July–August 2019

German Competition Law Newsletter

Highlights

— DCA Picks Apart FCO's Facebook Decision In Interim Proceedings

— Amazon Changes Business Terms Following FCO Investigation

DCA Picks Apart FCO's Facebook Decision In Interim Proceedings

On August 26, 2019, the Düsseldorf Court of Appeal ("DCA"), in an interim decision, suspended the German Federal Competition Office's ("FCO") prohibition decision against Facebook, Inc. ("Facebook"), expressing "serious doubts" about its legal basis.[1] This decision marks not only the second major setback for the FCO after the DCA's annulment of the FCO's *Booking.com* decision on price parity clauses earlier this year.[2] It might also constitute a major setback for the FCO's efforts to act as a leading enforcer of competition law in the digital economy.

Background

On February 6, 2019,[3] the FCO found Facebook's data policy an abuse of a dominant position, in particular by requiring users to consent to the extensive collection and processing of their personal data from Facebook's own services as well as from third-party platforms. Given the lack of alternative and comparable social networks, users had no other choice than to agree to Facebook's data collection practices if they wanted to use the social network. According to the FCO, the users' consent for the data collection was therefore not given freely (as required under the EU General Data Protection Regulation ("GDPR"))[4]. The FCO found that this practice amounted to an exploitative abuse of a dominant position to the detriment of Facebook's users. It also is an exclusionary abuse to the detriment of its competitors because Facebook's processing of extensive data enabled it to optimize its targeted advertising activities, thereby increasing entry barriers for Facebook's actual and potential competitors.

The FCO ordered Facebook to stop amalgamating user data from different sources without their freely given consent and to alter its terms and conditions

[1] *Facebook* (VI-Kart 1/19 (V)), DCA decision of August 26, 2019, only available in German here.

[2] *Booking* (VI - Kart 2/16 (V)), DCA decision of June 4, 2019, only available in German here. See also our article in the German Competition Law Newsletter May – June 2019, p. 4 *et. seq.*, available here.

[3] *Facebook* (B6-22/16), FCO decision of February 6, 2019, available in English here. See also our article in the German Competition Law Newsletter January – February 2019, p. 1 *et. seq.*, available here.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

within twelve months. Facebook then appealed the FCO's decision to the DCA and, in addition, requested the court to suspend the decision's effects in the interim.

The DCA's Interim Decision

The DCA held that Facebook's data policy did not give rise to any relevant competitive harm. Irrespectively of whether Facebook's data policy constituted an infringement of the GDPR, the DCA concluded that the FCO's decision raised serious doubts about the legal basis for both the alleged exploitative abuse to the detriment of Facebook's users as well as the alleged exclusionary abuse to the detriment of its competitors.[5]

Serious Doubts Regarding Exploitative Abuse Of Facebook's Users

An exploitative abuse requires that a dominant firm imposes prices or other trading conditions that differ from those likely to exist on a market with effective competition. The DCA held that, for an exploitative abuse, it did not suffice that unfair or unlawful contractual conditions were imposed by a dominant company, but that there must also be a causal link between dominance and the abusive conduct. According to the DCA, the FCO did not establish the existence of a causal link between Facebook's dominance and its far-reaching data collection practices, namely that Facebook's data collecting and processing practices (and thus the alleged GDPR infringement) were only made possible because of its dominance and that competitors, for this reason, would not be able to apply similar practices.

In addition, the DCA held that Facebook's data collection practice did not lead to a loss of the users' control over their personal data and thus did not harm users. The fact that the use of Facebook is linked to the user's consent to the use of additional data does not mean a loss of the user's control over the data. Users can choose freely between Facebook and other social media platforms and must therefore balance the benefits and disadvantages of using an advertising-funded social network.[6] By consenting to the data collection, users did also not suffer an economic loss, as the personal data could be easily duplicated (in contrast to a "normal" user charge).

Probably No Exclusionary Abuse Of Competitors

In the DCA's view, the FCO also failed to demonstrate to what extent Facebook's access to user data resulted in a foreclosure of actual or potential competitors. In particular, the DCA considered the FCO's finding that Facebook's access to considerable amounts of user data created high entry barriers for its competitors, "not comprehensible". In this regard, the DCA pointed out that Facebook's market power mainly stems from direct and indirect network effects rather than from its access to its users' data. In the DCA's view, the fact that the social network Google+ had access to a comparable amount of user data, but was not able to attract a significant number of users, indicates that access to user data is not a decisive barrier to market entry for potential competitors.

