the formation of a new consumer protection division at the FCO.

- The FCO already concluded a sector inquiry into price comparison websites, finding that several comparison websites infringed consumer rights by providing misleading or incomplete information.<sup>8</sup>
- In 2019, the FCO will continue two additional sector inquiries into the use of consumer data by smart TVs (launched in December 2017)<sup>9</sup> and into the authenticity and validity of user reviews on online platforms (launched in May 2019)<sup>10</sup>.

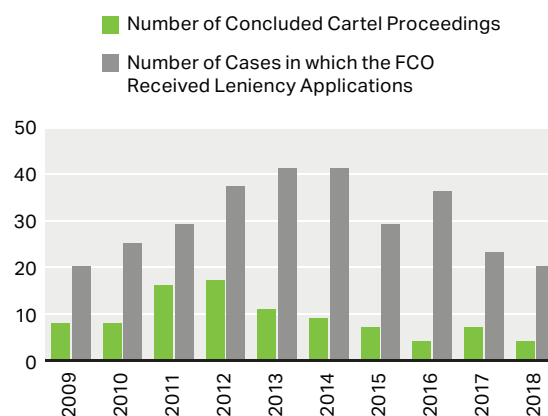
Mr. Mundt criticized the fact that while the FCO may now investigate consumer protection infringements, it lacks the competence to enforce consumer protection laws (*e.g.*, by imposing fines or issuing prohibition decisions). To date, the sector inquiries' results only may facilitate private enforcement by consumers, consumer associations or competitors. The FCO is thus seeking new enforcement powers, in particular with respect to the digital economy.

## Cartel Prosecution

In 2018, the FCO imposed fines of ca. € 376 million in eight different cases on a total of 22 companies or trade associations as well as 20 individuals, making 2018 a very successful year for the FCO. Only in 2003, 2007, and 2014 (with the exceptionally high amount of € 1,117 billion), the total amount of fines imposed was higher. The largest of the 2018 fines was imposed on a cartel of stainless steel manufacturers for price-fixing and information sharing, totaling € 291.7 million. The FCO also received 25 leniency applications concerning 20 cases, and conducted dawn raids in seven cases, inspecting 51 business premises and five private homes.

Overall, the 2018 enforcement statistics confirm tendencies from earlier years:

- The overall number of concluded cartel proceedings decreased from a peak of 17 in 2012 to only four in 2018.
- From 2013 to 2018, the number of cases in which the FCO received leniency applications decreased significantly by around 50%.



- By contrast, the number of private damage claims has substantially increased. Almost every cartel proceeding is now followed by numerous private damages claims. The FCO's

<sup>5</sup> FCO Press Release, February 1, 2018, available in English [here](#); FCO Background Paper, February 2018, is available in English [here](#).

<sup>6</sup> For example, for matching and ranking purposes as well as dynamic price setting.

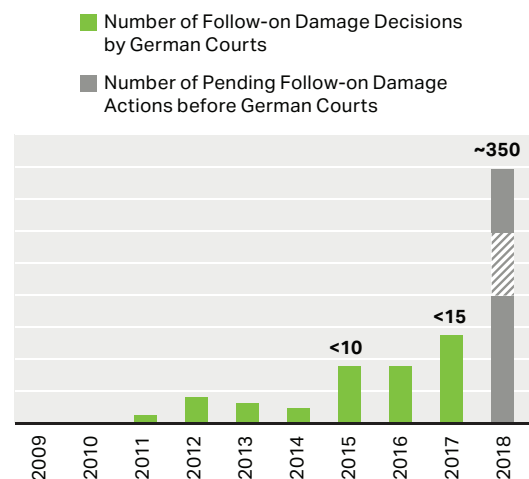
<sup>7</sup> FCO Press Release, June 19, 2018, available in English [here](#).

<sup>8</sup> See German Competition Law Newsletter March – April 2019, p. 1 *et seq.*, available [here](#).

<sup>9</sup> FCO Press Release, December 13, 2017, available in English [here](#); FCO Background Paper, October 2018, is available in English [here](#).

<sup>10</sup> FCO Press Release, May 23, 2019, available in English [here](#).

