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# German Competition Law Newsletter

## Highlight

— Brand-Gating: FCO Investigates Cooperation Between Amazon And Apple

## Brand-Gating: FCO Investigates Cooperation Between Amazon And Apple

In October 2020, the Federal Cartel Office (“FCO”) initiated an investigation against Amazon’s and Apple’s agreement to exclude non-authorized dealers from selling Apple products on the Amazon Marketplace.<sup>1</sup> While the FCO has not published a press release about the proceedings yet, the investigation is expected to focus on whether combatting product piracy justifies this practice.

Amazon is the largest online retailer and the largest online marketplace in Germany. To combat product piracy, Amazon offers manufacturers and brand owners the option to exclude unauthorized third-party dealers from the German Amazon Marketplace, so-called brand-gating. The FCO takes issue, that—in certain cases—Amazon provides brand-gating services only if Amazon itself is approved as an authorized dealer in return. At least for some brands, all dealers except Amazon and the respective brand manufacturer are excluded from Amazon Marketplace.

With respect to Apple, Amazon excluded all non-authorized dealers since 2019 and Amazon itself has become an authorized Apple dealer. The FCO investigates whether Amazon and Apple’s cooperation excludes third-party sellers and whether the behavior is justified.

The FCO could review the brand-gating agreements either as potentially anticompetitive agreements or as a potential abuse of dominance.

In the past, the FCO investigated Amazon’s terms and conditions vis-à-vis Marketplace sellers as an abuse of a dominant position. However, the FCO did not arrive at a final conclusion concerning market definition or Amazon’s alleged dominance, as it terminated its proceedings after Amazon had committed to make changes to its business terms.<sup>2</sup>

Similarly, the Regional Court of Frankfurt found in an interim decision that Amazon’s exclusion of an unauthorized merchant who sold original,

<sup>1</sup> Frankfurter Allgemeine Zeitung, *Wettbewerbsverfahren gegen Amazon und Apple*, October 29, 2020 (citing from an interview with the FCO’s president Andreas Mundt), only available in German [here](#).

<sup>2</sup> The investigation was closed after Amazon changed its terms and conditions, for more information see our German Competition Law Newsletter of July – August 2019, p. 3, available [here](#).

albeit used, Apple products was abusive.<sup>3</sup> In the court's view, Amazon was sufficiently likely to be found dominant with respect to online marketplace services in Germany and the ban of non-authorized resellers to be abusive, as it directly reduced competition and Amazon had failed to justify its behavior. The court did not accept the fight against piracy or an agreement between Apple and Amazon to justify a ban of all unauthorized resellers. The court did not analyze the cooperation between Amazon and Apple. Instead, it considered

the legality of Apple's distribution model to be irrelevant for a finding of Amazon's abuse.

The opening of the investigation ties in with the FCO's wider concerns with Amazon's gatekeeper position as operator of the Marketplace. In April 2020, the FCO had received complaints alleging that Amazon stocked its warehouses with high-demand everyday goods to the detriment of other suppliers,<sup>4</sup> and in August 2020, the FCO launched an investigation regarding Amazon's alleged interference on the price setting of third-party dealers in the Marketplace.<sup>5</sup>

## News

### FCO

#### ***FCO Finds No Market Dominance In The Electricity Generation Sector In Second Market Power Report***

On December 28, 2020, the FCO published its second report on market power for the electricity generation sector ("Market Power Report")<sup>6</sup> one year earlier than statutorily required, because the FCO considered the imminent phase-out of nuclear and coal energy could affect the position of the market leader RWE.

The FCO's analysis of the competitive landscape from October 1, 2019 to September 30, 2020 confirmed the market definitions as set out in its first Market Power Report.<sup>7</sup> As per its first Market Power Report, the FCO relied on the Residual Supply Index ("RSI"), which quantifies whether an electricity provider is indispensable to meet demand, and presumed that an electricity provider is dominant if it is indispensable to meet the demand for at least 5% of the hours of one year. As in the previous report, the FCO found

that RWE did not yet hold a dominant position in the generation and first time sale of electricity for general supply in Germany and Luxembourg. The FCO noted that the imminent phase-out of nuclear and coal energy will lead to a further decline in domestic generation capacity in the near future which may lead to shortages of supply capacities and may push RWE over the dominance threshold. The FCO considers publishing its next Market Power Report in 2021, also because it found that market conditions in the electricity markets (in particular, in the market for balancing power required to compensate for unforeseen fluctuations in the power grid) have changed very recently and a close monitoring and a full analysis of the new competitive conditions is required.

