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German Competition Law Newsletter

Highlights

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FCO Presents Annual Report 2020/2021 Focusing On The Digital Economy

On June 23, 2021, the German Federal Cartel Office ("FCO") published its Annual Report 2020/2021[1] as well as its biennial Activity Report 2019/2020. Andreas Mundt, the President of the FCO, pointed out that the FCO's enforcement activities continue to focus on the digital economy and consumer protection—especially with the help of the FCO's new enforcement tools created by the recently introduced 10th Amendment of the German Act Against Restraints of Competition ("ARC")[2]. The reports also provides various enforcement statistics that show that the FCO continues to be a highly active competition law enforcer in the EU.[3]

Digital Economy

The FCO stressed the accelerating impact of the COVID-19 pandemic on digitalization and its goal to ensure open markets by investigating large tech companies and platforms and their potential to abuse their dominant positions.

— In 2019, the FCO investigated Facebook's data processing practices and considered data protection law in its abuse of dominance analysis for the first time. This complex judicial proceeding is still ongoing and German courts have recently referred questions to the Court of Justice of the European Union ("CJEU") for guidance on how data protection law relates to antitrust law.[4]

[1] For activities in the first half of 2020 see German Competition Law Newsletter September – October 2020, p. 1 *et seq.*, available here.

[2] For more details, see German Competition Law Newsletter November 2019 – January 2020, p. 1 *et seq.*, available here.

[3] The Annual Report 2020/2021 is only available in German here. The Activity Report 2019/2020 is only available in German here. The press release is available in English here.

[4] For more details, see our article in this newsletter.

— On December 10, 2020, the FCO initiated proceedings against Facebook to examine whether requiring users of its Oculus virtual reality glasses to also have a Facebook account constitutes an abuse of a dominant position.[5] The FCO extended the scope of its investigation in January 2021 and is now examining whether Facebook has paramount cross-market significance ("PCMS") and whether linking the services needs to be assessed on this basis.[6]

— In the judicial proceedings following the proposed merger between CTS Eventim/Four Artists, the German Federal Court of Justice ("FCJ") confirmed the FCO's prohibition decision and emphasized the autonomous interpretation of German merger control law, which does not require the authority to establish a significant impediment to effective competition as long as the merger will strengthen a dominant position.[7]

In addition, the FCO supported the Federal Ministry for Economic Affairs and Energy to prepare the coming into force of the 10th Amendment to the ARC in January 2021 and actively participates in discussions on the Digital Markets Act at a European level.

The FCO also continued its 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.[8]

In August 2019, the FCO established the new unit "Digital Economy" to support decision divisions on issues relating to multi-sided markets, intermediate power, algorithms used by companies, and access to data relevant for competition.

Consumer Protection

In 2019/2020, the FCO concluded three sector inquiries into potential consumer protection issues and has launched one new inquiry:

— In April 2019, the final report of the sector inquiry into price comparison websites concluded that several comparison websites infringed consumer rights by providing misleading or incomplete information.[9]

— In July 2020, in its final report of the sector inquiry "smart TVs", the FCO found transparency and data protection gaps in manufacturers' data protection regulations.[10]

— In October 2020, the sector inquiry into the authenticity and validity of user reviews on online platforms showed that a relevant part of user reviews are manipulated and not easy to detect by consumers.[11]

— In November 2020, the FCO launched a sector inquiry into messenger services, which allow data exchange and communications on mobile devices via Internet. The FCO examines whether the services adequately protect consumer data privacy and expects insights on how to increase interoperability of messenger services.[12]

The FCO has also published a series of papers on "Competition and Consumer Protection in the Digital Economy"[13], highlighting threats to consumers and possible measures to protect them.

[5] See German Competition Law Newsletter November – December 2020, p. 2 *et seq.*, available here.

[6] See the FCO's Press Release of January 28, 2021, available in English here.

[7] For more details, see our article in this newsletter.

[8] FCO's Press Release, February 1, 2018, available in English here; FCO Background Paper, February 2018, is available in English here.

[9] FCO's Press Release, April 11, 2019, available in English here. For more details, see German Competition Law Newsletter March – April 2019, p. 1 *et seq.*, available here.

[10] FCO's Press Release, July 1, 2020, available in English here. For more details, see German Competition Law Newsletter September – October 2020, p. 5, available here.

[11] FCO's Press Release, October 6, 2020, available in English here. For more details, see German Competition Law Newsletter September – October 2020, p. 5 *et seq.*, available here.

[12] FCO's Press Release, November 12, 2020, available in English here.

[13] All papers are available in English here.

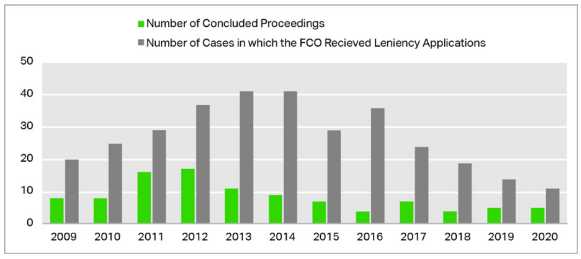
Cartel Prosecution

In 2020, the FCO imposed fines of approx. € 349.4 million on a total of 19 companies or trade associations as well as 24 individuals. Despite the COVID-19 pandemic and the fact that no dawn raids could be carried out in the first half of 2020, the amount of fines imposed by the FCO was higher only in 2003, 2007, 2014 (with the exceptionally high amount of € 1.117 million), 2018 and 2019. The highest fine in 2020 amounted to approx. € 174 million and was imposed on aluminum forging companies and individuals responsible for sharing information on their pricing factors in Germany. In 2020, the FCO received 13 leniency applications in 11 cases, and conducted dawn raids in three cases, inspecting 17 business premises.

Overall, the 2020 enforcement statistics confirm tendencies from earlier years:

— The overall number of concluded cartel proceedings decreased from a peak of 17 in 2012 to only five in 2020.

