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# German Competition Law Newsletter

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## FCO

### Horizontal Agreements

#### ***FCO Fines Manufacturers Of Modular Expansion Joints For Bridges For Quota Cartel***

On December 28, 2021 and January 21, 2022, the German Federal Cartel Office (“**FCO**”) imposed fines totaling €7.3 million on Maurer SE (“**Maurer**”) and Mageba GmbH, Göttingen (“**Mageba**”) for bid rigging and market allocation.<sup>1</sup>

Maurer and Mageba are Germany’s only manufacturers of modular expansion joints used for road bridges, which allow bridges to expand and contract as the temperature fluctuates. From 2004 until 2019, Maurer and Mageba engaged in a quota cartel to retain their respective market shares.

The FCO found that in October 2004, representatives of the relevant companies<sup>2</sup> agreed to fix quotas according to their current market shares and thereby divided the market for the supply of modular expansion joints used for road bridges amongst themselves. Until January 2019, representatives of the companies involved constantly monitored and enforced compliance with these quotas through regular meetings and phone calls. In case of substantial deviations from the fixed quotas at the end of a given year, the cartel members held a

“year-end meeting” to allocate future tenders as compensation or to adjust their quotas for the following year. To implement the quota agreement, the cartel members further agreed to a uniform pricing formula and coordinated their offers as subcontractors *vis à vis* construction companies bidding as general contractors on public tenders put out by municipalities, federal states or the federal government.<sup>3</sup>

The FCO and the Braunschweig public prosecution office carried out joint dawn raids at several premises and private properties in January 2019. While Maurer and Mageba cooperated during the investigation and settled the case with the FCO, the proceeding initiated by the Braunschweig public prosecution office against certain sales representatives for “submission fraud” is still ongoing.

#### ***FCO Allows Furniture Retailer To Join Purchasing Cooperation After Modifications To Initial Plans***

On January 19, 2022, the FCO closed its proceedings on furniture retailer KHG GmbH & Co. KG’s (Krieger/Höffner Group, “**KHG**”) envisaged accession to the purchasing cooperation Bedarfsgüter Großhandels-gesellschaft für Wohnung GmbH (“**Begros**”) which it had initiated in early 2021. In the end, KHG and

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<sup>1</sup> Case B11-22/17. The FCO’s Press Release of February 10, 2022 is available in English [here](#); the FCO’s Case Summary of February 10, 2022 is only available in German [here](#).

<sup>2</sup> These included at the time Maurer, RW Sollinger Hütte GmbH and a German subsidiary of the Swiss Mageba Group based in Uslar. In 2014, the Swiss Mageba Group acquired RW Sollinger Hütte GmbH and renamed it to Mageba, into which it merged its Uslar subsidiary.

<sup>3</sup> In some instances, the manufacturers of modular extension joints also participated directly in tenders put out by public-sector corporations.

Begros were able to dispel the FCO's concerns by offering substantial modifications to their initial plans.<sup>4</sup>

Begros is one of the leading furniture purchasing cooperations in Germany. Its 16 members (including in particular the Porta Group) operate large furniture stores throughout Germany and to some extent in neighboring countries as well as discount stores (including in particular Porta's SB-Möbel Boss stores) and online shops. A substantial share of their furniture range consists of Begros's own brands such as "MONDO" or "Vito".<sup>5</sup>

KHG is one of the leading furniture retailers in Germany with more than 30 large furniture stores (including the "Höffner", "Kraft" and "Mahler" brands) and more than 20 discount stores under the "Sconto" brand as well as several online shops. Until now, KHG has not been a member of a purchasing cooperation.<sup>6</sup>

Under EU and German antitrust law, there is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. However, in the European Commission's and FCO's view, it is considered unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market(s) and on the selling market(s).

During its investigation, the FCO focused on the selling markets and found that KHG's accession to Begros would lead to market shares clearly exceeding 15% in nine local selling markets in eastern Germany where Porta and KHG both have significant market positions.<sup>7</sup> Further, the FCO

found that joint purchasing by KHG and Begros would have likely resulted in an alignment of procurement costs and product ranges leading to restrictions in price and assortment competition between Porta and KHG to the detriment of consumers.

To eliminate the FCO's concerns, KHG and Begros offered to substantially modify their initial plans. In particular, KHG and Begros offered to apply a so-called "two brand families model", under which certain Begros proprietary brands will (for several years) only be sold by Porta whereas others will only be sold by KHG.<sup>8</sup> Further, Begros may only purchase and sell exclusive models either under the one or under the other brand family. Because Begros's proprietary brands account for a significant part of the furniture range and turnover of its members, this concept significantly reduces the risk of an alignment of costs and product ranges. Finally, KHG undertook to keep its previous purchasing conditions confidential from Begros. The FCO considered the parties' commitments suitable to dispel its concerns. Nevertheless, the FCO stressed that it will closely monitor the German furniture markets and KHG's and Begros's compliance with the commitments.