Conclusion

The FCO has appealed the DCA's interim order to the German Federal Court of Justice ("FCJ"); a decision is expected only for 2020. The DCA has indicated that it will commence oral hearings in its own main proceedings only after the FCJ's decision on the FCO's appeal of the DCA's interim order. While the FCO's prohibition decision was a major setback to Facebook's publicly announced plans to technically integrate the infrastructure of its three messaging apps (Facebook Messenger, WhatsApp and Instagram), the suspension of the FCO's prohibition decision means that it could now proceed with these plans, which could make the FCO's original remedy plans unfeasible.

While the DCA does not fundamentally reject the FCO's approach that certain data protection law violations may amount to an abuse of a

[5] For the sake of the interim proceedings, the DCA only assumed, but did not analyze further, that Facebook has a dominant position on the market for private social networks.

[6] For this reason, the DCA even questioned whether Facebook's data collection actually infringed data protection law at all.

dominant position, it does not agree with the FCO's interpretation of the FCJ case law on which the FCO based its Facebook decision. The FCO followed from the FCJ's decisions in *VBL Gegenwert II*[7] and *Pechstein*[8] that contractual terms and conditions agreed upon in an imbalanced negotiation, and infringing German civil law, constitutional rights or any other legal principle, which aims to protect a contracting party in an imbalanced negotiation position, could also constitute an exploitative abuse by a dominant company under German competition law. In contrast, the DCA held that the case law does not support this interpretation. The DCA took the position that in contrast to the Facebook case, the anticompetitive effects of the behavior at hand in the FCJ's precedents was rather obvious. Further, the DCA held that a strict causal link has to be shown between the dominant position and the unlawful terms and conditions. This means that in its Facebook decision, the FCO should have conducted a hypothetical comparison of Facebook's actual terms and conditions with the hypothetical terms and conditions it would have been able to impose under competitive market conditions. Should users be indifferent with regard to the terms and conditions, or if they would agree to similar terms in their interaction with companies that do not hold a dominant position, there would be no abuse of a dominant position.

The FCJ held in its *VBL Gegenwert II* decision that not every use of unlawful terms and conditions by a dominant company constitutes an abuse of a dominant position, and the DCA's reasoning is certainly in line with that. It remains to be seen whether the FCJ, when ruling on the case at hand, will confirm a narrow understanding of its *VBL Gegenwert II* and *Pechstein* precedents, or soften the "strict causality" requirement and, thus, overrule the DCA.

Amazon Changes Business Terms Following FCO Investigation

On July 17, 2019, the FCO terminated its abuse proceedings into Amazon.com, Inc.'s ("Amazon") German online marketplace, Amazon.de, after Amazon had committed to making several changes to its business terms towards sellers on its marketplace. The commitments apply not only to Amazon's business terms in Germany, but also worldwide on all its marketplaces.[9]

Background

The FCO initiated the investigation in November 2018 following more than 100 complaints from marketplace sellers offering products on Amazon's marketplace. These complaints concerned several clauses of Amazon's business terms towards sellers, the so-called Business Solutions Agreement ("BSA"). In the course of its seven-month investigation, the FCO liaised closely with competition authorities in- and outside of Europe, in particular with the Austrian competition authority and the European Commission.

In December 2018, the Austrian competition authority launched a similar investigation into Amazon's practices *vis-a-vis* Austrian marketplace sellers, and closed it without a formal decision on the same day as the FCO's investigation.[10] Also on the same day, the European Commission opened a formal investigation into Amazon's use of sensitive seller data and whether Amazon is abusing its dual role as the largest online marketplace operator and the largest seller.[11]

The FCO's Preliminary Findings

The FCO did neither conduct an in-depth investigation nor did it issue a formal decision as

[7] *VBL-Gegenwert II* (KZR 47/14), FCJ decision of January 24, 2017, only available in German here.

[8] *Pechstein/International Skating Union* (KZR 6/15), FCJ decision of June 7, 2016, only available in German here.

[9] Case B2-88/18. FCO Case Summary, July 17, 2019, available in English here.

[10] Austrian Competition Authority Case Summary, July 19, 2019, only available in German here.

[11] European Commission Press Release, July 17, 2019, available in English here.