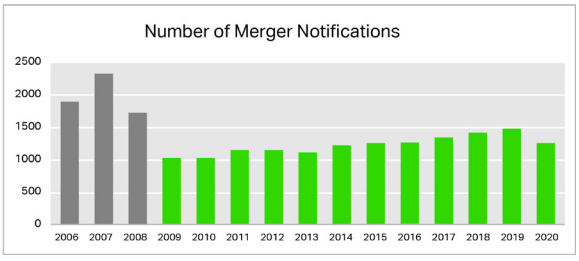
— The number of cases in which the FCO received leniency applications has continued to significantly decrease since 2016. The FCO is concerned that the unforeseeable scope of civil liability will continue to have a negative impact on the attractiveness of leniency programs, which currently represent a significant contribution to uncovering antitrust infringements.



— As in previous years, the FCO registered numerous actions for damages following completed cartel proceedings (so-called "follow-on" damages actions), including in the following sectors: sugar, trucks, rails, bathroom fittings, electronic cash, chipboard, detergents, picture tubes, packaging, cement, steel blasting abrasives, wallpaper, gas-insulated sound systems, drugstore articles, flour (mill cartel), confectionery, sausages, beer, and spark plugs. According to the FCO's Activity Report 2019/2020, around 370 new private damages action have been initiated. Compared to the previous report, the number of newly brought private damages actions has substantially decreased, mainly due to the fact that the wave of Truck Cartel-related lawsuits is diminishing (despite their declining total number, follow-on actions related to the Truck Cartel still accounted for more than 80% of all follow-on actions registered in the reporting period).[14]

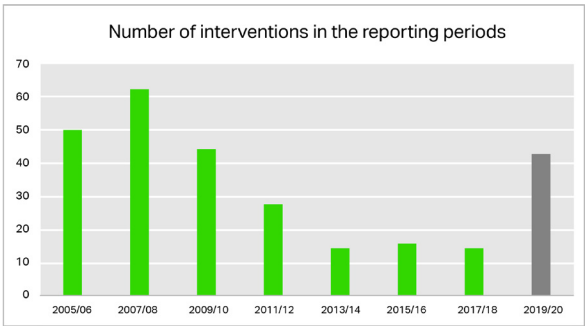
Merger Control

In 2020, the FCO received 1,236 merger notifications. This is a decrease of 13.7%, which is probably due to the COVID-19 pandemic. The increase in the relevant turnover thresholds for merger filings under the 10th Amendment to the ARC will reduce the number of filings even further going forward.



[14] *Trucks* (Case AT.39824), European Commission ("EC") decision of September 27, 2017, a case summary is available in English here. For private follow-on damages actions also see our French Competition Law Newsletter November 2019, p. 5 *et seq.*, available here, as well as our UK Competition Law Newsletter May 2019, p. 4 *et seq.*, available here, February – March 2020, p. 7, available here, April – May 2020, p. 5 *et seq.*, available here, June – July 2020, p. 6, available here, and November 2020, p. 5, available here, and our Alert Memorandum of December 7, 2020, available here.

In the reporting period 2019/2020 the FCO has been "intervening" in more cases than in the years before almost reaching the numbers of 2009/2010. This refers to cases in which either no notification or a modified notification was made due to competition concerns raised by the FCO during pre-notification, the notification was pulled during the initial review period (Phase I) or the in-depth review period (Phase II), clearance was only granted subject to conditions or the merger was blocked.



As in previous years, the FCO cleared approx. 99% of the notified transactions in Phase I (*i.e.*, within one month). The FCO concluded nine Phase II proceedings after an in-depth review. Of these nine transactions, the FCO cleared four unconditionally[15] and three subject to conditions (remedies)[16]. While the FCO did not issue a single prohibition decision in 2020, in the other two Phase II proceedings, the parties withdrew their notifications after the FCO had expressed serious competitive concerns.[17]

Outlook

The FCO will continue to focus on the digital economy and put their new toolbox from the 10th Amendment of the ARC into action. In particular, the FCO:

— Can prohibit certain conduct, *e.g.*, self-preferencing, exclusionary conduct that hinders access to a market, non-transparency, or impediment of interoperability if it had determined a company to have PCMS. After proceedings to determine Google's, Amazon's and Facebook's PCMS have already been launched earlier this year, Apple is now the last major digital company of the GAFA to be investigated by the FCO under the new rules.[18]

— Can establish dominance based on access to data in traditional markets that are not multi-sided as well as on the role as an intermediary that provides access to inputs or customers.

— Can order a company to notify any acquisitions after conducting a sector inquiry, and if there are indications that future concentrations may restrict competition in the sector, and acquirer and target fulfil certain turnover thresholds.

— Can impose interim measures if they are required to protect competition or to avert an immediate and serious impairment of another company.

[15] *Carglass/ATU-Glasgeschäft* (B4-60/20), FCO decision of December 17, 2020, a press release is available in English here; *Allianz/ControlExpert* (B9-49/20), FCO decision of October 20, 2020, a press release is available in English here; *Zentralklinikum Flensburg* (B3-33/20), FCO decision of July 30, 2020, a press release is available in English here; *CRRC/Vossloh Locomotives* (B4-114/19), FCO decision of April 27, 2020, available in English here.

[16] *Vue/Greater Union* (B6-80/18), FCO decision of February 28, 2020, a press release is available in English here; *XXXLutz/Roller* (B1-195/19), FCO decision of November 26, 2020, a cases summary is available in English here; *Kaufland/Real* (B2-83/20), FCO decision of December 22, 2020, a press release is available in English here.

[17] *Edgewell/Harry's* (B5-149/19), FCO's Press Release, March 6, 2020, available in English here; *RWZ/Raiwa*, FCO's Press Release, June 18, 2018, available in English here. The parties withdrew their notification on December 28, 2020, after the FCO had initiated a second phase proceeding. On April 21, 2021, the FCO cleared the acquisition after further changes, see FCO's Press Release, April 21, 2021, available in English here.

[18] For further information, please see our other article in this newsletter.