Activity Report 2017/2018 states that around 350 follow-on damages actions are currently pending before German courts (of which 300 concern the European Truck Cartel<sup>11</sup> alone). The FCO also observes an increasing professionalization in bundling and claiming damages, in particular by specialized law firms and litigation funding specialists, which will further spur private enforcement.

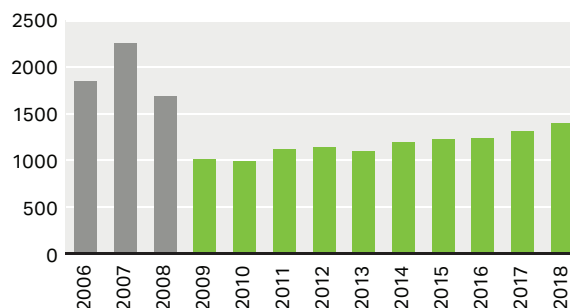


These opposed developments indicate that companies are more and more reluctant to apply for leniency due to the enhanced risk of being exposed to private damages claims.

## Merger Control

In 2018, the FCO received 1,383 merger notifications. While this is only ca. 60% of the pre-financial crisis number in 2007, it is the highest number since 2009 (when an additional filing threshold was introduced<sup>12</sup>) and a 6% increase over 2017.

Number of Merger Notifications



As in previous years, the FCO cleared ca. 99% of the notified transactions in Phase I (*i.e.*, within one month). The FCO concluded eight Phase II proceedings after an in-depth review. Of these eight transactions, the FCO cleared three unconditionally<sup>13</sup> and one subject to obligations<sup>14</sup>. While the FCO did not issue a single prohibition decision in 2018, in the other four Phase II proceedings, the parties withdrew their notifications after the FCO had expressed competitive concerns.<sup>15</sup>

The new transaction value-based threshold<sup>16</sup>, introduced in 2017, has not led to a significant number of additional notifications or cases that raises competitive concerns. According to the FCO, only 18 notifications in 2017 and 2018 were filed because of the new threshold. Seven of these notifications were withdrawn because there was no filing obligation. The remaining notifications were cleared in Phase I. In 2018, the FCO, together with the Austrian competition authority, also published a guidance paper on the application of the transaction value thresholds.<sup>17</sup>

<sup>11</sup> *Trucks* (Case AT.39824), Commission decision of September 27, 2017.

<sup>12</sup> The so-called “second domestic turnover threshold” states that a transaction is notifiable if (in addition to a combined worldwide turnover of all parties exceeding € 500 million and one party’s turnover in Germany exceeding € 25 million) at least one other party had a turnover in Germany exceeding € 5 million.

<sup>13</sup> *Aurubis/Deutsche Gießdraht* (B5-62/18), FCO decision of July 13, 2018, a press release is available in English [here](#); *Cargotec Oyj/GB Marine Cargo Handling Solutions* (B5-99/18), FCO decision of November 5, 2018, a press release is available in English [here](#); *Remondis/Helene Müntefering-Gockeln Wertstoffrecycling* (B4-77/18), FCO decision of December 13, 2018, a press release is available in English [here](#).

<sup>14</sup> *VTG Rail Assets/CIT Rail Holdings* (B9-124/17), FCO decision of March 21, 2018, a press release is available in English [here](#). The acquisition concerning the lessors of railway freight wagons has been cleared under the condition that the target’s business in Germany and Luxembourg will be divested.

<sup>15</sup> *Raiffeisen Waren-Zentrale Rhein-Main/Landgard Blumen & Pflanzen (JV)* (B2-62/17), FCO Press Release, February 23, 2018, available in English [here](#); *Horizon Global Corporation/Brink International* (B9-25/18), FCO Press Release, June 18, 2018, available in English [here](#); *Reinplus Van-Woerden Bunker/NWB Nord- und Westdeutsche Bunker* (B8-34/18), FCO Press Release, June 20, 2018, available in English [here](#); *Cellitinnen Nord/Cellitinnen Süd* (B3-122/18); FCO Press Release, April 4, 2019, available in English [here](#); see also German Competition Law Newsletter March – April 2019, p. 5 *et seq.*, available in English [here](#).

<sup>16</sup> Catching transactions with a transaction value exceeding € 400 million, in particular in the digital economy.