Amazon's commitments eliminated the FCO's preliminary concerns regarding Amazon's allegedly abusive conduct. Nonetheless, the FCO published a case summary that outlines its preliminary findings.

Dominant Market Position

The FCO did not arrive at a final conclusion concerning market definition. However, the FCO was at least inclined to assume a two-sided market for the provision of online marketplace services to sellers (who seek to sell products) on the one side and consumers (who seek to search for and buy products) on the other.[12]

Also in terms of Amazon's alleged dominance, the FCO did not arrive at a final conclusion, but established some preliminary findings:

First, Amazon is not only the largest seller in Germany, but also acts as the largest online marketplace in the country. As such, Amazon acts as a gatekeeper to consumers who purchase their products online. The FCO also referred to market studies according to which Amazon's marketplace accounts for significantly more than 40% of the German online sales.[13] In 2018, Amazon and third-party sellers sold more than 1.3 billion products to 37 million customers via Amazon.de. Amazon's retail branch accounted for about 40-45% of this total sales volume, whereas around 300,000 third-party sellers accounted for the remaining 55-60%.

Second, the FCO left open whether Amazon enjoyed "relative" market power, *i.e.*, whether smaller or medium-sized sellers depend on Amazon's marketplace and cannot choose to conduct their business through another marketplace. While Amazon acts as a gatekeeper, the FCO, however, also found that smaller sellers may only have entered the online sales business because Amazon's marketplace provided them with the opportunity and necessary tools to do so.

Abuse

The FCO only conducted a preliminary analysis whether any clauses in Amazon's BSA, individually or as a whole, amounted to a form of exploitative or exclusionary abuse under German law. The FCO stated, but did not further elaborate, that it also considered the application of the European abuse of dominance provisions. Further, the FCO applied the same test and referred to the same FCJ precedents as in its (recently suspended) Facebook prohibition decision (and referred to that, too) as a legal basis for its position that inappropriate contractual terms and conditions agreed upon in an imbalanced negotiation, and therefore infringing German civil law or constitutional rights, could constitute an exploitative abuse under German competition law.

The FCO found that Amazon's application of possibly inadequate contractual terms and conditions may have been exploitative as these clauses had the potential to restrict and threaten other sellers' economic activity on Amazon's marketplace. In this regard, the FCO did not analyze the effects of each individual clause separately but the cumulative effects of all clauses as a whole.

In addition, the FCO came to the preliminary conclusion that some clauses[14] also resulted in an exclusionary effect on sellers because these clauses might provide Amazon with the opportunity to improve its own position as a seller at the expense of competing sellers selling via Amazon's marketplace.

Amazon's Changes To The BSA

In order to address the FCO's preliminary concerns, Amazon committed to make the following changes to its BSA within 30 days[15]:

— ***More transparency.*** Amazon made its business terms and guidelines more easily accessible for sellers. Amazon also pledged to announce any

[12] The FCO's case summary is silent on the geographic market definition but generally refers to Amazon's activities in Germany.

[13] Section 18(4) of the German Act against Restraints of Competition ("ARC") provides for a (rebuttable) presumption of single dominance where a single company has a market share of at least 40%.

[14] *I.e.*, clauses regarding account termination and suspension, rights of usage and product materials parity requirements, product reviews, and European delivery schemes.

[15] The changes to the BSA entered into effect on August 16, 2019.

changes to its business terms at least 15 days before their implementation.

— ***Choice of law and forum.*** Previously, the BSA provided for exclusive jurisdiction of the courts of Luxembourg. Amazon has now included domestic courts, depending on the circumstances. To ensure that the legal framework remains consistent across Amazon's marketplaces in Europe, the FCO, however, accepted that Luxemburgish law will continue to govern the contractual relations between Amazon and third-party sellers.

— ***Liability.*** So far, the BSA basically excluded any liability by Amazon *vis-a-vis* sellers, whereas the latter were obliged to indemnify Amazon from any claims from third parties. Going forward, Amazon's liability will be less restricted and the third-party sellers' indemnity obligation less comprehensive.

— ***Account termination and suspension.*** The new BSA makes it harder for Amazon to terminate or suspend sellers' accounts without justification. Going forward, an ordinary termination will require a 30 days' notice. Amazon will generally only be able to suspend a seller's account with immediate effect if it provides sound reasons for such a measure (the FCO acknowledged that Amazon must be able to lock fraudulent sellers' accounts immediately due to product customer interests).