FCJ Confirms Narrow MFN Clauses As Anticompetitive

On May 18, 2021, the FCJ annulled a 2019 decision of the Düsseldorf Court of Appeal ("DCA") and found the "narrow" most favored nation ("MFN") clauses used by the hotel booking platform operator Booking Holdings ("Booking.com") to be incompatible with EU and German competition law.[19]

Background

MFN clauses, also known as "best price" or "price parity" clauses, are contractual clauses in agreements between, for instance, hotels and hotel booking platform operators, 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).[20]

Booking.com is a Dutch hotel booking platform operator that brokers hotel rooms to end customers for a commission of 10-15% for bookings concluded over their platforms. If end customers book their rooms directly over the hotel's website, the hotels do not pay a commission to Booking.com even if their customers initially found the hotel on their platform.[21]

Following Booking.com's decision to abandon the use of wide MFN clauses, the FCO, in 2015, also prohibited the use of narrow MFN clauses. Essentially, the FCO argued that narrow MFN clauses significantly reduce the attractiveness of the hotel's own online distribution channel and limit the hotel's pricing sovereignty.[22] On appeal, the DCA overturned the FCO's decision. While narrow MFN clauses are principally capable of restricting competition, they are to be considered necessary and ancillary restraints to Booking.com's brokerage agreements to prevent free-riding of hotel operators on Booking.com's services.[23] The FCO appealed the decision and, in parallel, launched an investigation into the effect of narrow MFN clauses on online sales.[24]

The FCJ Decision

The FCJ annulled the DCA's decision and found that (i) narrow MFN clauses cannot be considered ancillary restraints, *i.e.*, restrictions directly related and necessary to achieve the objectives of the brokerage agreement between Booking.com and the hotels, and (ii) narrow MFN clauses cannot benefit from an individual exemption.

No Ancillary Restraint

According to the ancillary restraints doctrine, certain restrictions should not be "restrictions of competition" within the meaning of Article 101(1) TFEU where, in consideration of the legal and economic context, they are demonstrably necessary for protecting the legitimate interests of the parties to the agreement. In the FCJ's view, Booking.com failed in establishing that narrow MFN clauses are necessary to ensure a fair and balanced exchange of services between Booking.com as the platform operator and the hotels as its customers. This was illustrated, *inter alia*, by the fact that, according to the FCO's

[19] See the FCJ's Press Release of May 18, 2021, available in German here.

[20] 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.

[21] See also our article in the German Competition Law Newsletter May – June 2019, p. 4 *et seq.*, available here.

[22] *Booking* (B9-121/13), FCO decision of December 22, 2015, available in German here and in English here, see also our article in the German Competition Law Newsletter May – June 2019, p. 4 *et seq.*, available here.

[23] *Bestpreisklausel* (VI - Kart 1/14 (V)), DCA decision of January 9, 2015, available in German here, see also our article.

[24] See "The effect of narrow price parity clauses on online sales – Investigation results from the Bundeskartellamt's Booking proceeding" ("Investigation Results") in the paper series "Competition and Consumer Protection in the Digital Economy" dated August 2020, available in English here, see also our article in the German Competition Law Newsletter – June 2019, p. 4 *et seq.*, available here.

investigation, Booking.com was able to further strengthen its market position in Germany—in terms of turnover, market share, booking volumes, number of hotel partners and number of hotel locations—even after Booking.com removed the narrow MFN clause from its contracts.

No Individual Exemption from the Ban On Agreements Restricting Competition

According to the FCJ, Booking.com's narrow MFN clauses could also not be exempted from the ban on agreements restricting competition on a case-by-case basis. In the FCJ's view, the clauses do not lead to an overall efficiency advantage by improving the production or distribution of goods or promoting technical or economic progress which outweighs the agreement's anticompetitive effects:

— While the FCJ acknowledged that Booking.com's search, compare and book functions offer consumers a convenient, unique and attractive service package and hotels an extended customer reach, these efficiency advantages do not presuppose the narrow MFN clauses.

— Further, the FCJ found that MFN clauses may have positive effects, such as securing an adequate remuneration for the platform service by solving the above-mentioned free-rider or increasing market transparency for consumers. However, based on the results of the FCO's investigation as well as other submissions by Booking.com, the FCJ does not consider the free-rider problem to be such a big issue that it could jeopardize the efficiency of the brokerage agreement.

— Finally, narrow MFN clauses considerably hindered the platform-independent online sales of hotel operators by diminishing the attractiveness of the operators' own online sales channels and restricting their pricing sovereignty. In particular, narrow MFN clauses deprive hotel operators of the opportunity to pass on the agency commission saved in the form of price reductions to attract customers.

Conclusion

The FCJ's judgment puts an end to a years-long saga. However, across the EU, national competition authorities and courts have investigated MFN clauses with different results. It will be interesting to see whether the ongoing review of the EU Vertical Block Exemption Regulation, which is expected to come to a close in mid-2022, will provide more clarity to the treatment of MFN clauses under EU competition law.

DCA Refers Facebook Case To The CJEU

On March 24, 2021, the DCA stayed the proceedings regarding Facebook's appeal against the FCO's decision of 2019 prohibiting Facebook to combine data from different sources and referred a number of questions to the CJEU.[25] The CJEU is now called upon to consider the relevance infringements of the General Data Protection Regulation ("GDPR") under competition law.

Background—The Battle In Interim Proceedings

In its 2019 decision, the FCO prohibited Facebook to combine data collected on its social network with data collected in other business areas (*e.g.*, through WhatsApp Inc. ("WhatsApp"), Instagram LLC ("Instagram"), and Oculus products) without the users' freely given consent.[26] The FCO based its decision on the novel argument that Facebook's data collection and processing practices were an

[25] *Facebook* (V-Kart 2/19), DCA decision of March 24, 2021, only available in German here, see also the DCA's press release of March 24, 2021, only available in German here.

[26] *Facebook* (B6-22/16), FCO decision of February 6, 2019, available in English here; the FCO's case summary is available in English here, see also our article in the German Competition Law Newsletter January – February 2019, p. 1 *et seq.*, available here.

exploitative abuse of users, because Facebook's terms and conditions infringed the GDPR.

