*July – December 2021*

# German Competition Law Newsletter

## Highlights

— The FCO's Annual Review 2021

— The FCO's New Guidelines On Leniency And Antitrust Fines

## The FCO's Annual Review 2021

On December 22, 2021, the German Federal Cartel Office ("**FCO**") published its annual review for 2021.[1] As done already on the occasion of the presentation of its Annual Report 2020/2021,[2] the FCO's President, Andreas Mundt, emphasized again that the protection of competition in the digital economy remains one of the FCO's top priorities. He underlined that also merger control will continue to serve as a key tool to achieve this goal. In addition, he pointed out that the FCO would welcome enforcement powers also with regard to infringements of consumer rights.

### Digital Economy And Consumer Protection

Ensuring open markets by investigating large digital players and their practices was at the top of the FCO's agenda in 2021. Accordingly, the FCO opened investigations against all major digital players under the new competition rules for companies with paramount cross-market significance ("**PCMS**") in the first half of 2021.[3] On December 30, 2021, the FCO issued its first PCMS decision.[4]

Also in the area of consumer protection, the FCO's focus in 2021 was on the digital economy (as it was already in 2019 and 2020). In this vein, in January 2021, the FCO joined forces with the German Federal Office for Information Security (*Bundesamt für Sicherheit in der Informationstechnik*, "**BSI**").[5] The FCO and Germany's cyber security authority BSI entered into a cooperation to pool respective competences and expertise for the benefit of consumers. Apart from the continuous exchange of information, the cooperation also envisages mutual assistance in the authorities' respective tasks relating to consumer protection.

[1] See the FCO's Press Release of December 22, 2021, available in English here.

[2] See the FCO's Press Release of June 23, 2021, available in English here; the Annual Report 2020/2021 is only available in German here.

[3] For more details, see our article on our Cleary Antitrust Watch blog here.

[4] Case B7-61/21, FCO decision of December 30, 2021; the FCO's Press Release of January 5, 2022 is available in English here; a case summary is available in English here; the decision is only available in German here.

[5] See the FCO's Press Release of January 22, 2021, available in English here.

Accordingly, the BSI assisted the FCO in one of two ongoing sector inquiries in the digital economy which the FCO had launched back in 2020, namely into messenger and video services. The other sector inquiry focused on mobile apps. The FCO published interim reports in July and November 2021, respectively.[6]

While in 2017, the FCO received powers to investigate consumer protection infringements via the launch of sector inquiries, it lacks the competence to enforce consumer protection law, *e.g.*, by issuing prohibition decisions or imposing fines. To date, the sector inquiries' results only may facilitate private enforcement by consumers, consumer associations or competitors. The FCO is thus still seeking new enforcement powers in this respect.

## Cartel Prosecution And Other Anticompetitive Agreements

In 2021, the FCO imposed fines of approx. €105 million on a total of 11 companies and eight individuals, but the FCO's prosecution activities were still restricted by the COVID-19 pandemic. In particular, the FCO carried out only two dawn raids, which are a key component to investigate cartel infringements and to collect evidence. The total amount of fines imposed for horizontal and vertical infringements was less than one third of the fines imposed for horizontal infringements only in 2020 (approx. €349.4 million).

In terms of horizontal infringements, the FCO concluded proceedings against steel forgers (information exchange) and stainless steel producers (price fixing and information exchange).[7] In addition, the FCO sanctioned vertical price fixing agreements (*i.e.*, resale price maintenance) for musical instruments, school backpacks and consumer electronics.[8] Nine companies applied for leniency and cooperated with the FCO, but the FCO also received additional tips from other sources.

Apart from its prosecution activities, the FCO revised its leniency and fining guidelines, in particular to better align them with the regulatory changes brought about by the 10th Amendment of the Act against Restraints of Competition ("**ARC**").[9]

## Merger Control

In 2021, the FCO reviewed around 1,000 merger notifications. This is another decrease compared to 2020 (1,236 merger notifications) which should largely relate to the COVID-19 pandemic rather than the increase in the relevant turnover thresholds for merger filings under the 10th Amendment to the ARC.