#### ***FCO Opens Additional Investigation of Facebook Practices***

On December 10, 2020, the FCO initiated an investigation against Facebook for requiring users of its Oculus virtual reality glasses to also have a Facebook account.<sup>8</sup>

<sup>3</sup> Regional Court of Frankfurt (3-06 O 94/18) judgment of February 12, 2019, only available in German [here](#).

<sup>4</sup> See Manager Magazin, *Bundeskartellamt besorgt über die Zunahme der Marktmacht*, April 20, 2020, only available in German [here](#).

<sup>5</sup> See Handelsblatt, *Kartellamt untersucht Amazon-Praktiken in Corona-Pandemie*, August 16, 2020, only available in German [here](#).

<sup>6</sup> The Market Power Report is only available in German [here](#); the accompanying FCO Press Release, December 28, 2020 is only available in German [here](#).

<sup>7</sup> FCO's first market power report for the electricity generation sector of December 2019, available only in German [here](#). See also German Competition Law Newsletter November 2019 – January 2020, p. 12 *et seq.*, available [here](#).

<sup>8</sup> See the FCO's Press Release of December 10, 2020, available in English [here](#).

According to press reports,<sup>9</sup> Oculus has stopped the rollout of its newest Oculus device, “Quest 2”, as well as the sale of all older models in Germany already in September 2020, noting discussions with German authorities as the reason.

The FCO’s investigates whether linking virtual reality products and Facebook’s social network constitutes an abuse of dominance. Facebook has a dominant position in social media platforms, but also a significant position in virtual reality glasses. It remains to be seen whether the FCO pursues a traditional theory of harm based on the economic effect of tying or rather tries to adopt a theory of harm based on privacy concerns.

The FCO already addressed the use of data acquired by Oculus in its 2019 decision against Facebook, which prohibited Facebook to combine data collected on its social network with data collected through other business areas (e.g., through WhatsApp Inc., Instagram LLC and Oculus products). The FCO based its decision on the novel argument that Facebook’s data collection and processing practices were an exploitative abuse of users because Facebook’s terms and conditions violated data protection law.<sup>10</sup>

The FCO’s 2019 decision is still subject to ongoing court proceedings and Facebook has not complied with it yet. In interim proceedings, the Düsseldorf Court of Appeals (“DCA”) suspended the FCO’s decision in August 2019;<sup>11</sup> the Federal Court of Justice (“FCJ”) reinstated the decision in June 2020 on the FCO’s appeal.<sup>12</sup> Upon a second motion for an interim order by Facebook, the DCA again ordered the suspension of the FCO’s decision on November 20, 2020.<sup>13</sup> It argued that despite the FCJ’s decision (which is not binding

in interim proceedings), the legality of the FCO decision was not obvious, and found that the decision’s execution could result in undue and irreparable hardship for Facebook. The FCO appealed the DCA’s decision<sup>14</sup>, but Facebook retracted its motion for the interim order in late December 2020, before the FCJ was able to decide.

The first hearing in the main proceedings before the DCA is scheduled for March 2021. It will be very interesting to see where the ongoing conflict between the FCJ and the DCA is heading.

### ***FCO Conditionally Clears Furniture Merger***

On November 25, 2020, after an in-depth investigation, the FCO approved the acquisition by Mann Mobilia Beteiligungs GmbH (part of the XXXLutz Group) of 50% of the shares in Möbel Management Holding GmbH & Co. KG and Roller GmbH & Co. KG (part of the Tessner Group), subject to the divestiture of 23 furniture outlets.<sup>15</sup> The FCO’s clearance only relates to the sales side of the transaction, i.e., the relationship between furniture retailers and consumers, whereas on November 30, 2020, the European Commission unconditionally cleared the transaction with respect to the procurement side, i.e., the relationship between furniture retailers and manufacturers.<sup>16</sup>

### BACKGROUND

The XXXLutz Group operates 200 furniture outlets in Germany and is the country’s second-largest furniture retailer in terms of turnover (following IKEA). The Tessner Group is the fourth-largest furniture retailer in Germany and operates 178 outlets, 155 of which would be subject

<sup>9</sup> See Welt, *Facebook stoppt Verkauf von Oculus-VR-Brillen in Deutschland*, September 3, 2020, only available in German [here](#).

<sup>10</sup> *Facebook* (B6-22/16), FCO decision of February 6, 2019, available in English [here](#); the FCO’s Case Summary is available in English [here](#), see also our article in the German Competition Law Newsletter January – February 2019, p. 1 *et seq.*, available [here](#).

<sup>11</sup> *Facebook* (V1-Kart 1/19 (V)), DCA decision of August 26, 2019, only available in German [here](#). See also our article in the German Competition Law Newsletter July – August 2019, p. 1 *et seq.*, available [here](#).