While the above shows that the FCO will carefully scrutinize purchasing cooperations, in particular where these involve larger market players and a close coordination of the economic behavior of the companies involved, the FCO is less concerned about horizontal cooperations between smaller competitors which combine forces to counterbalance market power of their contractors. In this vein, the FCO recently expressed no concerns regarding the collective legal assessment and negotiation of purchasing terms and conditions by an association of 39 small (often family-run) breweries ("Die

<sup>4</sup> Case B1-198/20. The FCO's Press Release of January 20, 2022 is available in English [here](#); the FCO's Case Summary of February 15, 2022 is only available in German [here](#).

<sup>5</sup> In addition, Begros also provides its members with services in marketing, goods imports, product development, central settlement and del credere.

<sup>6</sup> In 2019, KHG refrained from joining the purchasing cooperation VME Union GmbH after the FCO had expressed significant competition concerns—FCO case B1-229/18; see the FCO's Press Release of September 12, 2019, available in English [here](#) and the FCO's Case Summary of October 18, 2019, only available in German [here](#); see also our Cleary Antitrust Watch blog article, available [here](#).

<sup>7</sup> While the FCO did not investigate exhaustively the purchasing markets, it pointed out that the results of its investigations indicated that the purchasing markets are even wider than Germany in geographic scope and thus wider than the (regional) selling markets. Accordingly, the FCO concluded that Begros's and KHG's market shares on any potentially relevant purchasing market would presumably be lower than on the selling markets. After all, considering the parties' commitments, the FCO abstained from defining the relevant purchasing market(s) and from a final assessment of the competitive effects of KHG's cooperation with Begros on these market(s).

<sup>8</sup> Other Begros members will be allowed to jointly purchase and sell all Begros proprietary brands with Porta and/or KHG.

Freien Brauer” – The Free Breweries).<sup>9</sup> The members of the association have a combined German-wide market share of less than 5%. The FCO stressed that the cooperation rather resembles an outsourced legal department to assess the terms and conditions unilaterally dictated by food retailers, which, however, helps its members to assert themselves against food retailers and thereby to compensate competitive advantages of large breweries. Further, the breweries will continue to negotiate specific conditions such as prices and sales volumes individually.

### ***FCO Raids Cable Manufacturers***

Between January 18 and January 20, 2022, the FCO raided the German premises of four associations and several manufacturers of electrical cables and wires in relation to alleged coordination of industry-standard metal surcharges. The cable manufacturers Prysmian S.p.A. (“**Prysmian**”), Leoni AG (“**Leoni**”), Nexans S.A. (“**Nexans**”), and NKT A/S (“**NKT**”) confirmed searches at their premises and explained that they are cooperating with the FCO.<sup>10</sup>

Already in 2014, the European Commission (“**Commission**”) fined 11 manufacturers of underground and submarine high voltage power cables a total of € 302 million for allocating customers and territories between 1999 and 2009, among them also Nexans, NKT, and Prysmian.<sup>11</sup> All three companies (as many others) appealed the Commission’s decision. However, only NKT was partly successful and had its fine reduced.<sup>12</sup>

Raw material surcharges are a common price component in several industries and charged in addition to individually negotiated prices. The calculation formulas for surcharges are regularly linked to the current stock market price and thus automatically reflect fluctuations

in the raw material price. While the individual and independent imposition of surcharges does not raise competitive concerns, suppliers are prohibited to reach a common understanding to establish or maintain surcharges as a standard throughout the industry. Therefore, companies are well advised to scrutinize the origins of the surcharge formulas they use to exclude any links to arrangements or concerted practices in this regard.

## **Sustainability**

### ***FCO Provides Guidance On Sustainability Agreements***

With the examination of two sustainability cooperations concerning living wages in the banana sector as well as the expansion of an animal welfare initiative, the FCO provided further guidance for the implementation of sustainability initiatives in the food retail industry.<sup>13</sup> In its press release, the FCO informs that it is open to examine sustainability initiatives as part of the authority’s offer to provide companies guidance “*on how to ensure that sustainability strategies are embedded in competition law*”.

Because sustainability initiatives are often agreements between competitors which have implications on prices and conditions, the FCO stresses the need to ensure that sustainability and public interest objectives are brought in line with competition requirements. In this context, the FCO’s president, Andreas Mundt, noted that “*competition law is flexible enough to support sustainability initiatives especially in setting common standards while making sure that the conditions are fair and transparent. But there are also limits to this. Cooperations have to genuinely improve sustainability and must not only aim to increase the margins of a few companies*”.

<sup>9</sup> The FCO’s Press Release of March 24, 2022 is available in English [here](#).

<sup>10</sup> See the companies’ Press Releases: Prysmian, dated January 18, 2022, available in English [here](#); Leoni, dated January 18, 2022, available in English [here](#); Nexans, dated January 20, 2022, available in English [here](#); and NKT, dated January 20, 2022, available in English [here](#).

<sup>11</sup> Case AT.39610 – *Power Cables*. Commission, decision of April 2, 2014, available in English [here](#). A press release of April 2, 2022, is available in English [here](#).