While the FCO cleared most of the notified transactions in Phase I (*i.e.*, within one month), it carried out 14 in-depth reviews (Phase II). Of these 14 Phase II reviews, the FCO cleared three unconditionally[10] and one subject to conditions (remedies)[11]. The FCO prohibited one transaction.[12] In five other cases, the parties withdrew their notifications during the in-depth investigation.[13]

Interestingly, in the *Meta/Kustomer* case, the FCO initiated *ex officio* investigations and reviewed the

[6] For more details, please see our articles in this newsletter ("The FCO's Interim Report On Mobile Apps") and our article on our Cleary Antitrust Watch blog here.

[7] For more details, please see our article in this newsletter below ("Developments In 2021 In Relation To Horizontal Agreements").

[8] For more details, please see our article in this newsletter below ("The FCO's Enforcement Actions In 2021 In Relation To Resale Price Maintenance").

[9] For more details, please see our article in this newsletter below ("The FCO's New Guidelines On Leniency And Antitrust Fines").

[10] *Andros/Spreewaldhof* (B2-23/21), FCO decision of June 24, 2021, a press release is available in English here, the decision is only available in German here; *Rethmann/TSR Recycling/Willi Hennies Recycling* (B5-168/20), FCO decision of June 28, 2021; *Südbayerisches Portland-Zementwerk Gebr. Wiesböck/Ganser Baustoffe* (B1-40/21), FCO decision of August 23, 2021.

[11] *Edeka/Real* (B2-85/20), FCO decision of March 17, 2021, a press release is available in English here, the decision is only available in German here.

[12] *Funke Mediengruppe/Ostthüringer Zeitung* (V-36/20), FCO decision of September 28, 2021, a press release is only available in German here and the decision is only available in German here.

[13] *Magtech Europe/New Lachaussée* (B5-160/20), withdrawal on January 27, 2021; *OSR/Max Aicher Recycling/Hohenloher Recycling* (B5-39/21), withdrawal on April 22, 2021; *Dana/Modine Manufacturing* (B4-144/20), withdrawal on June 9, 2021; *Dana/Modine Manufacturing* (B4-72/21), withdrawal on October 25, 2021, the FCO's Case Summary is only available in German here; *TSR Recycling/Rhein-Main Rohstoffe* (B5-31/21), withdrawal on December 8, 2021, the FCO's Press Release of December 14, 2021 is only available in German here .

merger in parallel to the European Commission ("**EC**"). While the European Commission cleared the transaction subject to conditions, the FCO just recently cleared the transaction unconditionally.[14]

### Competition Register For Public Procurement

In March 2021, the FCO launched its digital Competition Register for Public Procurement ("**CR**").[15] The CR is a tool to record companies that have committed economic offenses and are therefore to be excluded from public procurement. In October 2021, the FCO announced that remaining requirements for electronic data transmission[16] are now in place.[17] The legal obligation of relevant authorities to submit the data to the CR became effective on December 1, 2021 and contracting authorities which had already registered can since consult the CR. However, legal obligations for public contracting authorities to consult the CR in relation to public procurement procedures involving projects exceeding certain contract values will only be effective as of June 2022.

Following public consultations on its draft guidelines and practical guide on the premature deletion of an entry in the CR,[18] the FCO published in November 2021 its final guidelines and practical guide.[19] According to these documents, premature deletion requires in particular that the company concerned actively cooperates with the relevant legal enforcement agencies, compensates any damages caused by the infringement, and implements compliance measures (*e.g.*, technical, organizational and personnel measures) to prevent further misconduct to the extent these are not yet in place.

## The FCO's New Guidelines On Leniency And Antitrust Fines

On October 11, 2021, the FCO published two new guidelines, the leniency guidelines and guidelines on the setting of antitrust fines.[20] Both guidelines reflect revisions to the ARC resulting from the 10th Amendment of the ARC earlier in 2021.[21] While the leniency program was legally anchored only by the 10th Amendment of the ARC, the FCO's new leniency guidelines largely correspond to the former guidelines as issued in 2000 and updated in 2006. In contrast, the FCO's new fining guidelines substantiate several important methodical changes introduced to the law by the 10th Amendment of the ARC and implement judicial practice which has in the past differed considerably from the FCO's principles in some cases.