<sup>12</sup> See *Facebook* (KVR 69/19), FCJ decision of June 23, 2020, available only in German [here](#). See also Cleary Gottlieb Alert Memorandum of June 29, 2020, available [here](#).

<sup>13</sup> *Facebook II* (Kart 13/20 (V)), DCA decision of November 30, 2020, available only in German [here](#).

<sup>14</sup> See *Facebook II* (KVZ 90/20), FCJ decision of December 15, 2020, available only in German [here](#).

<sup>15</sup> *XXXLutz* (B1-195/19), FCO decision of November 25, 2020, Case Summary available in German [here](#) and in English [here](#).

<sup>16</sup> *Mann Mobilia/Tessner Holding* (Case COMP/M.9609), not published yet; see European Commission Press Release (MEX/20/2277) of December 1, 2020, available in English [here](#).

to the transaction. Both companies are Germany's leading suppliers in the discount sector and will become Germany's largest furniture retailer post-transaction.

The Parties had requested a referral of the case from the European Commission to the FCO, but only received a partial referral, which led to aspects of the merger being separately reviewed by the two authorities simultaneously.<sup>17</sup> The FCO examined the consumer sales side of the transaction, due to its effects in Germany, while the European Commission analyzed the procurement side, which it found to have a European dimension.

#### FCO DECISION

The FCO conducted an in-depth analysis of the local retail markets of the affected Tessner Group outlets, examining all brick-and-mortar furniture retail outlets and the online sector. The FCO found three different market segments in the overall furniture retail market: discount, traditional, and specialty stores. The geographic markets analyzed were defined as a catchment area of 30 km around the affected Tessner Group outlets. Given the nature of the affected outlets, the FCO analysis focused on the discount segment, except in the minority of cases in which traditional furniture stores were implicated.

The FCO concluded that the transaction would significantly impede effective competition in 25 local markets throughout Germany. In more than half of these 25 markets, the merged entity would have had a combined share in the discounter segment of over 80%, while in almost every market there would have been an increase in the market share of over 10%. The FCO approved the merger subject to the divestiture of 23 outlets in the market areas.<sup>18</sup>

#### EUROPEAN COMMISSION DECISION

The European Commission unconditionally approved the procurement side of the transaction, finding that competition in the low-cost or ready-to-assemble furniture procurements would not be harmed. The European Commission noted that the companies' combined market share would remain moderate, with only a limited increase in market share, and that suppliers would have alternative customers.<sup>19</sup>

#### Courts

##### ***The Bonn Regional Court Dismisses BayWa's Damages Action For State Liability Against The FCO In The Context Of The Leniency Program***

On December 2, 2020, the Regional Court of Bonn dismissed BayWa AG's ("BayWa") action for state liability against the Republic of Germany and the FCO for a breach of the constitutional prohibition of discrimination in the context of the FCO's leniency program.<sup>20</sup>

BayWa claimed damages of around € 73 million—consisting of the fine the FCO imposed against BayWa for participating in the plant protection products cartel<sup>21</sup> as well as its counsels' fees. The action was based on the FCO's unfair treatment of BayWa and other wholesalers of plant protection products during its antitrust proceeding from 2014 to 2020. In 2014, the FCO received an anonymous complaint, claiming that BayWa and all its competitors in the wholesale of plant protection products had agreed on a method to calculate list prices. Upon receipt of that complaint, an official of the FCO called three of BayWa's main competitors, informing them about the anonymous complaint and advised them to apply for immunity under the FCO's leniency program. As a result, two competitors immediately applied for immunity, with the first one receiving full immunity.

<sup>17</sup> *Mann Mobilia/Tessner Holding* (Case COMP/M.9609), Commission Article 4/4 decision of January 23, 2020, available in German [here](#).

<sup>18</sup> As some market areas overlapped, the divestiture of 23 outlets would eliminate competition concerns in all relevant 25 market areas.

<sup>19</sup> *Mann Mobilia/Tessner Holding* (Case COMP/M.9609), not published yet; see European Commission Press Release (MEX/20/2277) of December 1, 2020, available in English [here](#).

<sup>20</sup> Regional Court of Bonn (1 O 201-20) decision dated December 2, 2020, only available in German [here](#).

<sup>21</sup> FCO Case Summary (B10-22/15) dated October 21, 2020, only available in German [here](#); FCO Press Release dated January 13, 2020 is available in English [here](#).

BayWa argued that the selective tip to three out of the 12 potential cartelists infringed the constitutional principle of equal treatment as well as the leniency program itself. According to BayWa, it is not for the FCO to decide, by way of selective tips, which company wins the race for immunity under the leniency program. If BayWa had also received the same tip, it would have won the immunity race and avoided the claimed damages (fine and counsels' fees).