<sup>12</sup> See also our Cleary Antitrust Watch blog articles, available [here](#), and [here](#).

<sup>13</sup> See the FCO’s Press Release of January 18, 2022, available in English [here](#). The FCO’s previous—though rather limited—case law is summarized in its 2020 working paper “Offene Märkte und nachhaltiges Wirtschaften - Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis”, only available in German [here](#).

The first initiative by the German retail sector and the Deutsche Gesellschaft für internationale Zusammenarbeit (“GIZ”) concerned the introduction of voluntary common standards (*i.e.*, to promote living wages) and strategic goals along the private-label banana supply chain.<sup>14</sup> More specifically, the initiative includes a common standard of responsible procurement practices, processes to monitor transparent wages and a gradual increase of the volumes of bananas subject to this standard. Given that the parties ensured that they will not exchange information on procurement prices, other costs, production volumes or margins nor introduce any mandatory minimum prices or markups at any point in the supply chain, the FCO did not raise any competition concerns, but requested to be kept informed about the initiative’s progress.

For the second initiative, the FCO has provided guidance on a continuous basis since 2014. The goal of the animal welfare initiative (*Initiative Tierwohl*) is to reward livestock owners for improving the conditions under which animals are held and has been financed mainly by the four largest German food retailers.<sup>15</sup> The current scheme under the initiative includes payments of standard premiums to participating livestock owners via participating slaughterhouses. The FCO’s guidance led already to adjustments to the initial scheme for pork and poultry meat, in particular with respect to a clear labelling of such meat to ensure that animal welfare conditions are transparent for consumers and with respect to the premium and financing model. The recent expansion of this initiative intends to introduce the same model to cattle fattening. Again, the FCO called for caution and required the parties to appropriately label the products and to further develop the existing financing model for the

next phase of the initiative starting in 2024. In particular, it suggested that instead of a standard premium, the new scheme should link the payment of cattle fattening to the actual costs of measures that improve animal welfare.

The increased focus on and call for more sustainability as well as a push for more supply chain legislation in the European Union has incentivized companies to pursue sustainability initiatives. These sustainability goals can often only be achieved through industry-wide cooperation, *e.g.*, to jointly invest, identify solutions, produce, and distribute sustainable products. Competition authorities have stressed that the use of sustainability initiatives as a cover for cartels will not be tolerated. Detailed guidance and legal certainty is needed on the circumstances in which sustainability initiatives comply with competition law. The FCO’s publication of recent cases as well as its willingness to discuss individual initiatives are thus very welcome,<sup>16</sup> but still more general guidance at European level is needed to give comfort to companies seeking to cooperate to achieve sustainability goals. The Commission has already announced<sup>17</sup> to provide guidance and greater clarity in its revised Guidelines on horizontal cooperations<sup>18</sup> and thereby to harmonize approaches within the European Union.

### ***Further Guidance On Sustainability Agreements: FCO Rejected An Initiative In The Milk Sector***

On January 25, 2022, the FCO provided further guidance for the implementation of sustainability initiatives under competition law: It concluded that a proposed agreement in the milk sector to introduce surcharges for the benefit of milk

<sup>14</sup> Case B2-90/21. The FCO’s Case Summary of March 8, 2022 is only available in German [here](#).

<sup>15</sup> Case B2-72/14. The FCO’s Case Summary of March 8, 2022 is only available in German [here](#).

<sup>16</sup> Besides the FCO, also other national competition authorities have already published guidance on the application of competition law to sustainability initiatives. For example, the Dutch Competition Authority (“ACM”) published its draft Guidelines on sustainability agreements (available [here](#)). The Hellenic Competition Commission (“HCC”) published a draft staff discussion paper on sustainability issues and competition law in 2020 (available [here](#)) and recently launched a public consultation on a sandbox for sustainable development in the Greek market (available [here](#)). The ACM and HCC also jointly commissioned a “Technical Report on Sustainability and Competition” on the quantification of sustainability benefits (available [here](#)). Further, in September 2021, Austria introduced into its competition law an express exemption from the prohibition of restrictive agreements where the agreement substantially contribute to an ecologically sustainable or climate-neutral economy.

<sup>17</sup> See Commission, Competition policy brief, “Competition Policy in Support of Europe’s Green Ambition”, September 2021, available [here](#).

<sup>18</sup> The Commission is expected to publish a draft of the revised horizontal rules for stakeholder comments in the first half of 2022. A key feedback by stakeholders in the public consultation on the revision of the Guidelines on horizontal cooperations was the need for clarity on when sustainability agreements are compatible with competition law; see Commission, Staff Working Document SWD(2021) 103 final of May 6, 2021 available [here](#).

producers was anticompetitive. However, the FCO indicated that it would be open to consider a revised concept including sustainability objectives which is not based on a price agreement to the detriment of consumers.<sup>19</sup>

## Background

In recent years, milk producers claimed that they faced economic difficulties due to the low prices for raw milk which often did not cover their costs. To address this issue, in the informal discussion group Agrardialog Milch (“**Agrardialog**”), milk producers, dairy companies and food retailers discussed the introduction of retroactive surcharges on the base milk price based on the average milk production costs for agricultural businesses. The FCO reviewed the proposed financial scheme as part of its offer to provide competition law guidance for new sustainability initiatives.