### Calculation Of Antitrust Fines

The 10th Amendment of the ARC implemented the European ECN+-Directive[22] and defined non-exhaustive criteria to be used for the calculation

[14] For more details, please see our article in this newsletter below ("No "One-Stop-Shop": FCO Reviews Digital Merger In Parallel To The Commission"). The FCO's Press Release of February 11, 2022 is only available in German here.

[15] See the FCO's Press Release of March 25, 2021, available in English here; see also our article on our Cleary Antitrust Watch blog here.

[16] Such requirements are a prerequisite for the relevant authorities' obligation to communicate data to the CR and the public contracting authorities' obligation to consult the CR Authorities required to transmit data to the CR include in particular the public prosecution offices and authorities competent for the prosecution of administrative offences.

[17] See the FCO's Press Release of October 29, 2021, available in English here.

[18] The FCO has opened public consultations in June 2021. For more details, please see also our article on our Cleary Antitrust Watch blog here.

[19] See the FCO's Press Release of November 25, 2021, available in English here; the Guidelines on the premature deletion of an entry in the CR due to self-cleaning are only available in German here; the Practical Guide on filing an application is only available in German here.

[20] See the FCO's Press Release of October 11, 2021, available in English here. See also the FCO's Leniency Guidelines available in English here, and The Guidelines On the Setting Of Antitrust Fines available in English here.

[21] For further details on the changes brought about by the 10th Amendment of the ARC, see our article on our Cleary Antitrust Watch blog here.

[22] Directive (EU) 2019/1 of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

of antitrust fines. These include, *inter alia*, and in line with the European Commission's practice, the amount of the turnover affected by the infringement.

***Affected Turnover And Size Of The Company As A Starting Point***

To align more closely with the jurisdictional practice of German appeal courts, the FCO will from now on determine an initial baseline value depending on the companies' turnover affected by the infringement and the companies' global group turnover achieved in the year preceding the infringement. To determine the baseline value, the FCO will use a percentage of the companies' affected turnover, *i.e.*, the companies' turnover achieved with the products or services that were subject to the infringement during the infringement period. The percentage used will depend on the companies' annual group turnover and range from at least 10 % for companies with an annual group turnover of up to €100 million up to more than 30 % for companies with an annual group turnover exceeding €100 billion.

***Effective Compliance Measures Will Be Taken Into Account***

In a second step, the FCO will consider aggravating or mitigating factors, as introduced to the law by the 10th Amendment of the ARC, which either relate to (i) the offence, such as the type, gravity, duration and extent of the infringement, or (ii) the offender, such as its role in the cartel, its market position, the degree of intent/negligence or previous infringements. The offender/company-specific criteria include also *pre*- and *post*-offence compliance measures which the FCO had not previously taken into account when calculating antitrust fines, but only recommended to avoid personal (organizational) liability of the company owner.

*Pre-offence compliance* (*i.e.*, effective precautionary measures to prevent and detect infringements) may now be considered as a mitigating factor provided that the company's management level was not involved. Different from its previous position, the FCO acknowledges that the effectiveness of a compliance management system cannot *per se* be denied merely because the precautions taken did not lead to the detection and reporting of the infringement. This can be the case if the acting person has disregarded the company's compliance code to an extraordinary extent and with deliberate deception of his or her superiors in order to achieve personal advantages in the infringement.

*Post-offence compliance* (*i.e.*, precautionary measures to effectively prevent corresponding offenses in the future) may be considered as a mitigating factor if the company convincingly demonstrates effective measures to prevent future comparable violations and its clear commitment to comply with the law.

## Leniency Guidelines

According to the FCO's president, Andreas Mundt, "[k]*ey witnesses still play a crucial role in uncovering and prosecuting illegal cartels*". The FCO's leniency program, which now also found its way into the law, offers cartel members full or partial immunity from antitrust fines if they cooperate with the FCO and help to uncover the cartel from the inside.

While the key principles of the FCO's leniency program remain unchanged, the new guidelines include a number of smaller changes worth noting.

***First Come, Full Immunity***

As before, cartel members may be granted full immunity from fines if they continuously and fully cooperate with the FCO and are the first leniency applicant to submit evidence which would enable the FCO to obtain a search warrant or to prove the infringement.