<sup>17</sup> Their 2018 “Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification” is available in English [here](#). For more information on the transaction value threshold see the Cleary Gottlieb Alert Memorandum available [here](#).

In light of the fact that the FCO reviews a much larger number of merger cases than other competition authorities and that the FCO clears 99% of the notified transactions within Phase I, Mr. Mundt considered a reduction of the number of cases within the framework of the upcoming amendment to the ARC helpful to be able to focus on the cases that really matter to consumers and on Phase II cases which require an enormous amount of time and effort.

## Outlook

The German legislator is drafting the Tenth Amendment to the ARC with the aim to publish a first draft later this year. A number of changes are planned, and it remains to be seen how this will affect the FCO's competences and workload:

— The FCO's focus on digital economy will also be reflected in the Tenth Amendment as new rules on abuse control, in particular for digital platforms, will be implemented.

- The Tenth Amendment, however, will most likely not grant the FCO enforcement powers when investigating consumer infringements.
- Cartel prosecution will be improved by the implementation of the ECN+-Directive<sup>18</sup> into national law, which will grant the competition authorities additional competencies to ensure uniform enforcement of the European competition law.
- Merger control will be enhanced by increasing the second domestic turnover threshold from € 5 million to € 10 million to reduce the number of notifications and focus on the macro-economically important transactions.
- The Tenth Amendment will also include procedural improvements to accelerate procedures, *e.g.*, by issuing interim orders.

# DCA Finds Narrow MFN Clauses Compatible With Competition Law

On June 4, 2019, the Düsseldorf Court of Appeals (“DCA”) annulled the FCO's 2015 decision prohibiting hotel booking platform operator Booking Holdings (“Booking.com”) from using narrow most favored nation (“MFN”) clauses.<sup>19</sup> The DCA's decision aligns the German position with that of other European national competition authorities (“NCAs”). However, new causes of divergence—stemming from legislative interventions—are already emerging.

## Background

MFN clauses, also known as “best price” or “price parity” clauses, are provisions in agreements between, for instance, hotels and hotel booking platform operators, such as Booking.com, whereby the hotels guarantee to offer the same—or

better—rates and conditions for hotel rooms than those offered either: (i) on any other offline or online sales channel, *e.g.*, on other booking platforms (wide MFN clauses) or (ii) on the hotels' own website (narrow MFN clauses).<sup>20</sup> Booking.com and other platforms broker hotel rooms to end customers and receive a commission of 10-15% for bookings made via its platform. However, hotels do not pay any commission for direct bookings, even if the end customers had only become aware of the hotel in question via Booking.com.

Starting in 2010, several NCAs have investigated MFN clauses in agreements between hotels and hotel booking platform operators and taken different approaches:

<sup>18</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3.

<sup>19</sup> *Booking* (VI - Kart 2/16 (V)), DCA decision of June 4, 2019, only available in German [here](#).

<sup>20</sup> Hotels may still offer cheaper rates offline, *i.e.*, at their receptions, or if contacted directly by customers, as long as these cheaper rates are not advertised or promoted online.

- In 2013, the FCO prohibited German online hotel booking platform operator HRS GmbH (“HRS”)’s wide MFN clauses because they reduced competition between existing booking platforms and prevented new market entries by other platforms.<sup>21</sup> The DCA confirmed the FCO’s decision.<sup>22</sup>
- In April 2015, the French, Italian and Swedish NCAs (coordinated by the European Commission)<sup>23</sup> similarly found Booking.com’s wide MFN clauses to be anticompetitive. The three NCAs accepted commitments from Booking.com to replace wide with narrow MFNs.
- Already in 2013, *i.e.*, shortly after concluding its proceedings against HRS, the FCO had initiated proceedings against Booking.com. During the course of the FCO’s investigation, Booking.com extended the commitments it had previously made to the French, Italian and Swedish NCAs to Germany, also replacing its wide MFN clauses with narrow MFN clauses. The FCO, nonetheless, continued its proceedings against Booking.com and ultimately prohibited the use of narrow MFNs.<sup>24</sup>

## The DCA Decision

The DCA annulled the FCO’s decision, finding that narrow MFN clauses are to be considered ancillary restraints, *i.e.*, restrictions directly related and necessary to achieve the objectives of the contracts between Booking.com and the hotels. Narrow MFN clauses therefore do not constitute an infringement of Art. 101 TFEU or Section 1 ARC.