## The Proposed Agreement Violates Competition Law

The FCO rejected the proposed agreement because it did not improve sustainability in the milk sector, but the proposed scheme of surcharges would ultimately lead to price increases for consumers as they would not be able to switch to viable alternatives. The FCO’s president, Andreas Mundt, clarified that *“the economic interest in a higher level of income per se cannot justify the exemption of such an agreement from competition law rule”*. While according to Agrardialog, the surcharge was instrumental in financing the transformation of the agricultural sector, the FCO concluded that the proposed agreement did not include any sustainability aspects and thereby the initiative, in the words of Andreas Mundt, *“clearly exceeds the boundaries of competition law”*. Against this background, the proposed financial scheme could all the more not benefit from newly introduced rules at EU level which generally exclude from competition law scrutiny agreements that aim to

apply a higher sustainability standard for agricultural products.<sup>20</sup> Still, Mr. Mundt noted that *“Agrardialog can at any time present us with a sustainability concept which is not based on a price agreement to the disadvantage of consumers”*.

## Conclusion

The FCO’s review of the proposed agreement in the milk sector as well as the review of the two sustainability initiatives concluded earlier this month, show that the FCO is generally open to consider sustainability considerations and to work with parties to implement their sustainability initiatives. Nonetheless, the FCO will carefully assess the initiatives’ compatibility with competition law. In particular, the FCO draws a red line where the agreement impacts prices without any clear sustainability benefits and it does not tolerate the “greenwashing” of anticompetitive cooperations.

## Abuse

### ***FCO Concerned Lufthansa Hinders Condor In Its Long-Haul Flights***

On February 8, 2022, the FCO preliminarily found that Deutsche Lufthansa AG (“**Lufthansa**”) has to provide feeder flights for Condor Flugdienst GmbH’s (“**Condor**”) long-haul flights.<sup>21</sup> The FCO invited the parties to comment on its preliminary findings before issuing its decision.

Lufthansa and Condor had established a long-standing cooperation pursuant to which Lufthansa and its subsidiaries Austrian Airlines and Swiss Airlines provided feeder flights to Condor’s long-haul passengers. Condor itself does not operate feeder flights. In November 2020, Lufthansa canceled its “feeder arrangement” with Condor effective as of June 2021. Condor subsequently complained to the FCO, alleging Lufthansa to abuse of its dominant position to the detriment of Condor’s long-haul operations.

<sup>19</sup> Case B2-87/21. The FCO’s Press Release of January 25, 2022, is available in English [here](#). The FCO’s Case Summary of March 8, 2022 is only available in German [here](#).

<sup>20</sup> Article 210a Regulation (EU) No 1308/2013 of December 17, 2013 establishing a common organization of the markets in agricultural products, as amended by Regulation (EU) 2021/2117 of December 2, 2021.

<sup>21</sup> See the FCO’s Press Release of February 8, 2022, available in English [here](#).

Following the FCO's opening of interim as well as main proceedings,<sup>22</sup> Lufthansa suspended the termination until May 10, 2022. The FCO subsequently closed its interim proceedings.

In its main proceedings, the FCO now preliminarily found that Lufthansa abuses its dominant position on the feeder flights market to the detriment of Condor's long-haul operations. According to the FCO, Condor (in the absence of its own feeder network and of suitable slots to develop such a network) must have access to Lufthansa's feeder flights to ensure sufficient competition on the already strongly concentrated indirect long-haul markets. In particular, the termination of the "feeder arrangement" would give Lufthansa a major competitive advantage in the provision of long-haul flights and lead to a dominant position on almost 90 flight routes to tourist destinations.

The 10<sup>th</sup> Amendment of the German Act against Restraints of Competition ("**ARC**"), which entered into force in January 2021, significantly lowered the thresholds for ordering interim measures. In particular, interim measures can now be issued to protect individual companies (rather than competition overall). While in the past, the FCO only rarely initiated interim proceedings, it remains to be seen if the FCO will open interim proceedings more frequently now.

### ***No FCO Investigation Into DNS Services***

On February 3, 2022, the FCO declared that it will not—at this stage—launch an investigation in the area of Domain Name System ("**DNS**") services.<sup>23</sup> Following indications from market participants, the FCO conducted a preliminary investigation lasting several months, but found that the suspicion of anticompetitive conduct in this field has not been substantiated.

In order to reach a particular website, users usually enter the website's name into the browser, but to open the desired website, the website's name needs to be translated into an IP-address. This

service is provided by so-called "DNS resolvers" or "clients", which perform name resolution services in the internet. DNS resolvers are usually provided by the internet access provider whose services are often set as default in the operating system. However, users can change their settings to use different proprietary or public DNS resolvers.