The new guidelines specify that any active involvement in the cartel must be terminated immediately after filing the leniency application. Under the old regime, it was not entirely clear whether this duty only applied upon the FCO's explicit request.

Further, the guidelines state that the applicant must provide any and all evidence promptly and that evidence must not be destroyed or distorted. The latter duty thereby already applies prior to the filing of the leniency application when the applicant only considers applying for leniency (*e.g.*, following an internal investigation).

While those cartel members who forced others to participate in the cartel are still being exempted from full immunity, according to the new law and guidelines, this does not apply to ringleaders any longer, *i.e.*, even ringleaders can now apply for full immunity.

Subsequent leniency applicants, including ringleaders or cartel members who forced others to participate in the cartel, may only obtain partial immunity (reduction in fine of up to 50%) if the evidence they provide is of a "significant added value" for the FCO's investigation. In this context, the guidelines emphasize that the earlier an applicant cooperates, the more valuable its information usually is. As before, moving fast in the "leniency race" is key to secure at least a significant reduction in fine.

***Benefits Of The Disclosure Of Additional Facts***

Pursuant to the new leniency guidelines, companies which are first to provide the FCO with additional (*i.e.*, new) facts on a distinct part of the infringement (such as an extension of the period of the infringement or its geographic scope) or to support such facts with evidence, will profit from an exemption according to which the FCO will not use such additional (aggravating) facts against the submitting company when setting its fine, even if that company does not enjoy immunity.

***Civil And Criminal Liability***

As before, the new leniency program is without prejudice to any civil or criminal liability of cartel members. In particular, leniency applicants remain jointly and severally liable for any cartel damages claims. The immunity recipient, however, is privileged insofar as he remains liable only for cartel damages claims put forward by its direct and indirect suppliers.

## Conclusion

While the FCO's new guidelines will certainly provide more legal certainty and transparency for the companies concerned, they also fall short of the expectations with regard to several practical implications.

In this vein, the leniency guidelines expressly state that leniency may only be granted for cartels, *i.e.*, horizontal but not vertical restraints. While this statement suggests that the FCO may want to cease its practice to informally apply its leniency program also to vertical infringements, recent FCO decisions show the opposite. In particular, the FCO just recently settled a case with consumer electronics manufacturer Bose GmbH on resale price maintenance.[23] In addition, companies would have welcomed the possibility of an anonymous leniency application.

Certainly, the new law and the FCO's new guidelines on the setting of antitrust fines provide the FCO with a more flexible system to set adequate fines in each individual case and better align with the jurisdictional practice of German appeal courts. However, there remains uncertainty with regard to the interpretation and application of the relevant criteria to be assessed by the FCO. In particular, while the FCO will now have to take into account also precautionary measures to prevent and detect (future) infringements, the guidelines do not provide for best practices as to when the FCO will regard a compliance system as appropriate and effective enough to consider it as a mitigating factor. Further, the FCO will continue to have discretionary power in applying and balancing relevant criteria in each individual case which may still lead to significant differences in the level of fines set by the FCO and German appeal courts. According to Andreas Mundt, though, the level of fines should not change significantly.

[23] For further information, please see our article on the matter in this newsletter ("The FCO's Enforcement Actions In 2021 In Relation To Resale Price Maintenance"). See also the FCO's Press Release of December 2, 2021, available in English here; and the FCO's Case Summary of December 17, 2021, available in English here.

# News

## FCO

### The FCO's Enforcement Actions In 2021 In Relation To Resale Price Maintenance

In 2021, the FCO concluded three major proceedings on resale price maintenance and vertical price fixing. It fined five musical instrument companies a total of €21 million for resale price maintenance and horizontal price-fixing, a backpack maker €2 million for setting minimum retail prices, and consumer electronics manufacturer €7 million for resale price maintenance. These cases illustrate that the FCO considers resale price maintenance a serious infringement for which it imposes significant fines.