— ***IP rights and product materials parity requirements.*** Under the old BSA, sellers were required to grant Amazon extensive rights of usage to the texts and pictures they used on Amazon.de. In addition, the materials that sellers used on Amazon.de had to be equal in quality to the highest grade materials that they used in any other sales channel. In the FCO's preliminary view, these two provisions exposed sellers to potential conflicts: On the one hand, they were required to provide product materials for which they might not necessarily be able to grant the required usage rights to Amazon. On the other hand, they had the obligation to indemnify Amazon, in case that the actual owner of the IP rights to these materials cracked down on Amazon. The new BSA therefore limits the scope of how IP rights are granted and their duration. In addition, even though Amazon agreed to waive the old product materials parity requirement, it will still be able to define quality standards for product information material.[16]

— ***Returns and reimbursements.*** While nothing will change for consumers, sellers may object to Amazon's reimbursement decision within 30 days. Amazon will have to bear the refund risk in the relationship with the seller.

— ***Product reviews.*** In the future, Amazon will make its Vine Rating Program available to those sellers that own a brand name and will launch its Early Reviewer Program also in Europe.[17] The FCO generally sees a considerable risk of abusive, false, and/or manipulative use of customer reviews. However, in light of its soon to be concluded sector inquiry into online user reviews, the FCO refrained from making additional suggestions.

— ***Public statements.*** Amazon no longer requires sellers to obtain its prior written approval for any public statements by the seller.

Outlook

The FCO stressed that, while Amazon's cooperation and commitments helped to conclude the investigation swiftly, Amazon will, nonetheless, remain under scrutiny. The FCO is willing to reopen proceedings in case Amazon does not comply and properly implement the changes to its BSA. Interestingly, the FCO relied in its preliminary assessment on its own decisions against Facebook

[16] Already in 2013, Amazon eliminated its price parity clauses for sellers using its marketplace following a FCO investigation. Concerning the rationale for waiving the old product materials parity requirement, the FCO referred to its 2015 decision prohibiting hotel booking platform operator Booking Holdings from using narrow price parity clauses; which was only recently annulled by the DCA on June 4, 2019.

[17] For its Vine Rating Program, Amazon invites customers to join its club of product testers based on their product review record. According to Amazon, it invites in particular such customers whose previous reviews have been considered helpful by other customers. Amazon claims that the program is supposed to incentivize trustworthy and reliable product reviews for its customers. Amazon's Early Reviewer Program is, so far, only available in the U.S. According to Amazon, the program's goal is to provide brand owners with the opportunity to acquire early reviews for their products and customers better guidance. If a brand owner chooses to participate, Amazon randomly selects customers that have purchased the product and offers them a small reward for writing a review.

and Booking.com, which only recently were suspended or annulled by the DCA.[18] While the DCA's judgments do not affect this investigation, as the FCO closed it without a formal decision following Amazon's commitments, the DCA's judgments might become relevant should the FCO reopen proceedings due to Amazon's non-compliance with the commitments or following new complaints by the sellers.

On the day the FCO closed its probe, the European Commission opened a formal investigation into Amazon's use of sensitive independent seller data that may potentially breach Article 101/102 TFEU. Already in 2016, the Commission had started its investigation into Amazon's collection and use of transaction data and sent questionnaires to a large number of retailers in 2018. Addressing additional complaints by sellers, the Commission's investigation looks into Amazon's dual role as seller and platform operator. In particular, the Commission investigates (i) whether and how Amazon uses accumulated seller data collected on its marketplace platform to potentially leverage its own position, and (ii) how Amazon decides which sellers will appear in the "Buy Box," a box allowing Amazon's and some sellers' customers to purchase a product with a single click.

News

FCO

FCO Blocks Waste Recycling Deal

On July 11, 2019, the FCO prohibited waste disposal company Remondis SE & Co. KG's ("Remondis") acquisition of the dual system for packing recycling DSD – Duales System Holding GmbH & Co KG ("DSD").[19]

Dual systems organize the collection and recycling of packing waste for manufacturers and distributors of packaged goods.[20] They then commission waste disposal companies with the actual collection and recycling process. According to the FCO, DSD is the largest dual system for packaging recycling in Germany, whereas Remondis is the largest German waste disposal company. Both companies are also active in the marketing of cullet for the glass recycling industry.