The market for public DNS resolvers is highly concentrated and their use has increased significantly over the last years. According to the FCO, this trend could (also) be driven by the fact that public DNS resolvers often offer encryption when accessing a website while to date, only few internet access providers offer encrypted DNS services.

In this vein, the FCO conducted preliminary investigations to identify potential antitrust infringements in the course of the introduction of encrypted DNS services. The FCO focused particularly on competing types of encryption, changes of default settings in browsers and operating systems, and DNS-related services in the area of safe browsing and child protection filters.

While the FCO's preliminary investigations did not confirm the suspicion of any anticompetitive conduct, the FCO announced that it will continue to monitor this field and launch an investigation at a later stage if necessary.

## **Mergers & Acquisitions**

### ***FCO Blocks Merger Of Number 1 And Number 3 Linear Drainage Providers***

On January 13, 2022, the FCO prohibited ACO Ahlmann SE & Co. KG's ("**ACO**") acquisition of BIRCO GmbH ("**BIRCO**").<sup>24</sup>

Both companies (*inter alia*) provide surface drainage systems. Surface drainage refers to the drainage of sealed surfaces in outdoor areas, such as streets, residential complexes, private

<sup>22</sup> See the FCO's Annual Report 2020/2021, p. 30, available in English [here](#).

<sup>23</sup> Case B7-202/115. The FCO's Case Summary of February 3, 2022 is only available in German [here](#).

<sup>24</sup> The FCO's Press Release of January 14, 2022 is available in English [here](#); the full decision is only available in German [here](#).

properties, or industrial areas. There are different systems for surface drainage: linear drainage (drainage channels covered by drain covers), open drainage (drainage channels without cover), point drainage, and other surface drainage systems (e.g., grass pavers or permeable pavement).

While the merging parties strongly argued for a relevant product market encompassing all different types of surface drainage, the FCO's comprehensive market investigation<sup>25</sup> revealed that linear drainage systems are not substitutable with other drainage systems. In particular, the FCO's market test indicated that customers purchasing surface drainage systems precisely demand either linear drainage or one of the other systems as determined during the construction planning stage where all relevant aspects like technical feasibility, economic efficiency and design aspects are considered. Further, the FCO found significant differences in the supplier structure and thus competitive conditions with regards to the different systems for surface drainage. Accordingly, the FCO concluded that linear drainage systems form a distinct product market.

In addition, the market test revealed that the parties had significantly underestimated their market shares. Already today, ACO is the leading supplier of linear drainage systems in Germany. ACO's acquisition of BIRCO, the number three supplier in the German market, would have resulted in a dominant position of the merged entity with a combined market share of 45-50% *post-transaction*, nearly three times that of the number 2 supplier. The FCO noted that even if the relevant product market were to be defined to encompass also open drainage systems, the merging parties' combined market share would still exceed 40%.

Finally, the FCO stressed that the merged entity would gain superior access to contracting entities

and building material dealers, giving reason to fear that competitors are given less consideration in future calls for tender and squeezed out of the market.

The FCO rarely issues prohibition decisions.<sup>26</sup> However, in view of the results of the market test and the absence of remedies offered by the parties to address the FCO's concerns, the FCO had little choice but to prohibit the merger. The parties did not appeal the decision.<sup>27</sup>

### ***FCO Conditionally Clears Filling Station Network Merger***

On February 11, 2022, the FCO approved the acquisition of OMV Retail Deutschland GmbH's ("OMV") filling station network by the British convenience retailer EG Group Limited ("EG Group"). The FCO's approval is subject to the prior divestiture of 25 EG Group filling stations and 23 OMV filling stations in southern Germany.<sup>28</sup>

Besides BP (under the "Aral" brand), Shell and Total, EG Group is one of the leading filling station operators in Germany with more than 900 filling stations operated under the "Esso" brand.<sup>29</sup> OMV's filling station network comprises 285 stations in southern Germany.

Following an in-depth investigation, the FCO found that the complete takeover of OMV's filling station network would have led to a significant increase in market concentration in several regions of southern Germany.<sup>30</sup> The FCO raised concerns that the merger creates or strengthens a collective dominant position of BP, Shell, and EG Group in these areas. To address the FCO's concerns, EG Group and OMV offered to divest 25 and 23 filling stations, respectively, in the relevant regions.

<sup>25</sup> The FCO questioned more than 200 competitors, contracting entities, and building materials traders.

<sup>26</sup> The FCO only issued one prohibition decision in 2021 and none in 2020. The prohibition of ACO's acquisition of BIRCO is the first prohibition decision this year.

<sup>27</sup> See BIRCO's Press Release of February 14, 2022, available in English [here](#).

<sup>28</sup> Case B8-137/21. See FCO decision of February 10, 2022, only available in German [here](#). The FCO's Press Release of February 11, 2022 is available in English [here](#). The parties initially notified the transaction to the Commission. Upon the FCO's request, the Commission referred the investigation to the FCO in July 2021 (Case COMP/M.10134 – EG Group/OMV Germany Business; decision of July 9, 2021; a press release dated July 12, 2021 is available in English [here](#), the full decision is available in English [here](#)).