In the DCA’s view, the narrow MFNs are necessary to ensure a fair and balanced business relationship between Booking.com and hotels that use its services. Hotels pay a commission only when a guest actually books a hotel via Booking.com. By contrast, Booking.com provides its services in advance, *i.e.*, without any immediate return from

the hotels. The balance between these mutual obligations would be significantly impaired if hotels were allowed to avoid paying commission by diverting customers that initially found the hotels on Booking.com away from Booking.com to the hotels’ own websites (by offering cheaper prices on their own website than on Booking.com). The DCA found that such a behavior exploited Booking.com’s efforts in breach of good faith.

In addition, the DCA identified an evident and genuine risk that hotels would actually follow this approach without the restrictions imposed by narrow MFN clauses: First, the DCA considered that cheaper prices have a significant pulling effect with respect to the customers’ choice of where to book a hotel room. Even if a customer searched for accommodations via Booking.com and decided for a specific hotel on that basis, the customer is likely to conduct the actual booking through the channel that offers the best price and booking conditions—at least, if the alternative channel is easily accessible. Given that booking platforms provide hyperlinks to hotels’ websites, customers can easily access the hotels’ own offers, and would likely book via the hotels’ own websites if prices there are lower than on the platform.

Second, the DCA found that hotels have an incentive to divert bookings to their own websites by offering lower prices there. Although the large majority of hotels in Germany considered the services of booking platforms—and in particular Booking.com—to be essential for their business, the FCO’s market test (conducted at the DCA’s request) showed that a significant number of hotels already offer prices and booking conditions on their websites that are more favorable than those offered on Booking.com.<sup>25</sup>

Against this background, the DCA confirmed that Booking.com was entitled to avoid the illicit diversion of bookings from its own platform by establishing contractual countermeasures to prevent “free-riding” by hotels. The DCA

<sup>21</sup> *HRS – Bestpreisklausel* (B9-66/10), FCO decision of December 20, 2013, available in English [here](#).

<sup>22</sup> *Bestpreisklausel* (VI - Kart 1/14 (V)), DCA decision of January 9, 2015, summary available in English [here](#).

<sup>23</sup> For details on the cooperation, see Italian Competition Authority’s Press Release of April 21, 2015, available in English [here](#).

<sup>24</sup> *Booking* (B9-121/13), FCO decision of December 22, 2015, available in English [here](#).

<sup>25</sup> Prices on the hotels’ own websites are often 5%-15% lower than the prices of identical offers on Booking.com.

held that the use of narrow MFN clauses was not only necessary to ensure a balance between the contractual parties (Booking.com and the hotels), but also proportionate. The FCO was not able to indicate an alternative, similarly effective contractual measure to the DCA that would restrict competition to a lesser extent and be less burdensome for the hotels. In particular, the DCA found that fixed listing or click-based fees would restrict competition more significantly than narrow MFN clauses. In addition, the DCA held that Booking.com's use of narrow MFN clauses did not result in disproportionate disadvantages for hotels.

The DCA denied leave for appeal on points of law. The FCO, however, has lodged an appeal with the German Federal Court of Justice against the DCA's denial of leave to appeal.

## News

### FCO

#### ***FCO Blocks Heidelberger Druckmaschinen's Acquisition Of MBO Group***

On May 7, 2019, after an in-depth investigation, the FCO prohibited Heidelberger Druckmaschinen AG's acquisition of sheet folding machine manufacturer MBO Maschinenbau Oppenweiler Binder GmbH & Co. KG ("MBO Group").<sup>27</sup> Based on an extensive market investigation, with a particular emphasis on customer feedback, the FCO found that the merger would have created a dominant position for Heidelberger Druckmaschinen AG and significantly impeded competition in the market for the manufacture and distribution of sheet folding machines for industrial printing processes.

Sheet folding machines are used in the final stage of the printing process (*i.e.*, the print finishing)

### Outlook

The DCA's decision is consistent with the 2015 decisions of the French, Italian and Swedish NCAs. However, new laws in several EU Member States,<sup>26</sup> including France and Italy, now specifically prohibit booking platforms from interfering with a hotel's pricing at all. This means that the approach to narrow MFN clauses in the EU remains inconsistent.