#### *Musical Instruments*

In six decisions between the second half of 2020 and the first half of 2021, the FCO imposed fines totaling approx. €21 million against manufacturers and retailers of musical instruments, namely manufacturers Yamaha Music Europa GmbH, Roland Germany GmbH and Fender Musical Instruments GmbH, and retailers Thomann GmbH and MUSIC STORE professional GmbH as well as responsible staff members.[24] The FCO found that the manufacturers, together with at least these two retailers, had agreed not to undercut fixed minimum resale prices for several years.[25] Two manufacturers also used price tracking software to monitor compliance with the minimum prices. Even though there was no or only sporadic enforcement and monitoring of compliance with the fixed prices concerning some products, on some occasions, the manufacturers had threatened or even imposed penalties, such as the suspension of supply. Further, the two retailers had also complained to and requested from the manufacturers that other retailers should also comply with the minimum prices. In addition, the FCO found that the two retailers had entered into horizontal price-fixing agreements in 13 cases between December 2014 and April 2018.

#### *School Backpacks*

In the second case, the FCO imposed a fine totaling approx. €2 million on German backpack maker Fond Of GmbH ("**Fond Of**").[26] The FCO found that between March 2010 and January 2019, Fond Of had agreed with some retailers that its school backpacks should generally be sold at the recommended retail price, monitored these restrictions on a regular basis and intervened in case the retailer deviated from the recommended retail price. In addition, the FCO found that at least until 2016, Fond Of restricted online sales and permitted only few selected retailers to sell its products online.

#### *Consumer Electronics*

In the third case, the FCO fined high-end consumer electronics manufacturer Bose GmbH ("**Bose**") approx. €7 million for resale price maintenance between April 2015 and March 2018.[27] Bose had agreed with authorized dealers to fix and even to raise retail prices for certain products in an attempt to keep prices at the level of the recommended retail price. The FCO found that Bose monitored retail prices and successfully intervened in several cases where dealers deviated from the recommended retail price.

In all three cases, the undertakings had cooperated and reached a settlement with the FCO.

[24] Cases B11-33/19 and B11-31/19. The FCO's Press Release dated August 5, 2021 is available in English here. A case summary is only available in German here.

[25] For Yamaha and Thomann and Music Store between August 2005 and March 2017, for Roland and Thomann between January 2006 and March 2018 and Roland and Music Store between October 2009 and March 2018, and for Fender and Thomann and Music Store between January 2011 and March 2018.

[26] Case B10-26/20. The FCO's Press Release dated August 17, 2021 is available in English here. A case summary is only available in German here.

[27] Case B10-23/20. The FCO's Press Release dated December 2, 2021 is available in English here. A case summary is only available in German here.

## Developments In 2021 In Relation To Horizontal Agreements

In 2021, the FCO concluded a long-lasting proceeding into price fixing and information exchange in the stainless steel sector after it had already in early 2021 fined steel forgers €35 million for information[28], while it unsuccessfully defended its decision relating to an alleged "Kölsch" beer cartel before the Düsseldorf Court of Appeal ("**DCA**"). The FCO will find itself before the courts again soon as it has appealed the DCA's "Kölsch" beer cartel judgment and two undertakings have appealed the FCO's stainless steel cartel decision.

### *The Stainless Steel Cartel*

In July 2021, the FCO concluded its long-lasting investigation into the stainless steel cartel and imposed fines against the last members of the cartel.[29] After it had already imposed fines of around €205 million in July 2018,[30] the fines against members of the stainless steel cartel now total €355 million.

The investigation was initiated ffollowing a leniency application by Voestalpine AG, which led to industry-wide dawn raids in November 2015. The cartel members fixed price surcharges and exchanged sensitive information in relation to long stainless steel which forms the basis for high-quality steel products used for high-quality constructions, tools, industrial applications, and in the automotive sector. In Germany, long stainless steel products are usually sold subject to a pricing model that essentially consisted of a base price and scrap and alloy surcharges. These surcharges could account for a considerable part of the final price. The cartel members coordinated the calculation method for the scrap and alloy surcharges. The coordination occurred through two industry associations which collected, processed and supplied necessary data to coordinate surcharge prices.

While the fines against eight stainless steel undertakings, two industry associations and 17 individuals are final, two undertakings have appealed the FCO's decision to the DCA.