<sup>29</sup> EG Group also operates filling station networks, food service and retail stores outside of Germany.

<sup>30</sup> Namely: Stuttgart, Munich, Rosenheim, Bad Herrenalb, Weil am Rhein, Lindau am Bodensee and Passau/Bayerischer Wald.

With regard to OMV's remaining filling stations, the FCO found that EG Group's or OMV's market position in these areas is weaker and that the merged entity faces competition from a large number of other suppliers which, in some cases, hold substantial market shares and pursue different market strategies (especially with regard to pricing).

### ***FCO Increases Scrutiny Of Waste Recycling Takeovers***

On January 19, 2022, the FCO launched a new sector inquiry into the waste management sector in preparation to order Rethmann SE & Co. KG ("**Rethmann Group**") to notify future acquisitions of smaller waste management companies.<sup>31</sup>

The 10<sup>th</sup> Amendment to the ARC introduced a new provision empowering the FCO to examine concentrations below the turnover and transaction value thresholds if successive acquisitions of smaller targets below the second domestic turnover threshold lead to further concentration in an economic sector and thus might impede competition in Germany.<sup>32</sup> Pursuant to the new Section 39a ARC, the FCO can order companies to notify all concentrations in a particular economic sector for the following three years if the following (cumulative) conditions are met: (i) the FCO sees indications that future concentrations may significantly impede competition in that sector, (ii) the company concerned achieved a global turnover exceeding €500 million in its last financial year and supplies or procures at least 15% of goods or services in that sector, (iii) the target company generated more than €2 million turnover in its last financial year, two-thirds of which it achieved in Germany, and (iv) the FCO conducted a sector inquiry into that economic sector. Already during the legislative consultation procedure of

the 10<sup>th</sup> Amendment to the ARC, the FCO had identified regional markets with medium-sized competitors, such as the waste management and construction sectors, as likely areas of application.<sup>33</sup>

To set the scene for a potential Section 39a ARC order against Rethmann Group, the FCO launched a new sector inquiry into the waste management sector after it had concluded a sector inquiry into this sector only in December 2021.<sup>34</sup> In its previous sector inquiry, the FCO found that Rethmann Group (through Remondis) was the market leader in Germany and had engaged in a series of non-notifiable acquisitions of smaller local competitors. The FCO's new sector inquiry is intended to update and specify the prior findings with a view to the requirements of Section 39a ARC.

This is the first time that the FCO launches a sector inquiry in preparation for an order under Section 39a ARC. It remains to be seen whether it will have the desired outcome and more generally, whether the new Section 39a ARC will be an effective merger control instrument. In any event, even if the FCO were to order Rethmann Group to notify smaller acquisitions on that basis, it will still have to examine the concrete competitive impact of each single acquisition. In addition, Rethmann Group can appeal the FCO's order and any subsequent merger control decisions issued by the FCO.

### ***Automotive Supplier Dana Finally Abandons Acquisition Of Modine's Light-Vehicle Thermal Business***

On January 17, 2022, the FCO published a case summary on its two consecutive in-depth-investigations of automotive supplier Dana Inc.'s ("**Dana**")<sup>35</sup> proposed acquisition of (a portion of) Modine Manufacturing Company's ("**Modine**")<sup>36</sup>

<sup>31</sup> See the FCO's Press Release of January 19, 2022, available in English [here](#).

<sup>32</sup> For more details, please also see our Cleary Antitrust Watch blog article on the government's draft of the 10<sup>th</sup> Amendment to the ARC [here](#).

<sup>33</sup> See the FCO's opinion on the government draft of the 10<sup>th</sup> Amendment to the ARC of November 23, 2020, p. 20, only available in German [here](#).

<sup>34</sup> See the FCO's Press Release of December 21, 2021, available in English [here](#).

<sup>35</sup> Dana is a global manufacturer of propulsion and energy-management solutions powering vehicles and machines, including thermal systems for passenger cars and light commercial vehicles.

<sup>36</sup> Modine is a global power-conveyance and energy-management systems manufacturer which likewise offers thermal systems for the automotive industry.



light-vehicle thermal business.<sup>37</sup> The parties first notified the acquisition in December 2020. When the FCO informed the notifying parties about its competitive concerns, Dana and Modine withdrew their merger notification and subsequently re-filed the transaction with a limited scope in June 2021. Following another in-depth review of the FCO, the parties definitely abandoned the merger and withdrew the modified merger notification in October 2021, before the FCO came to a conclusion as to whether the modified transaction would have raised competitive concerns.

Both parties manufacture and supply, *inter alia*, thermal systems for the automotive industry such as oil coolers. Oil coolers for vehicles are available in various designs: heat can be dissipated by the cooler directly to the air (air-cooled oil cooler) or first to a water-based liquid (liquid-cooled oil cooler) and then to the air.