While the abovementioned decisions deal with MFN clauses in the hotel booking sector, other online platforms are closely following the legal development. For example, after the FCO's decision against HRS, German price comparison website Verivox GmbH ("Verivox") removed all MFN clauses from its contracts to avoid further investigation by the FCO. Following the DCA's latest decision, Verivox, as well as other price comparison websites or platform providers, may reconsider the use of narrow MFN clauses.

to fold printed paper or book-binding paper. The folded paper is then used to make books or brochures. The FCO found that industrial sheet folding machines constitute a single product market, distinct from other machines used in the print finishing stage. Customers had indicated that the relevant machines are substitutable and can be flexibly deployed. Therefore, a further subdivision of the market according to different print formats and performance levels was not justified.

According to the FCO, the merger would have allowed the European market leader Heidelberger Druckmaschinen AG to acquire its closest competitor leading to combined market shares far exceeding 50% in an already highly concentrated market with only four companies manufacturing and selling industrial sheet

<sup>26</sup> See Art. L311-5-1 *et seq.* of the French Tourism Code (2015); Austria's Section 1a of the Law on Unfair Competition as well as their Price Marking Act (2017); Italy's Art. 1 (166) of the Annual Competition Law (2017); and Belgium's Law relating to freedom of pricing by operators of touristic accommodation in contracts concluded with platform operators for online reservation (2018); see also the final report of the UK competition authority on their digital comparison tools market study from September 26, 2017, available in English [here](#).

<sup>27</sup> FCO Press Release, May 7, 2019, available in English [here](#). A non-confidential version of the decision (B5-185/18) is only available in German [here](#).

folding machines throughout the whole of Europe. Further, the FCO's investigations revealed high barriers for new market entrants, because of the significant cost and time required to enter the market. In addition, the market is characterized by a high level of customer loyalty. Indeed, there have been no new market entries throughout the last 20 years. The parties did not offer remedies to address the FCO's concerns.

The decision is final. It continues a recent series of prohibition decisions and withdrawals of merger filings in Germany.<sup>28</sup>

### ***FCO Clears RWE's Acquisition Of A Minority Stake In E.ON***

On February 26, 2019, the FCO approved RWE AG's ("RWE") acquisition of a minority stake of 16.67% in E.ON SE ("E.ON").<sup>29</sup> The acquisition is part of a complex share and asset swap deal between the two energy companies. Following the share and asset swap, E.ON will focus on the distribution and retail of electricity and gas, whereas RWE will be primarily active in upstream electricity generation and wholesale markets.

#### **BACKGROUND**

As part of the overall share and asset swap, RWE will acquire (i) the major part of, and control over, E.ON's renewable and nuclear power assets and (ii) a 16.67% minority stake in E.ON as part of the payment for its assets to be sold to E.ON. In exchange, E.ON will acquire (iii) RWE's majority stake of 76.69% in, and control over, Innogy SE ("Innogy"), and thus take over RWE's retail and distribution business.

RWE's acquisition of E.ON's renewable energies business, and E.ON's acquisition of RWE's majority

stake in Innogy, had to be notified to the European Commission. By contrast, RWE's acquisition of a minority stake in E.ON did not fall under the European Commission's jurisdiction<sup>30</sup> and was thus subject to review by national competition authorities, namely the FCO and the UK Competition and Markets Authority ("CMA"), which cleared the transaction on April 8, 2019.<sup>31</sup>

#### **FCO DECISION**

The FCO found that RWE's acquisition of 16.67% of the shares in E.ON constitutes a notifiable concentration under German merger control because RWE will acquire a "competitively significant influence" over E.ON: First, the minority shareholding combined with RWE's right to propose a member of E.ON's supervisory board gives RWE influence over E.ON. Further, this influence is competitively relevant because both companies will be active across almost all stages of the value chain of the electricity and gas markets. Finally, RWE's influence over E.ON is significant because RWE will *de facto* hold more than 25% of the voting rights and thus enjoy a veto over company decisions that require a qualified majority. In addition, RWE will become E.ON's largest single shareholder and the envisaged minority shareholding needs to be seen in the context of the overall transaction which is aimed at a vertical specialization of each of RWE's and E.ON's areas of activity.