In August 2019, the DCA suspended the enforcement of the FCO's decision in interim proceedings.[27] The DCA found that the FCO failed to establish a strict causal link between the allegedly abusive behavior and Facebook's dominance, *i.e.*, Facebook's dominant position was not necessary to impose the allegedly unlawful terms and conditions. Consequently, the DCA did not consider whether Facebook's behavior infringed the GDPR.

Upon the FCO's appeal, the FCJ reinstated the FCO's decision in June 2020.[28] Unlike the DCA, the FCJ did not rely on GDPR infringements. Instead, the FCJ found Facebook to infringe competition law by imposing an additional service in the form of personalized advertising based on aggregated data from different services (such as WhatsApp, Instagram, and Oculus products).

Upon a second motion for an interim order by Facebook, the DCA again suspended the FCO's decision on November 20, 2020.[29] The FCO appealed the DCA's decision, but Facebook retracted its motion for the interim order in late December 2020 before the FCJ could decide.

Referral To The CJEU In Main Proceedings

Although, in its first interim decision, the DCA found that it was irrelevant whether Facebook infringed the GDPR, the DCA now stayed the main proceedings to have the CJEU clarify the relevance of GDPR infringements under competition law.

The DCA specifically asked the CJEU whether it is compatible with Article 51 *et seq.* GDPR if a national competition authority—such as the FCO—finds, for the purposes of monitoring abuses of competition law, that Facebook's contractual terms relating to data processing and their implementation breach the GDPR and issues an order to end that breach. If the answer is yes, the DCA asked the CJEU a number of additional questions regarding the application of the GDPR. If the answer is no, the DCA asked the CJEU whether the FCO may nonetheless consider compliance of Facebook's data processing terms and their implementation with the GDPR when assessing an abuse of a dominant position, *e.g.*, when balancing different interests.

The decision to call upon the CJEU suggests that the DCA no longer requires a strict causality between a dominant position and a certain behavior to find a competition infringement. This view would be in line with the legislator's claim that German law never required strict causality.[30] The result of this view may be that any infringement of non-competition law, such as the GDPR, could be considered an abuse of dominance.

Formal Errors

In the oral hearing, the DCA also noted that the FCO's decision was unlawfully addressed to several companies of the Facebook group. First, the decision was unlawfully addressed to Facebook subsidiaries that were not parties to the proceedings because they were not heard by the FCO. Second, Facebook Deutschland GmbH was unlawfully addressed because it does not have decisive influence over its Irish sister company collecting the data and therefore cannot terminate the alleged infringement. Third, the FCO had discretion to address the parent company Facebook Inc. but failed to give any consideration as to why it chose to address it, thereby rending it unlawful.

[27] *Facebook* (VI-Kart 1/19 (V)), DCA decision of August 26, 2019, only available in German here. See also our article in the German Competition Law Newsletter July – August 2019, p. 1 *et seq.*, available here.

[28] See *Facebook* (KVR 69/19), FCJ judgment of June 23, 2020, only available in German here. See also Cleary Gottlieb Alert Memorandum of June 29, 2020, available here.

[29] *Facebook II* (Kart 13/20 (V)), DCA decision of November 20, 2020, only available in German here.

[30] See also the changes to Sect. 19 ARC in the course of the 10th Amendment of the ARC.

DCA Rejects The FCJ's Reasoning

Not bound by the FCJ's interim decision, the DCA further noted in the oral hearing that the FCJ's reasoning which focused on Facebook imposing an additional service on its users, is an entirely different behavior than the GDPR infringement found by the FCO. The FCO neither found that Facebook imposed such a service nor that this conduct hindered competitors. The DCA further rejected the FCO's decision as disproportionate finding that Facebook could terminate the infringement by closing its social network in Germany or allowing users to choose whether and to what extent they allow Facebook to combine their data across different services. The FCO's decision ordered Facebook to stop the infringement by changing its terms and conditions, leaving Facebook no choice between these alternatives.

Conclusion

The battle between Facebook and the FCO is expected to drag on for a few more years, as the DCA proceedings are stayed until the CJEU has responded and any DCA decision will likely be appealed to the FCJ. The consequences of GDPR violations, and more generally of violations of non-competition law, for dominant companies will therefore remain an open question for some more time.

In the meantime, the German legislator has—also in reaction to these Facebook proceedings—provided the FCO with a new toolset to prohibit certain behaviors of large digital platforms in the course of the 10th Amendment of the ARC. The new law specifically enables the FCO to prohibit the combination of user data without giving users a choice. The FCO has already opened a new proceeding against Facebook using these new tools.[31]

FCJ Confirms: German Merger Control Test Differs From European Test

On January 12, 2021, the FCJ dismissed CTS Eventim's appeal against a decision of the DCA [32], thus confirming the FCO prohibition of CTS Eventim's acquisition of Four Artists.[33] In its landmark decision, the FCJ clarified that under German merger control law, any strengthening of a dominant position, even if it is not appreciable, can constitute a significant impediment to effective competition ("SIEC") and serve as grounds for prohibiting a transaction.

Background

CTS Eventim—the operator of Germany's largest ticketing system—intended to acquire 51% of the shares in the booking and concert agency Four Artists. In 2017, the FCO blocked the deal on the grounds that the vertical integration of Four Artists into the CTS group resulting from the merger would have strengthened CTS Eventim's already dominant position in the downstream market for ticketing services in Germany. CTS Eventim appealed to the DCA mainly based on the argument that Four Artist's minimal market share (less than 1.5% of all concert tickets sold in Germany) would not have significantly strengthened CTS Eventim's position. The DCA rejected the appeal. In turn, CTS Eventim appealed the case to the FCJ.

[31] See FCO's Press Release of January 28, 2021, available in English here.

[32] *CTS Eventim/Four Artists* (KVR 34/20), FCJ judgment of January 12, 2021, only available in German here. See *Ticketvertrieb* (VI-Kart 3/18 (V)) for the DCA's decision December 5, 2018, only available in German here. An English summary of the DCA's decision can be found in the German Competition Law Newsletter March - April 2019, p. 8 *et seq.*, available here.