The Regional Court of Bonn dismissed BayWa's action, mainly arguing that:

- The selection of the three competitors was not arbitrary and within the FCO's general discretionary and investigatory powers. The FCO's leniency program does not impose a duty on the FCO to conduct its investigation in a certain manner. Specifically, the court dismissed a violation of the equality principle. First, the court emphasized that there is no right of equal treatment between wrongdoers. Second, the court noted that BayWa was the only firm explicitly mentioned in the anonymous complaint, which justified the FCO to not to contact BayWa.
- The principle of fair trial as laid down in Article 6 ECHR is not applicable, as it only ensures equality of arms vis-à-vis the opponents in proceedings, not between the defendants themselves.
- BayWa could not establish causality between the FCO's tips to competitors and the imposed fines—in particular, the cartel could have been uncovered without the allegedly illegal selective tip at a later point in time.
- BayWa could have appealed the FCO's fining decision to the DCA and raised its constitutional claims in that context. As a result, there is no basis for raising those claims later in a state liability action.

On December 12, 2020, BayWa appealed the Regional Court of Bonn's judgment. The Court of Appeal will thus be called to decide the questions concerning the interplay between the FCO's investigatory powers and its duties under the leniency program.

### ***A Sports Association Abused Its Monopoly By Discriminating Against Affiliated Athletes***

On October 7, 2020, the Frankfurt am Main Court of Appeals found the top-tier sports association for beach volleyball (*Deutscher Volleyball-Verband*, "DVV") liable for abusing its dominant position by discriminating the plaintiffs, two female professional volleyball players.<sup>22</sup> The plaintiffs were awarded USD 17,000 in damages reflecting the prize money the plaintiffs missed out on during that period of time.

The court found that only DVV could nominate players for international tournaments and thus held a monopoly. DVV therefore had an obligation to consider and nominate any team fulfilling the performance criteria. DVV did not meet this standard, but refused to nominate the claimants to participate in any international competition since April 2019. Instead, DVV determined a number of national teams to whom it guaranteed spots in international tournaments irrespective of their performance in an effort to alleviate their pressure to perform, and even though the plaintiffs ranked higher in the worlds ranking than some of the sponsored national teams. The court found that the intent to alleviate pressure from certain teams did not constitute an objective justification for the selection. DVV has announced to appeal the decision.

### ***FCJ Strikes Down Passing-On Defense When Damages Are Spread Across Many Consumers***

On September 23, 2020, the FCJ overturned a judgement by the DCA in which the Essen Transportation Authority brought a follow-on damages action against members of the so-called Rail Cartel ("*Schienenkartell*").<sup>23</sup> It referred

<sup>22</sup> Frankfurt am Main Court of Appeals (2-06 O 457/19) judgment of October 7, 2020. See also the press release only available in German [here](#).

<sup>23</sup> *Schienenkartell V* (KZR 4/19), FCJ judgment of September 23, 2020, only available in German [here](#).

the case back to the DCA and provided further guidance to the DCA in relation to the applicable burden of proof as well as the scope of the passing-on defense.

The FCJ emphasized once again its decisional practice that claimants cannot rely on *prima facie* evidence for the causal damage. Instead, a factual presumption can apply in cases where the judge, on the basis of an overall assessment of all circumstances, finds a high probability of the occurrence of the main fact (*i.e.*, the occurrence of a causal damage). The burden of proof for circumstantial facts is on the party that also has to prove the main fact. On the other hand, it is for the opposing party to present and prove circumstantial facts that are suitable to influence the judge's weighing of probabilities of the occurrence of the causal damage. If the judge does not find a high probability of the occurrence of the main facts, the plaintiff cannot rely on a factual presumption. The FCJ emphasized that it is not necessary for the defendant to prove the contrary, *i.e.*, to prove that no damage has occurred.

In turn, the burden of proof for the passing-on of damages generally lies with the defendant relying on the passing-on defense. However, the burden of proof should not render it impossible for the defendants to demonstrate the passing-on of the overcharge. According to the FCJ, the standard of proof must therefore be reduced to a weighing of probabilities—*i.e.*, the same standard that applies to the plaintiff for proving the occurrence of a damage—and the burden of proof shifts to the plaintiff where there is a high probability that from an economic perspective passing-on of the overcharge occurred.

The FCJ further explains that the aim of private enforcement is not only to compensate victims of the cartel but private enforcement also plays an integral part of an effective enforcement regime. The FCJ therefore held that where there is no risk that indirect purchasers will claim damages—which will regularly be the case in cases concerning consumer products/services—the defendant cannot rely on the passing-on defense to prevent any undue enrichment of the cartelists.

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