### *The "Kölsch" Beer Cartel Saga*

On September 8, 2021, the DCA annulled the FCO's cartel fines of €8 million imposed on three Cologne-based "Kölsch" breweries and two managers, ruling that the FCO relied on insufficient evidence.[31]

In 2014, the FCO imposed a fine totaling €338 million on several breweries, the North Rhine-Westphalian brewers association ("**NRWBA**") as well as their respective managers for price fixing at meetings of the NRWBA and trade fairs in 2006 and 2007.[32]

Before the DCA, the main question was whether the FCO had sufficiently proven that the three companies had fixed prices during an NRWBA meeting in September 2007. Only two of 14 witnesses were able to even recall such an agreement. However, the DCA found their memories too vague and not sufficiently founded to support the FCO's finding of a price-fixing agreement. In addition, the DCA could not confirm that one of the alleged participants was actually present at the committee meeting. The DCA therefore annulled in their entirety the fines against these three companies and the two managers.

The DCA's judgment is a novelty in that the breweries were acquitted entirely. However, the saga is not yet over: the FCO has appealed the judgment to the Federal Court of Justice, which will have its final say on the required standard of proof.

[28] Case B12-22/17. The FCO's Press Release is available in German here and in English here. A case summary is only available in German here.

[29] Cases B12-22/15 and B12-21/17. A case summary is only available in German here.

[30] The FCO's Press Release is available in German here and in English here.

[31] Case V-4 Kart 4/16 OWi. The DCA's Press Release of September 8, 2021 is only available in German here.

[32] Case B10-105/11. The FCO's Case Summary is only available in German here.

## No "One-Stop-Shop": FCO Reviews Digital Merger In Parallel To The Commission

On December 9, 2021, following *ex officio* proceedings,[33] the FCO concluded that the acquisition of customer relationship management software provider Kustomer, Inc., ("**Kustomer**") by Facebook Inc., re-named Meta Platforms Inc. ("**Meta**") since October 2021, is notifiable under the German merger control regime as it falls under the €400 million transaction value threshold of the ARC[34] and asked Meta to submit documents to review the transaction.[35] On January 11, 2022, the parties notified the transaction to the FCO.

At the time the FCO initiated proceedings to assess the notifiability of the intended transaction, the EC was already reviewing the transaction upon referral by the Austrian national competition authority pursuant to Art. 22 of the European Merger Control Regulation ("**EUMR**"). While nine European competition authorities joined the Austrian competition authority's referral,[36] the FCO declined to do so. The FCO argued that it would not correspond to its "general practice" to refer a case to the EC only if it is subject to German merger control. Since it was not clear whether this was the case, the FCO decided to examine its jurisdiction to review the case instead of referring it to the EC.

The FCO's "general practice" is in blatant conflict with the EC's new Guidance on the application of Art. 22 EUMR, which expressly states that Art. 22 EUMR is applicable also to concentrations which do not meet the respective jurisdictional criteria of the referring Member States.[37] By encouraging national competition authorities to refer also "below threshold" transactions (that neither meet national nor EU merger control thresholds), the EC hopes to capture and review so-called "killer acquisitions" which are typical for dynamic, innovation driven sectors like the digital or pharma industries.

However, the FCO may be in good company, should the General Court of the European Union, which is currently reviewing the EC's interpretation of Art. 22 EUMR in the *Illumina/ Grail* case,[38] conclude that the EC is not competent to review a merger that was referred under Article 22 EUMR, if the national notification thresholds of the referring country were not met.

Anyhow, even when the FCO concluded that the transaction is in fact subject to German merger control, it decided to review the case in parallel to the EC and—once again—went its own way. In the meantime, after an in-depth investigation, the EC has conditionally cleared the transaction subject to Meta's commitment to give Kustomer's rivals non-discriminatory access to its messaging channels (*e.g.*, Instagram, WhatsApp) for ten years.[39] On February 11, 2022, the FCO unconditionally cleared the transaction taking into account also the EC's decision.[40]

The FCO's parallel review once more shows that the FCO is prepared to use every single weapon it has in its arsenal to review the digital companies. In this vein, the FCO's president, Andreas Mundt, emphasized that "[e]*ffective merger control is the most powerful instrument we have to prevent too much market power from falling into the hands of only a few companies*".[41]

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[33] For the initiating of the *ex officio* proceedings, see the FCO's Press Release of July 23, 2021, available in English here.