[33] *CTS Eventim/Four Artists* (B6-35/17), FCO decision of November 23, 2017. A press release is available in English here and the full decision is available in German here.

Introduction Of The SIEC Test In Germany

In 2013, the German legislator introduced the significant impediment to effective competition ("SIEC") test—which has already been the relevant substantive test under the EC Merger Regulation[34] since 2004. Since then, the substantive test under German merger control rules has been whether a transaction would "significantly impede effective competition", which was to be the case in particular if the transaction was "likely to create or strengthen a dominant position". However, it has been unclear whether every strengthening of a dominant position requires a prohibition or whether the "strengthening effect" must also be "significant".

Separate Determination Of Significance Not Required For A Strengthening Of A Dominant Position

The FCJ found that the strengthening of a dominant position as a presumptive example always constitutes a significant impediment to competition. This is true even if the strengthening of the dominant position itself was not significant or even appreciable. The FCJ based this in particular on the following grounds:

— The wording of the German SIEC test does not provide any indication for a separate assessment of significance if a transaction is expected to create or strengthen a dominant position. Rather, a prohibition is justified "in particular" if a dominant position is strengthened. In this respect, the wording of the German SIEC test differs from the SIEC test of the EC Merger Regulation, according to which transactions "which would significantly impede effective competition, [...], in particular *as a result* of the creation or strengthening of a dominant position" (emphasis added) are to be prohibited. Because of the different wording of the two tests, the EC Merger Regulation allows for a different interpretation of the prohibition requirements, according to which—unlike under German law—not every strengthening of a dominant position can be sufficient.

— The intention of the legislator also speaks for this result. The German SIEC test was introduced to further expand the FCO's room for maneuvering and to fill suspected "enforcement gaps". In doing so, the legislator had cases in mind in which—according to the traditional German dominance test—the conditions for dominance were not met, but the transactions nevertheless had a negative impact on competition in the market. However, it cannot be concluded from this circumstance that a significant impediment to effective competition must always be established separately, which would be tantamount to restricting merger control.

Further, the FCJ clarified that the substantive assessment of a transaction cannot merely rely on market shares. Rather, it had to be examined whether the structural changes resulting from the transaction created a more favorable competitive situation for the dominant undertaking. If certain changes in the factors determining market power are so minor that they do not justify the conclusion that competitive conditions have deteriorated, the criterion of strengthening a dominant position is not met. If, on the other hand, a further reduction of the balancing effect of competition, in particular—as in the case at hand—through even more unfavorable conditions for downstream competition, is to be feared, the strengthening of the dominant position necessarily leads to a significant impediment to effective competition.

Conclusion

It remains to be seen how the FCO will apply this test in practice—in particular, with regard to non-vertical cases.

[34] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

News

FCO

Investigation Against Apple Under New Rules For Large Digital Companies

On June 21, 2021, the FCO opened an investigation against Apple under the new competition rules for companies with PCMS.[35] After proceedings against Google, Amazon and Facebook have already been launched earlier this year, Apple is the last major digital company of the GAFA to be investigated by the FCO under the new rules.

In a first step, the FCO will investigate whether Apple has PCMS through its ecosystem consisting of the operating system iOS, smartphones, computers, tablets and wearables, as well as related services such as the App Store, iCloud, AppleCare, Apple Music and Apple TV+.

In a second step, the FCO intends to review certain practices of Apple. In particular, the FCO has received various complaints regarding Apple's restriction of user tracking in their operating system iOS by third-party advertisers, the exclusive pre-installation of Apple's proprietary applications, the mandatory use of Apple's payment system for in-app-purchases involving commission payments of up to 30%, and marketing restrictions for app developers.

Already in June 2020, the EC has opened investigations against Apple regarding its payment system as well as various practices relating to its App Store.[36] The FCO has announced that it intends to cooperate with the EC and other national competition agencies.

FCO Approves RTL Group's Acquisition Of The Remaining Shares In Super RTL

On June 11, 2021, the FCO cleared Bertelsmann SE & Co. KGaA's ("RTL Group") acquisition of the remaining 50% shares in RTL Disney Fernsehen GmbH & Co. KG ("Super RTL") from its co-shareholder The Walt Disney Company ("Disney").[37] RTL Group and Disney established Super RTL as a joint venture in 1995, each holding 50 percent of the shares in Super RTL. Following the transaction, RTL Group is the sole shareholder of Super RTL.

The FCO conducted a market investigation which confirmed its traditional market definition distinguishing TV advertising from online advertising. While in 2011, the FCO had found RTL Group to hold a joint dominant position in TV advertising with broadcaster ProSiebenSat.1 Media, it left open whether this position still persists today. The FCO cleared the transaction in Phase I because the transaction was not expected to substantially strengthen the position of RTL Group. As a jointly controlling shareholder, RTL Group already benefitted from Super RTL's advertising activities. In addition, the FCO considered that the separation of Disney from RTL Group as joint-venture partner could have pro-competitive effects.

FCO Launches Public Consultations On "Self-Cleaning Guidelines"

On June 8, 2021, the FCO published its draft "Guidelines for the premature deletion of an entry in the Competition Register due to self-cleaning"[38]

[35] See FCO's Press Release of June 21, 2021, available in German here and in English here.

[36] *Apple/App Store Practices - music streaming* (Case AT.40437, Press Release available in English here), *Apple/Mobile Payments* (Case AT.40452, Press Release available in English here), *Apple/App Store Practices – e books/audiobooks* (Case AT.40652, Press Release available in English here), and *Apple/App Store Practices* (Case AT.40716, the EC's opening decision dated June 16, 2020 is available in English here.).

[37] See FCO's Press Release of June 11, 2021, available in German here and in English here.

[38] See the publication only available in German here. A press release dated June 8, 2021 is available in English here and in German here.

as well as its draft "Practical guide on filing an application for premature deletion".[39] In addition, it opened public consultations on the drafts. Interested parties were invited to submit their comments by July 20, 2021.