The FCO defined the relevant market as the European Economic Area market for liquid-cooled oil coolers for passenger cars and light commercial vehicles, where the parties' combined market share (resulting from the transaction as initially notified in December 2020) would have amounted to 60-70%. Consequently, in its first investigation, the FCO preliminarily found that neither the car manufacturer's buying power nor the (limited) competitive pressure exercised by internally produced and captively used coolers could have offset this market position. Dana and Modine therefore withdrew their initial filing.

Under the modified transaction filed in June 2021, Modine would have retained part of its oil cooler business. While one could wonder why the parties did not offer this modification to the transaction as a reverse carve-out commitment already during the first investigation to remedy the FCO's concerns, the FCO noted that the modified transaction raised complex additional questions which would have gone beyond the scope of the FCO's usual market testing to assess the suitability of remedies

offered to mitigate its concerns. In particular, Modine originally intended to exit the automotive business by selling its complete light-vehicle thermal business to Dana. Accordingly, the FCO had to carefully scrutinize Modine's incentive to continue its retained oil cooler business as a concern and whether the retained business could compete effectively with Dana's business in the future. Further, the FCO was concerned that Modine's detailed knowledge of the cost structure and technological capabilities of the business to be acquired by Dana would have facilitated anticompetitive coordination between the two companies. The parties definitely abandoned the transaction before the FCO could complete its investigation and finalize its assessment.

## Policy & Procedure

### ***FCO's Third Market Power Report Finds Market Dominance In The Electricity Generation Sector And Analyses New Framework Conditions For The Provision Of Balancing Energy***

On February 17, 2021, the FCO published its third report on market power in the electricity generation sector ("**Market Power Report**"), analyzing the competitive landscape from October 1, 2020 to September 30, 2021.<sup>38</sup> Again, the FCO published its results one year earlier than statutorily required because of the continuing phase-out of nuclear and coal energy.

As per its previous Market Power Reports, the FCO applied the Residual Supply Index to quantify whether an electricity provider is indispensable to meet the demand and presumed dominance if an electricity provider is indispensable to meet the demand for at least 5% of the hours of a given year.<sup>39</sup> While in its second Market Power Report, the FCO found that market leader RWE AG ("**RWE**") did not hold a dominant position in the generation and first time sale of electricity for general supply in Germany and Luxembourg at

<sup>37</sup> Case B4-72/21. The FCO's Case Summary of January 17, 2022 is only available in German [here](#).

<sup>38</sup> The FCO's third Market Power Report for 2021 is only available in German [here](#); the FCO's Press Release of February 17, 2022 is available in English [here](#).

<sup>39</sup> The FCO's first and second Market Power Reports for 2019 and 2020 are only available in German [here](#) and [here](#); see our Cleary Antitrust Watch blog articles [here](#) and [here](#), respectively.

the time, it already anticipated that RWE may well pass the dominance threshold in the near future. Following the reduced domestic generation capacity resulting from the shutdowns of three larger coal-fired power plants in 2021, the FCO now found RWE to be indispensable for meeting the demand in a significantly higher number of hours and thus to clearly exceed the dominance threshold. Considering the shutdown of another three nuclear power plants at the end of 2021 and the continuing phase-out of nuclear and coal energy, the FCO's president, Andreas Mundt, expects RWE's market position to expand even further.

As required by European regulation<sup>40</sup>, on November 2, 2020, Germany introduced the balancing energy market.<sup>41</sup> With a view to the fundamentally changed market conditions in this area, the FCO explained in detail in the third Market Power Report indicators for the analysis of the new market conditions for the different types of balancing energy and found high levels of concentration in the area of positive aFRR balancing energy. Andreas Mundt stressed that pump storage plants play an important role in this field, singling out Energie Baden-Württemberg AG as the largest supplier. The FCO further announced to closely monitor pricing patterns of large balancing energy providers.

In light of the dynamic transformation process of the energy markets driven by the continued phase-out of nuclear and coal energy as well as the development of European platforms for the procurement of balancing energy services, the FCO considers publishing its next Market Power Report already in 2023.

## ***Monopoly Commission Presents 2021 Sector Reports On The Postal And Telecommunications Markets***

On December 16, 2021, the German Monopoly Commission, an advisory board of the German Government, published its 12<sup>th</sup> Sector Reports on competition in the postal<sup>42</sup> and telecommunications<sup>43</sup> markets.

### **Postal Services**

In its 12<sup>th</sup> Sector Report Post, the Monopoly Commission finds that the letter-post market still lacks effective competition and continues to be dominated by Deutsche Post AG (“**DPAG**”) with a market share of 83%. Similarly, the Monopoly Commission finds that DPAG still has a strong position in the parcel market (market share of >40%), but increasingly faces competition from several other competitors with significant market shares, notably Amazon.

Like in its 2019 report,<sup>44</sup> the Monopoly Commission strongly recommends a fundamental reform to the German Postal Act, which has remained largely unchanged since 1997. The Monopoly Commission's chairman, Professor Jürgen Kühling, criticized the legislative changes brought about by the 2021 Amendment to the German Postal Act as insufficient and, moreover, favoring DPAG when it comes to pricing of postal services. In this vein, the Commission stresses that the comprehensive draft amendment proposed by the Federal Ministry of Economic Affairs already in May 2020 would still form a good basis for the much needed fundamental reform of the German Postal Act. According to the Commission, key

<sup>40</sup> Namely the “European Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing” and the “Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity”.