The FCO found that the vertical integration of DSD and Remondis would have significantly impeded competition between the dual systems in Germany: The FCO considered it likely that the merged entity would have used its strong position on the downstream waste disposal market to significantly increase the prices for DSD's competitors, thereby strengthening DSD's market position on the upstream market. In addition, the FCO was concerned that the transaction would have enabled the merged company to foreclose competing waste disposal companies, which would have indirectly led to an additional price increase for DSD's competitors.

Further, the FCO found that the transaction would have created a dominant position in the marketing of cullet because DSD and Remondis were the number one and two players with a combined market share exceeding 40% at national level, even close to 60% in some regions.

The parties had offered to divest two glass processing plants in addition to commitments on the merged entity's future conduct. However, the FCO considered these commitments neither suitable nor sufficient to eliminate the FCO's concerns. Remondis appealed the FCO decision before the DCA.

[18] For more details, see our articles on the DCA's Facebook decision of August 26, 2019 in this newsletter on p. 1 *et. seq.*, and on the DCA's Booking decision of June 4, 2019 in the German Competition Law Newsletter May – June 2019, p. 4 *et. seq.*, available here.

[19] *Remondis/DSD* (B4-21/19), FCO decision of July 11, 2019, only available in German here; see also FCO Press Release, July 11, 2019, available in English here.

[20] Under the German Packaging Act (*Verpackungsgesetz*), manufacturers and distributors of packaged goods are responsible for taking back and recycling their product's packaging. They pay a license fee to dual systems for their services, which exempts the producers of their legal obligation to collect and recycle such packaging waste themselves.

FCO Clears Paper Dealer Merger

On July 2, 2019, after an in-depth investigation, the FCO approved the acquisition of German paper dealer Papyrus Deutschland GmbH & Co. KG ("Papyrus") by its competitor Papier Union GmbH despite high combined market shares in the market for printing paper.[21]

The FCO found that the parties' combined share in the printing paper market would be 40-45% and thus exceed the statutory presumption of single market dominance.[22] However, the FCO concluded that the merger would not create a single dominant position, in particular because the parties' largest competitor, the Igepa group GmbH & Co. KG ("Igepa Group"), has an even higher market share. Further, printer companies multi-source and can easily switch suppliers. Competitors also have sufficient unused capacity to meet additional demand. Finally, the FCO considered direct paper suppliers by paper manufacturers a competitive constraint on the merged entity.

In addition, the FCO found that, together with Igepa Group, the parties would also exceed the statutory presumption threshold of collective dominance.[23] Yet, because of the changing market structure, in an overall shrinking market, and the existing external competition through direct supplies by one paper manufacturer, the FCO could not show that coordinated effects were sufficiently likely.

FCO Approves EDEKA's Acquisition Of Handelshof Group

On July 1, 2019, the FCO cleared EDEKA Zentrale AG & Co. KG's ("EDEKA") 100% acquisition of the Handelshof Management GmbH ("Handelshof group").[24] The FCO found that the merger did not significantly impede effective competition in the food (and related non-food) product wholesale and procurement markets.

The FCO found that there was a single product market comprising both pick-up and delivery wholesalers. The FCO explicitly abandoned its previous approach distinguishing between distinct markets for pick-up and delivery wholesalers,[25] because its market investigation had shown that the substitutability between both wholesale channels had significantly increased. Despite the parties' combined shares of 30-35% in two regional markets, making them the number one food (and related non-food) product wholesaler post-transaction, the FCO found that even in these regions, customers would still have sufficient possibilities to switch to alternative wholesalers.

Further, the FCO found that the Handelshof group's share was well below 0.5% of the total food and related non-food product procurement volume in Germany. The FCO concluded that this increment to EDEKA's position was so small that it would have no significant effect on competition. The FCO also stressed that the affected procurement volume lags far behind the increment that had been classified as critical in *Edeka/Kaiser's Tengelmann*.[26]

Courts

DCA Dismisses MVV's Appeal To Prevent EnBW's Blocking Minority

On July 10, 2019, the DCA rejected German energy supplier MVV Energie AG's ("MVV") appeal against the FCO's clearance decision, allowing its competitor EnBW Energie Baden-Württemberg AG ("EnBW") to increase its stake to a minority shareholding of 28.76% in MVV.[27]

[21] *Papier Union/Papyrus* (B5-187/18), FCO decision of July 2, 2019, only available in German here. A Press Release is available in English here.

[22] Section 18(4) ARC provides for a rebuttable presumption of single dominance for a share of at least 40%.