[34] The transaction value threshold aims to capture acquisitions of start-up companies or other companies with no or little turnover achieved in Germany but substantial local operations and a certain competitive potential reflected in the deal value; often referred to as "killer-acquisitions".

[35] Case B6-37/21; see the FCO's Press Release of December 9, 2021, available in English here. The FCO's decision is available in German here.

[36] Namely those of Belgium, Bulgaria, France, Iceland, Italy, Ireland, the Netherlands, Portugal, and Romania.

[37] See the EC's communication of March 26, 2021, para. 6, available in English here. For further information, please see Cleary's Alert Memorandum published April 23, 2021 in English here.

[38] Illumina Inc.'s acquisition of Grail Inc. (Case COMP/M.10188) was the first case referred to the EC under its new Guidelines by the French competition authority. See also our article on our Cleary Antitrust Watch blog here.

[39] Case M.10262, EC decision of January 27, 2022. A press release is available here.

[40] See the FCO's Press Release of February 11, 2022, only available in German here.

[41] See the FCO's Press Release of July 23, 2021, available in English here.

## FCO Interim Report On Messenger And Video Services

On November 4, 2021, the FCO published an interim report on its sector inquiry into messenger and video services,[42] exploring the necessity of interoperability rules for messaging services. The interim report does not contain recommendations but reserved them for the final report expected to be released in 2022.

The FCO considers that the economic analysis of possible interoperability rules is very complex due to the large number of operators employing different business models (advertisement-based, freemium, paid subscriptions, open-source). While interoperability may reduce lock-in effects, it would require standardization which may reduce innovation and competition through product differentiation. Further, it is "*at best questionable*" whether interoperability would entice users to switch to more privacy-friendly services, in particular because approx. 65% of users already use more than one service.

The FCO's findings were supported by the results of a survey among messenger and video services providers. The majority of the 44 respondents expected an interoperability obligation to decrease innovation, data security, and data protection as well as user experience. All respondents expected that an interoperability obligation would not increase their revenues, but either not affect or decrease them.

The sector inquiry shows the FCO's continued interest in the digital sector. It is the fifth sector inquiry concerning consumer protection in digital markets following inquiries into price comparison websites[43], user reviews[44], smart TVs[45] and mobile apps[46].

## Monopolies Commission Proposed Amendments To The Draft Digital Markets Act

On October 5, 2021, the Monopolies Commission published its Special Report on the draft Digital Markets Act ("**DMA**")[47] welcoming many rules of the draft DMA but also proposing amendments.

The Monopolies Commission advocates for a limited application of the DMA to digital ecosystems, *i.e.*, companies that either have a "dual role" on one platform because they both operate the platform and offer goods or services on the platform, or that operate of several interrelated and complementary platform services.

The DMA should introduce a narrowly construed efficiency defense to avoid prohibitions of efficient conduct. Companies relying on an efficiency defense should remain bound by the DMA until they requested an individual exemption by the EC demonstrating the efficiency of the underlying conduct and the EC granted the exemption.

In addition, the Monopolies Commission suggests a number of smaller amendments:

— The DMA's objectives to ensure competition to gatekeepers' offers (*i.e.*, contestability of their market positions) and to prevent exploitative abuses (*i.e.*, fairness for the gatekeeper's customers) should be set out more clearly in the preamble.

— Web browsers, e-commerce market places, and voice assistant services should be listed as services potentially falling under the DMA.

— The dialogue procedure (which allows the EC to order specific remedies) should apply to any conduct instead of being limited to certain behaviors currently set out in Art. 6 DMA.

[42] See the FCO's Press Release of November 4, 2021, available here. The full interim report is only available in German here.

[43] For further information, please see our article on our Cleary Antitrust Watch blog here.

[44] For further information, please see our article on our Cleary Antitrust Watch blog here.

[45] For further information, please see our article on our Cleary Antitrust Watch blog here.

[46] For further information, please see our article in this newsletter below ("The FCO's Interim Report On Mobile Apps").