<sup>41</sup> Balancing services are provided by transmission system operators and help to balance out frequency fluctuations in the electricity grid. There are three types of balancing services: (i) frequency containment reserves, which must be fully available within 30 seconds, (ii) automatic frequency restoration reserves (“**aFRR**”), which must be available within five minutes, and (iii) manual frequency restoration reserves (“**mFRR**”), which must be available within 15 minutes. Further, one can distinguish between positive balancing services (when consumption exceeds electricity generation) and negative balancing services (when electricity generation exceeds consumption). Until November 1, 2020, Germany used a joint tendering process for the procurement of aFRR and mFRR. Since November 2, 2020, aFRR and mFRR are tendered in two separate markets. Delivering balancing energy is now possible without prior participation in a capacity auction (*i.e.*, all pre-qualified aFRR and mFRR providers can participate in the relevant energy auctions).

<sup>42</sup> The Monopoly Commission's “12<sup>th</sup> Sector Report Post (2021): Competition with new momentum!” is only available in German [here](#); a press release dated December 16, 2021, is available in English [here](#).

<sup>43</sup> The Monopoly Commission's “12<sup>th</sup> Sector Report Telecommunications (2021): Competition in transition” is only available in German [here](#); a press release dated December 16, 2021, is available in English [here](#).

<sup>44</sup> The Monopoly Commission's “11<sup>th</sup> Sector Report Post (2019): The amendment to the Postal Act: New opportunities for competition” is only available in German [here](#); a press release dated December 3, 2019 is available in English [here](#). For more information on the 11<sup>th</sup> Sector Report on the Postal Market please see our Cleary Antitrust Watch blog article, available [here](#).

points to strengthen competition in the letter-post market include the following:

- Revision of the pricing principles;
- Extension of the partial access to DPAG's mail centers to include shipments of goods and press items;
- Requiring DPAG to also submit to the Federal Network Agency its so-called "partial access service contracts" with business customers.

With respect to the parcel market, the Monopoly Commission finds that Amazon's logistic division has clearly enhanced competition. Since 2020, Amazon has become one of the six largest parcel service providers in Germany with a market share between 5 and 15%. Amazon's high quality standards for parcel delivery encourage innovation and stimulate competition. However, the Monopoly Commission recommends monitoring to assess whether Amazon's could leverage its position as the operator of the largest online marketplace into parcel deliveries by offering other network retailers advantages in exchange for using Amazon's parcel delivery services.

### Telecommunication Services

In its 12<sup>th</sup> Sector Report Telecommunications, the Monopoly Commission makes fundamental recommendations how to further increase competition at the network and interpersonal telecommunication services levels to the benefit of end users. These include the following three key aspects:

- *Ensure migration from copper to fiber-optic networks in line with competition law.* First, the Monopoly Commission stresses the importance of a migration process that respects competition law and provides for planning security for market participants. To achieve these two objectives, the Monopoly Commission recommends to keep the copper-based wholesale prices stable until the end of the migration process. Second, the Monopoly Commission criticizes Deutsche Telekom AG's

practice to conclude long-term purchasing agreements only with large wholesale customers, which permanently deprives smaller fiber-optic network operators outside this "Commitment Model" of demand for network access. In this vein, the Monopoly Commission points out that it will be even more difficult for smaller operators to expand their fiber-optic networks which may slow down the overall migration process. To create positive incentives for the migration process, the Monopoly Commission recommends against imposing comprehensive *ex ante* price regulation on fiber-optic networks, subject to the imposition of non-discrimination obligations.

- *Maintain auctioning of mobile communication frequencies.* The Monopoly Commission further recommends to give auctioning of mobile communications frequencies during times of scarcity priority over tendering mobile communications frequencies. In the Monopoly Commission's view, auctioning is the best way to ensure high-quality mobile communications coverage as well as competition between mobile networks. Relatedly, it pleads for the reintroduction of the statutory principle of priority of auctioning mobile communication frequencies during times of scarcity which has been abandoned in the most recent amendment to the German Telecommunications Act.
- *Reject interoperability obligation for interpersonal telecommunication services.* Last but not the least, the Monopoly Commission advises to reject the government's proposal to enable communications across different communication services (such as WhatsApp, Signal, Threema and Wire) via an interoperability obligation. In the Monopoly Commission's view, a symmetrical obligation on all communication services providers would disproportionately burden smaller providers and deprive them of the ability to differentiate themselves from larger providers through better functionalities and higher data protection standards. Similarly, an asymmetrical obligation solely on the large and powerful providers is only justified in the event of market failures, which have yet to be identified.

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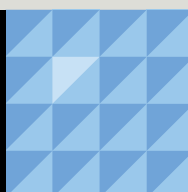
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