[23] Section 18(6) No. 1 ARC provides for a rebuttable presumption of collective dominance if three or fewer companies have a combined share of at least 50%; No. 2 if five or fewer companies have a combined share of at least two-thirds.

[24] FCO Press Release (B2-55/19), July 1, 2019, available in English here; a German case summary is available here.

[25] *Edeka/Ratio* (B2-125/10), FCO decision of February 15, 2011, a German case summary is available here.

[26] *Edeka/Kaiser's Tengelmann* (B2-96/14), FCO decision of March 31, 2015, an English case summary is available here. The FCO had prohibited the acquisition of the supermarket chain Kaiser's Tengelmann by its competitor EDEKA. However, the German Federal Minister of Economic Affairs granted a Ministerial Authorization for the transaction.

[27] See DCA decision of July 10, 2019, (2 Kart 1/18 (V)), only available in German here. FCO decision of December 13, 2017, (B4-80/17), only available in German here; an English press release is available here.

The DCA held that MVV, as the target, did not have standing to challenge an unconditional clearance decision because it did not affect its rights; only third parties have standing to challenge clearance decisions. The DCA confirmed that any adverse competitive consequences for the parties to a transaction did not result from the FCO's clearance decision, but from the underlying private law agreement. While the DCA applied this rationale also in this case, and dismissed MVV's appeal, it still acknowledged that MVV, as the target company, was not itself a party to the share purchase agreements that EnBW had concluded with the previous stock owner (ENGIE SA). It therefore expressly granted MVV leave to appeal on points of law to the FCJ. MVV already lodged an appeal with the FCJ.

The FCJ Quashes Two DCA Decisions Due To Procedural Errors

On June 21 and July 9, 2019, the FCJ annulled two judgments of the DCA relating to the cartels in the confectionary[28] and roasted coffee[29] sectors due to procedural flaws. In both cases, the DCA had previously increased cartel fines set by the FCO. The FCJ referred both cases back to another cartel division of the DCA for a new hearing and ruling. Whether this, however, will result in an actual reduction of the fines remains to be seen.

THE FCJ'S DECISION IN THE "CONFECTIONARY CARTEL"

In 2013, the FCO imposed total fines of €19.6 million on confectionary producers for information exchange at working groups of the "Conditions Association of the German Confectionary Industry" (*Konditionenvereinigung der Deutschen Süßwarenindustrie e.V.*). On appeal by five of the parties, the DCA not only confirmed the FCO's decision in January 2017, but also significantly increased the appellants' fines. Four of them appealed this ruling to the FCJ.

On June 21, 2019, the FCJ annulled the DCA's ruling, holding that the DCA's findings were based on an incomplete and thus flawed assessment of the available evidence. The FCJ criticized that the DCA had only taken into account incriminating witness statements but not statements by all parties involved. Because of this incomplete assessment of evidence, the FCJ found itself unable to examine whether the DCA's assessment of evidence constitutes a viable basis for its decision and, therefore, whether it had correctly applied the substantive law. According to the FCJ, a judgement must demonstrate that the court did not disregard any essential aspect that might influence the assessment of evidence, including the parties' own submissions. The FCJ therefore set aside the judgment and remitted the case to another cartel division of the DCA for retrial. Interestingly, the FCJ set aside the judgment not only with respect to the appellants, but also with respect to the other parties that had not appealed.

THE FCJ'S DECISION IN "ROSSMANN"

In 2015, the FCO fined coffee producer Melitta Kaffee GmbH and five retailers, including Dirk Rossmann GmbH ("Rossmann"), for price fixing roasted coffee. On Rossmann's appeal, the DCA increased Rossmann's fine nearly sixfold[30] in 2018.[31] Rossmann appealed the decision to the FCJ, which annulled the DCA's judgment.

In its decision of July 9, 2019, the FCJ found the DCA's delay in filing the judgment to be a procedural error. The DCA would have had to file its judgment no later than 11 weeks after its pronouncement; this period may be exceeded only in unforeseeable and unavoidable circumstances. The FCJ held that, in a collegiate judicial body, such as the DCA's cartel division, the absence of the DCA's judge-rapporteur due to health and personal reasons did not constitute such grounds because every judge of the collegiate judicial body is responsible for meeting statutory time limits. The FCJ referred the case back to another cartel division of the DCA for retrial.