However, the FCO found that this part of the overall transaction would not significantly impede effective competition on the market for the generation and sale of electricity to wholesalers, distributors or large industrial customers,<sup>32</sup> as its actual effect on RWE's market position would be minimal. In particular, the FCO did not consider the acquisition of a minority shareholding to

<sup>28</sup> The FCO's *Miba/Zollern* prohibition decision (B5-29/18) in January 2019 (FCO Press Release, January 17, 2019, available in English [here](#); see also German Competition Law Newsletter January – February 2019, p. 6, available in English [here](#)) marked the first prohibition decision since its *CTS Eventim and Four Artist* decision (B6-35/17) in November 2017 (FCO Press Release, November 23, 2017, available in English [here](#)) and was followed by a number of withdrawals of merger notifications in early 2019; see also German Competition Law Newsletter March – April 2019, p. 5 *et seq.*, available in English [here](#).

<sup>29</sup> Case B8-28/19. FCO Press Release, February 26, 2019, available in English [here](#); FCO Case Summary May 31, 2019, only available in German [here](#); and FCO Background Paper, February 26, 2019, only available in German [here](#).

<sup>30</sup> Under the European Merger Control Regulation (Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)) ("EUMR"), a concentration is defined as a merger of two or more previously independent undertakings (or parts of undertakings) or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. The EUMR applies to concentrations that have a 'Union dimension' (*i.e.*, meet certain turnover thresholds).

<sup>31</sup> CMA decision of April 8, 2019, ME/6800/19, available in English [here](#); CMA Notice, available in English [here](#).

<sup>32</sup> This part of the overall transaction did not concern the distribution of electricity to final consumers.

provide RWE with a way to control the power production capacities remaining with E.ON.

The FCO emphasized that it did not conduct an isolated review of this part of the overall transaction, but took into account also the effects of the overall transaction and cooperated closely with the European Commission to achieve a more streamlined procedure. In particular, given that all parts of the overall transaction essentially concerned the same relevant markets, the authorities joined forces with regard to the collection of market data to avoid burdening recipients with duplicate surveys.

#### **STATUS OF THE EUROPEAN COMMISSION'S MERGER REVIEW**

On the day of the FCO's decision (February 26, 2019), the European Commission approved RWE's acquisition of E.ON's renewable and nuclear electricity generation assets.<sup>33</sup> In contrast, on March 7, 2019, the European Commission opened a still ongoing in-depth investigation into E.ON's proposed acquisition of Innogy, having initially determined that the parties have a strong combined market position in several retail markets on a national or subnational level in four Member States, including Germany.<sup>34</sup> While the parties did not offer remedies during Phase 1, E.ON has recently offered to divest businesses in three of the four Member States concerned to gain the European Commission's approval also for E.ON's acquisition of Innogy.<sup>35</sup>

## **Courts**

### ***FCO Rapporteurs' Opinions Protected From Access***

On May 9, 2019, the German Federal Administrative Court ("FAC") ruled that access to the preparatory notes (so-called "opinions") of the rapporteurs of the FCO's decision divisions under the German Freedom of Information Act is restricted, because public access to the rapporteurs' opinions would jeopardize the decision divisions' deliberation process.<sup>36</sup> The FAC thus ultimately confirmed the FCO's denial of a journalist association's access request to information on one of the FCO's merger assessments, including access to the rapporteur's opinions.

While the German Freedom of Information Act, in principle, confers to the public a right to gain access to official documents, this right is excluded if a public disclosure would affect an authority's internal deliberation process. The FAC emphasized that the FCO's decision divisions decide as collegial bodies. If opinions that only reflect a single members' opinion were made public, and could be compared against the FCO's later decision, the open exchange of views and discussions inside the decision division could be impaired. Therefore, access to the opinions could not be granted.

<sup>33</sup> European Commission Press Release (M.8871), February 26, 2019, available in English [here](#).

<sup>34</sup> European Commission Press Release (M.8870), March 7, 2019, available in English [here](#).

<sup>35</sup> Global Competition Review article, June 27, 2019, available in English [here](#); see also the European Commission's case page with further details on the overall timeline for this case [here](#).

<sup>36</sup> Federal Administrative Court Press Release, May 9, 2019, available in German only [here](#).



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