The Competition Register for Public Procurement[40], which has been in operation since March 2021, records companies that have committed economic offenses and are therefore excluded from public procurement procedures. Pursuant to the Competition Register Act (*Wettbewerbsregistergesetz*), the procedure for a premature deletion due to "self-cleaning" requires, among other things, that the company must compensate for the damage caused by its misconduct, actively cooperate with the investigating authorities and implement technical, organizational and personnel measures to prevent further misconduct (*i.e.*, compliance measures). The Competition Register Act also provides that the FCO must decide on such requests for premature deletion and further specify the legal requirements for "self-cleaning" in corresponding guidelines.

FCO Clears Merger Of "Charité" And "Deutsches Herzzentrum Berlin"

On June 7, 2021, the FCO cleared the merger between Charité – Universitätsmedizin Berlin ("Charité") and the "Deutsches Herzzentrum Berlin" ("DHZB"), thus allowing the establishment of the "Deutsches Herzzentrum der Charité".[41]

Charité is one of the largest university hospitals in Europe and offers, *inter alia*, cardiac medical services. DHZB is a leading player in cardiac and vascular surgery. As Charité is controlled by the federal state of Berlin and DHZB is organized as an independent foundation within the federal state of Berlin, the FCO considered both to be separate legal entities for merger control purposes. The FCO found that the merger would not significantly impede effective competition. While Charité may be considered to hold a dominant position in some regional markets (on the basis of the statutory presumption for single-firm dominance which kicks in if a company holds a market share exceeding 40%), the merger would not further strengthen this position. The market share increases brought about by the merger are very small (1%-3%). Further, due to the already existing close cooperation between the parties and the influence of the federal state of Berlin on both parties, the competitive pressure exerted by each party on the other has already been dampened. In addition, there will be sufficient alternatives for the same treatments in Berlin post-transaction. Finally, without going into too much detail, the FCO conceded that the merger will lead to efficiency gains in the health care system.

FCO Terminated Proceedings After Liebherr Adjusted Requirements For Online Sales

Following the FCO's intervention, Liebherr-Hausgeräte Vertriebs- und Service GmbH ("Liebherr") dropped certain sales conditions which in the FCO's preliminary view would have resulted in disadvantaging online sales compared to sales in brick-and-mortar shops.[42]

Liebherr sells household appliances mainly through authorized retailers in a so-called selective distribution system and has an important market position for freezers and refrigerated wine cabinets in Germany. In 2021, Liebherr introduced a rebate scheme imposing significantly stricter criteria for online sales than for offline sales, *e.g.*, online retailers were to ensure customer service between 9 a.m. and 8 p.m. on Sundays and holidays, guarantee a specific delivery period for products that are not in stock, and offer certain modes of payment.

[39] See the publication only available in German here.

[40] See the FCO's Press Release dated March 25, 2021 available in English here and in German here.

[41] *Charité/Deutsches Herzzentrum Berlin* (B3-67/21), FCO decision dated June 7, 2021. A case summary is only available in German here. A press release is available in German here and in English here.

[42] See the FCO's Press Release of April 12, 2021, available in English here and in German here.

The FCO examined the rebate scheme upon complaints from market participants and found that the undue disadvantages for online and hybrid retailers (selling online and offline) were suitable to render price-active online sales unattractive and thereby weaken the intra-brand competition between Liebherr retailers.

The FCO terminated the proceedings upon Liebherr's commitment to align the criteria for online sales to those for offline sales. The FCO announced to continue to closely observe selective distribution systems, in particular with regard to requirements for online sales.

Green Light For Emergency Platform For Vaccination Equipment

On March 29, 2021, the FCO cleared the way for full-line pharmaceutical wholesalers' participation in the VCI Emergency Platform for Vaccination Equipment ("Emergency Platform").[43]

The Emergency Platform was launched in February 2021 with the FCO's approval to better coordinate the supply of vaccination equipment such as syringes, cannulas, and NaCl-solution among the German states and manufacturers to prevent shortages or misallocation of equipment. The Emergency Platform does not provide details on prices or supply quantities.

As of the second quarter of 2021, the federal government plans for pharmaceutical wholesalers, together with pharmacies, to organize the supply of the COVID-19 vaccines and related equipment to physicians making it appropriate to grant wholesalers access to the Emergency Platform.

Deutsche Post Commits To Abandon Rebate System For Newspaper Post

On February 26, 2021, the FCO closed its investigation of Deutsche Post AG's ("Deutsche Post") rebate scheme for addressed newspapers and magazines ("newspaper post") after Deutsche Post adjusted its pricing policies.[44]

The FCO objected to exclusivity clauses that obliged senders of newspaper post to send their entire newspaper and magazine portfolio via Deutsche Post. In addition, certain volume rebates were granted on the entire volume of newspaper post and not just on the volumes that actually surpassed the relevant threshold. According to the FCO, the latter meant that the clauses disincentivized senders to switch to competing post services and thus had the same effect as illicit exclusivity clauses.

To alleviate the FCO's concerns, Deutsche Post removed the exclusivity clauses and amended the rebate system. But the FCO still considered that the rebates, specifically the discount amounts and thresholds, contract durations and billing periods, could have the same effect as an exclusivity obligation. Additionally, the FCO could not exclude that the rebates were independent of a specific cost saving measure and therefore discriminatory.

Deutsche Post therefore committed to abandon its rebate system for newspaper post entirely. Instead, Deutsche Post will negotiate, based on the number of total deliveries expected with that customer, prices for each delivery. The prices must not be below the average cost per delivery. The contracts will run for a minimum of one year and provide sufficiently long termination periods to prevent Deutsche Post from being able to quickly terminate contracts to sanction customers for moving parts of their business to competitors.

Deutsche Post also committed not to discriminate against individual customers. While Deutsche Post will not grant the same price to each customer, it will publish and apply a set of objective parameters to guide pricing negotiations, such as the customer's expected delivery volumes and specific cost savings (*e.g.*, because the customer presorts the newspaper post or is flexible regarding delivery days).

[43] See the FCO's Press Release of March 29, 2021, available in English here and in German here.

[44] FCO decision (B9-208/16) of February 26, 2021, a case summary is only available in German here; Press release available in English here.