[28] *Süßwarenkartell* (KRB 10/18), FCJ decision of June 21, 2019, only available in German here.

[29] *Rossmann* (KRB 37/19), FCJ decision of July 9, 2019, only available in German here.

[30] *I.e.*, from €5.25 million to €30 million.

[31] See our article in the German Competition Law Newsletter March – April 2019, p. 9 *et. seq.*, available here.

Other Developments

Federal Minister Of Economic Affairs Grants Ministerial Authorization For Miba And Zollern

On August 19, 2019, the German Federal Minister of Economic Affairs, Peter Altmaier, applied the rarely used ministerial right[32] to overrule the FCO's prohibition of a joint venture between Miba AG ("Miba") and Zollern GmbH & Co. KG ("Zollern") and cleared the transaction subject to commitments.[33] The Monopolies Commission, an advisory body to the German federal government, had previously issued a non-binding recommendation to reject Miba's and Zollern's request for ministerial clearance.[34]

Despite the FCO's concerns that a joint venture between Miba and Zollern would stifle competition in the already highly concentrated market for the production of hydrodynamic plain bearings,[35] the Minister found that overriding public interests—in particular the interest of safeguarding know-how and innovation potential in the areas of clean energy and sustainability—outweighed competitive concerns in this case. The ministerial authorization is subject to several commitments, including that (i) Miba and Zollern will not change the size of their shareholdings in the joint venture for the next five years, (ii) they contribute their know-how to the joint venture in accordance with the joint venture agreement, and (iii) they invest €50 million in Germany over the course of the next five years.

Ministerial authorizations are rarely granted[36] and typically concern large scale transactions[37]. However, in this case, the authorization concerned medium-sized companies. Further—and in contrast to most previous authorizations—the minister did not base this authorization primarily on the preservation of jobs or regional access to important goods and services, but referred to the transaction's importance for the success of Germany's transition to renewable energies.

Monopolies Commission Calls For Higher Quality Train Services And More Competition In The Railway Sector

On July 25, 2019, the German Monopolies Commission presented its 7th Sector Report on the German Railway market, assessing quality and competition in the industry.[38]

The Monopolies Commission identifies poor train punctuality and a poor condition of the railway infrastructure as the key deficiencies of the German railway sector. To improve quality standards, the report's recommendations focus on the role of the infrastructure operators, most prominently on DB Netz AG. *Inter alia*, the Monopolies Commission recommends to hold infrastructure operators liable for traffic delays caused by poor infrastructure. To incentivize them to contribute to improved train punctuality, infrastructure operators should be obliged to compensate train operators if train punctuality targets are missed because of infrastructure issues. In the same vein, the German federal government should make better use of its ability to make the public funds regularly granted to DB Netz AG subject to the condition that the network operator meets specific pre-defined quality standards.

Further, the Monopolies Commission considers it necessary to strengthen competition in the German railway sector to increase the quality of train services. The report recommends to reduce track access charges for independent train

[32] Section 42 ARC provides the Federal Minister for Economic Affairs and Energy with the ability to issue a ministerial authorization if the negative effects of a merger on competition are outweighed by benefits to the economy as a whole, or if the merger is justified by an overriding public interest.

[33] Federal Minister of Economic Affairs and Energy's decision of August 19, 2019, only available in German here. See also the Ministry's Press Release, August 19, 2019, only available in German here.

[34] Monopolies Commission Special Report No. 81 and press release of April 18, 2019, only available in German here. The Monopolies Commission criticized the ministerial clearance in a statement of August 19, 2019, only available in German here.

[35] *Miba/Zollern* (B5-29/18), FCO decision of January 17, 2019, only available in German here. See also German Competition Law Newsletter January – February 2019, p. 6, available here.

[36] This is only the tenth ministerial authorization since the introduction of merger control in Germany in 1973.

[37] See the most recent Ministerial Authorization concerning EDEKA's acquisition of Kaiser's Tengelmann.

[38] Monopolies Commission 7th Sector Report, July 2019, only available in German here. Monopolies Commission Press Release, July 25, 2019, available in English here.

operators and—most importantly—to establish truly independent infrastructure operators, *i.e.*, to foster a clear vertical separation between infrastructure and train operations within the DB group. To that end, the Monopolies Commission recommends that the federal government as the sole owner of the DB group should divest all shares held in any DB group companies that are active in competitive railway markets, and should keep only shares in companies that are active in regulated railway markets.

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