[47] The Monopolies Commission's Press Release of October 5, 2021, available in English here. The full report "Recommendations for an effective and efficient Digital Markets Act" of October 5, 2021 is available in English here. See also the EC's current proposal for the DMA of December 15, 2021, available in English here. For more details on the DMA, see also our article on our Cleary Antitrust Watch blog here; and here; and here.

— The DMA should more comprehensively prohibit any self-preferencing including presetting of gatekeeper apps and services as default.

— Third-party providers should be able to port data on behalf of end users rather than users being required to involve themselves into the process.

While the FCO and other competition authorities had requested that enforcement powers under the DMA be delegated to national competition authorities, the Monopolies Commission does not comment on the enforcement competencies.[48]

## The Focus On Competition In Car Charging Infrastructure

On September 1, 2022, the Monopolies Commission published its 8th Energy Sector Report focusing *inter alia* on competition for electric vehicle charging points.[49] Just one month later, the FCO published its interim report on its sector inquiry into the charging infrastructure for electric vehicles.[50]

The reports identify a three-tiered value chain of the charging infrastructure market. First, local municipalities (and to a lesser extent private land owners) provide suitable areas for the construction of charging points. Second, charging point operators ("**CPO**") construct and operate the charging points. Third, drivers of electric vehicles have two options to charge their car. Either they buy electricity directly (*ad hoc)* from the CPO. In the alternative, they acquire a charging card from an Emobility Service Provider ("**EMP**") that allows them to charge their cars at the CPO charging points. EMPs resell the CPOs services, offer apps to help drivers find partner CPOs and provide payment services.

Both the FCO and the Monopolies Commission observe that the municipalities' practice to award charging point areas have created dominant CPOs in a number of regions, which are often the local municipal utility providers. They therefore recommend mandatory public tenders. Subsidies for the construction of charging points should be awarded in a non-discriminatory manner.

The FCO examined but did not find excessive prices for the charging of electric vehicles. Differences in pricing may be due to varying degrees of utilization of the charging points, differences in charging speed, and due to the market still being nascent. The FCO does not recommend regulation of prices, but rather encourages measures to promote competition among CPOs.

The Monopolies Commission suggests a creation of a public price register, akin to the register maintained by the FCO's Market Transparency Unit for Fuels to enhance price transparency for customers. The FCO does not support creating such a register in this nascent market.

## The FCO's Interim Report On Mobile Apps

On July 29, 2021, the FCO published the results of its sector inquiry into mobile apps,[51] finding severe deficiencies regarding the information provided to app users and apps' compliance with data protection law. The FCO recommends app publishers and app store operators should increase transparency and requests increased private enforcement and more enforcement by data protection authorities.

Based *inter alia* on a user survey, the FCO found a need to clarify the contractual relationship between users, app publishers and app stores. For example, the terms and conditions of popular app stores currently do not sufficiently clarify whether users buy apps from the app publishers or from app store operators. App stores also lack app publishers' contact details.

[48] See the FCO's Press Release of June 23, 2021 on the joint paper of the European Competition Network, available in English here; and its joint paper, available in English here.

[49] The Monopoly Commission's Press Release of September 1, 2022, available in English here; the full report is only available in German here.

[50] The FCO's Press Release of October 12, 2021, available in English here; the full interim report is only available in German here. We also published an article on the commencement of the investigation, available on our Cleary Antitrust Watch blog here.

[51] The FCO's Press Release of July 29, 2021, available here. The full report is only available in German here.

The FCO inspected the privacy practices of 32 popular Android apps and found that most apps lack sufficient information on third-party recipients of user data, non-EU countries in which the data is stored, and the storage duration. Nine apps failed to provide privacy policies in German. The FCO therefore recommends a rework of the privacy policies and suggests that providers of operating systems introduce a central privacy center allowing users to limit the apps' access to data and certain system functionalities such as internet access.

The FCO urges app store operators to provide additional information on apps, in particular more detail on in-app purchases and so called "lootboxes". The latter are virtual treasure chests containing random items that can be used in online games. The purchaser of a lootbox does not know its content at the time of the purchase resulting in a gambling-like nature. The FCO also suggests introducing a display of short app assessments by third-party experts covering categories such as child protection, advertisement, in-app purchases and data protection.

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