Courts

FCJ Finds German Courts Have Jurisdiction Over Injunction For Abuse Of Dominant Position

On February 10, 2021 the FCJ annulled a decision by which the Schleswig Court of Appeal ("SCA") had denied jurisdiction over the injunction claims of Hotel Wikingerhof's ("Wikingerhof") against the Dutch hotel booking platform operator Booking.com and remanded the case back to the SCA.[45]

Wikingerhof sought an injunction against certain practices relating to the contract between the parties, which Wikingerhof argued they had been forced to agree to due to the dominant market position of Booking.com in the brokerage of hotel services, which violated German competition law. After the Kiel Regional Court decided that, according to the rules of the Brussels Ibis Regulation on jurisdiction in civil and commercial matters, only Dutch courts had jurisdiction over the case, Wikingerhof appealed this decision.

The FCJ referred the case to the CJEU for a preliminary ruling, seeking guidance on the age-old question of where to draw the line between special jurisdiction for contract and tort if the two parties are bound by a contract but the claim is not strictly-speaking based on it. The CJEU found that the claim had to be qualified as non-contractual as it concerned the breach of an obligation imposed by law. It does not appear requisite to examine the content of the contract concluded with the defendant to assess whether the conduct of which the latter is accused is lawful or unlawful, the CJEU found, since that obligation applies to the defendant independently of that contract.[46]

Consequently, the FCJ decided that, in the present case, the Brussels *Ibis* Regulation's rules on jurisdiction in matters relating to tort, delict or quasi-delict can also be opened if it can be considered that the allegedly abusive conduct complies with the provisions of a contract existing between the parties. Based on these rules, a person domiciled in a Member State may be sued in another Member State in the courts for the place where the harmful event occurred or may occur.

The FCJ further held that a jurisdiction clause contained in the terms and conditions of Booking.com, according to which the court at its registered office has jurisdiction over disputes arising from the contractual agreement, would only cover claims for abuse of a dominant position if there were clear indications that the contracting parties intended to extend the material scope of the choice of forum agreement to such non-contractual claims. In the FCJ's view, this was not the case here.

It remains to be seen whether the decision will encourage "forum shopping" in the form that claimants in the future will increasingly sue for claims that are actually contractual in a tort forum by alleging that the defendant also violated a statute and thus committed a tort.

FCJ Accepts Liquidated Damages Clauses Of Up To 15% For Cartel Infringements In Buyer's Terms And Conditions

On February 10, 2021, the FCJ declared liquidated damages clauses for cartel damages of up to 15% admissible in its sixth ruling in connection with the so-called "rail cartel".[47]

In the case at hand, the plaintiff was a public transport company in Berlin that had purchased railway equipment from members of the rail cartel. The purchase was subject to the buyer's general terms and conditions, which contained a clause obligating the supplier to pay 5% of the purchase price as liquidated damages if it was found that the seller had engaged in anti-competitive behavior.

The FCJ found this liquidated damages clause to be valid as it did not unreasonably disadvantage the supplier. The clause provided for an amount which, in view of the hypothetical "typically

[45] *Wikingerhof/Booking.com* (KZR 66/17), FCJ judgment of February 10, 20201, only available in German here.

[46] *Wikingerhof* (Case C-59/19), CJEU decision of November 24, 2020, available in English here.

[47] *Schienenkartell VI* (KZR 63/18), FCJ judgment of February 10, 2021, only available in German here.

to be expected" market price, "makes under-compensation and over-compensation of the damage appear equally likely". According to the FCJ, the "general findings of empirical economic research" available at the time of the conclusion of the contract can be used to determine this typical damage. In contrast, the proof of an average damage typical for the industry was dispensable, at least as long as no empirical findings on such industry-typical damages are available. In the absence of such findings, the FCJ approved a clause of 5% in the specific case and indicated in an *obiter dictum* that it was also prepared to accept clauses of up to 1.

Dortmund Regional Court Aligns Principles For Jurisdiction With EU Law

On February 10, 2021, the Dortmund Regional Court set out principles for determining jurisdiction, specifically in competition damages litigation.[48]

Absent a collective redress regime for cartel damages in Germany, holders of damages claims often assign their claims to one single party to concentrate the enforcement of their damages claims in one proceeding. This type of bundling of claims is problematic where the assigned claims would fall within the jurisdiction of different courts if enforced separately. In the case before the Dortmund Regional Court, 30 entities had assigned their claims to the plaintiff. 22 of these claims did not fall within the jurisdiction of Dortmund Regional Court.

First, the Dortmund Regional Court repeated its prior ruling[49] that the place where the harm occurred does not extend to every place where the harmful consequences of an event may be felt, but the harm must result directly from the causal event.[50] A mere subsequent adverse consequence is not capable of giving rise to an allocation of jurisdiction. Applying these principles, the Dortmund Regional Court held that the harm occurred at the assignor's place of business rather than at the plaintiff's place of business.

Second, the Dortmund Regional Court took a pragmatic approach, which—if approved by appellate courts—could facilitate the collective enforcement of assigned cartel damages claims: it allowed plaintiffs to request a determination of a common court competent for all claims under Sec. 36 German Civil Procedure Rules (*Zivilprozessordnung*, "ZPO") by the Court of Appeal. Although Sec. 36 ZPO applies to different defendants, the Dortmund Regional Court held that the provision is also applicable by analogy if a plaintiff files claims from multiply assignors against one defendant.

The Nuremberg-Fürth Regional Court Dismisses A Damages Action Against the Immunity Recipient In The Confectionary Cartel

On January 14, 2021, the Nuremberg-Fürth Regional Court dismissed an action for damages against a confectionery manufacturer, which participated in an information exchange in the so-called "Four Party" discussion group.[51]

The FCO found that representatives of the defendant and three other manufacturers had met between 2006 and 2008 to coordinate price increases and to exchange information on the state of the annual price negotiations with retailers. The defendant had disclosed the conduct and received immunity from fines.

The plaintiff, a grocery discounter, filed a damages actions solely against the immunity recipient in 2015. Even though the FCO had not issued a decision against the immunity recipient and the decisions against other members of the "Four Party" discussion group were not binding for the

[48] Dortmund Regional Court decision (8 O 15/18 Kart) of February 10, 2021, only available in German here.

[49] *Gerichtszuständigkeit bei abgetretenem Schadensersatzanspruch* (8 O 42/18), Dortmund Regional Court decision of September 9, 2020, only available in German here.

[50] The reasoning is in line with the CJEU's case law in relation to Article 7 no. 2 of the Brussels Ia. See for example *flyLAL-Lithuanian Airlines* (Case C-27/17), CJEU decision of July 5, 2018, available in English here.

[51] *Vierer-Runde* (19 O 9454/15), Nuremberg-Fürth Regional Court decision of January 14, 2021, available in German here.

defendant, the Court found the findings in those decisions to be sufficient circumstantial evidence to prove the defendant's participation in the infringement as such.

The Nuremberg-Fürth Regional Court still dismissed the claim because the plaintiff did not show a causal damage that followed from the violations of the competition rules. Based on circumstantial evidence—*e.g.*, the exchange of only vague information, the price increase for raw materials, inflation during the same period—the Nuremberg-Fürth Regional Court concluded that the plaintiff failed to prove that the cartel had caused plaintiff to pay higher prices. Moreover, the plaintiff did not respond sufficiently to refute the passing-on defense raised by the defendant.

Discovery In Private Follow-On Cartel Litigation

On December 17, 2020, the Hanover Regional Court ordered the disclosure of the confidential version of an infringement decision of the EC (the "Infringement Decision").[52] It is the first decision granting access to a confidential version of a previously nondisclosed decision by a competition authority. Other courts have shown a tendency to limit the scope of the disclosure rights.[53]

The defendant was a member of a cartel which fixed the purchase prices of scrap lead-acid automotive batteries from 2009 to 2012 ("car battery cartel").[54] The applicant, a waste disposal and recycling company in Berlin, requested the Infringement Decision by way of an interim injunction in order to prepare its claim for damages caused by the cartel.[55] The Hanover Regional Court made two observations that are likely to have a significant impact on the pre-trial discovery in private follow-on cartel damages actions.

First, the Hanover Regional Court held that a party striving to obtain information necessary to prepare cartel damage actions benefits from a simplified interim injunction procedure which does not require the applicant to present the urgency of the matter. In recent cases, applicants had difficulties showing urgency and thus resulting in courts dismissing their motions.

Second, the Hanover Regional Court held that the plaintiffs' interests prevailed over the defendant's interest in secrecy because the redacted parts of the decision merely provided further details of the infringing conduct, were limited to information regarding a specific purchase, and the defendant's right to secrecy was ensured by the Hanover Regional Court's order prohibiting the disclose to third parties, including other entities of the same organization.

The decision has been appealed by the defendant.

FCJ Provides Guidance On Competition Infringements In The Railway Sector

On December 8, 2020, the FCJ overturned a decision of the DCA concerning an increase in cancellation fees for track access charges imposed by Deutsche Bahn AG ("DB") between 2008 and 2011. The plaintiff demanded the repayment of a partial amount of the cancellation fees paid following a price increase of 150%. The FCJ referred the case back to the DCA.[56]

The FCJ confirmed its decisional practice allowing civil courts to review cancellation fees under EU competition law in parallel to and independently from any action taken by the national regulator, namely the Federal Network Agency. Despite a pending reference to the CJEU by the Berlin Court of Appeal for a preliminary judgement

[52] *Altbatterien-Kartell* (13 O 265/20), Hanover Regional Court decision of December 17, 2020, not yet published.

[53] *E.g., Herausgabe von Beweismitteln I* (VI-W (Kart) 2/18), DCA decision of April 3, 2018, only available in German here.

[54] *Car battery recycling* (Case AT.40018), EC decision of February 8, 2017, available in English here.

[55] See Sec. 89d (5), Sec. 33g and Sec. 186 (5) ARC.

[56] *Stornierungsentgelt II* (KZR 60/16), FCJ judgment of December 8, 2020, only available in German here.

on the question whether such parallel review is permissible in the regulated railway infrastructure sector, the FCJ decided not to await the CJEU's decision.[57] In the FCJ's view, it was clear that such parallel review on the basis of EU competition law should be permissible.[58]

Further, the FCJ provided the DCA with guidance for its forthcoming examination under EU competition law whether the increase in cancellation fees for track access charges constitutes an abuse of a dominant position under Article 102 TFEU:

— First, the DCA will have to assess whether the increase in cancellation fees constitutes a refusal to grant another undertaking access on reasonable, non-discriminatory terms to an infrastructure, in this case DB's rail network, which is essential for the other undertaking to carry out its business. Prices and terms are considered excessive if a dominant company has made use of the opportunities arising out of its dominant position in such way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition and thus has been able to impose prices which have no reasonable relation to the economic value of the service. The FCJ considers a sudden sharp price increase an indication of the exploitation of a dominant company's operational leeway, which is no longer sufficiently controlled by competition.

— Second, the DCA will have to examine whether DB's pricing constitutes an exclusionary abuse on the downstream market for rail transport. This would be the case if DB's pricing qualifies as a so-called "margin squeeze" which prevents competitors in the downstream markets from competing effectively because they are left with a profit or margin that is too small to effective compete with the dominant company's product or service on the downstream market. In this regard, The FCJ pointed in particular to the vertically-integrated nature of DB's business and to the fact that access to its rail network is essential for other railway undertakings.

[57] *DB Station & Service* (C-721/20), Application as a working document, available in English here. The Berlin Court of Appeal decision (2 U 4/12 Kart) dated December 11, 2020 is only available in German here.

[58] In its landmark decision *CTL Logistics* , the CJEU previously considered that a national court's review of the cancellation fees on the basis of national civil law was incompatible with EU law; see CJEU *CTL Logistics* (C-489/15) ECLI:EU:C:2017:834, available in English here. Consequently, the FCJ deemed the DCA's decision unlawful because it wrongfully assessed DB's conduct solely on the basis of national civil law with regard to its individual contractual equity.

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