March–April 2019

German Competition Law Newsletter

Highlights

— FCO Concludes Sector Inquiry Into Comparison Websites

— Recent Jurisprudence On Prima Facie Evidence Vs. Factual Presumption In Cartel Follow-On Damages Actions

FCO Concludes Sector Inquiry Into Comparison Websites

On April 11, 2019, the Federal Cartel Office ("FCO") published its final report on its sector inquiry into comparison websites.[1] This inquiry marked the first time that the FCO had analyzed a sector on the basis of its consumer protection competencies that have only recently been created. It clearly emphasized the agency's ambition to expand its enforcement authority also into this area. Overall, the FCO came to the conclusion that several comparison portals infringed consumer rights in particular by providing misleading or incomplete information to consumers.

Background

The German legislator granted the FCO the competence to conduct sector inquiries into potential consumer protection issues in 2017 as part of the Ninth Amendment of the German Act against Restraints of Competition ("ARC"). The FCO may investigate conditions in a specific industry sector if there is reasonable suspicion of significant, permanent or repeated infringements of consumer protection law affecting a large number of consumers (*e.g.*, widespread infringements of the German Act Against Unfair Competition and the rules on general terms and conditions). The FCO's new powers, however, do not include investigations against individual companies or the imposition of fines or other penalties. Nonetheless, the sector inquiries' results may facilitate private enforcement by consumers, consumer associations or competitors.

The FCO's newly founded consumer protection division launched its inquiry into comparison websites in October 2017, *i.e.*, only four months after its new powers entered into force and closely followed by a second—still ongoing—sector inquiry regarding potential consumer protection issues, namely the use of consumer data by smart-TV producers, which commenced in December 2017.[2] On May 23, 2019, the FCO further launched another sector inquiry into the authenticity and validity of user reviews on online platforms.[3]

[1] FCO Report, Sektoruntersuchung Vergleichsportale, April 11, 2019, only available in German here. A short background paper is available in English here. The FCO's article "Consumer rights and comparison websites: Need for action", February 4, 2019, gives a preliminary summary, available in English here.

[2] FCO Press Release "Bundeskartellamt launches sector inquiry into smart TVs", December 13, 2017, available in English here.

[3] FCO Press Release "Bundeskartellamt launches sector inquiry into user reviews", May 23, 2019, available in English here.

Scope Of The Sector Inquiry

The sector inquiry was intended to explore criticisms regarding the objectivity and transparency of comparison portals. The inquiry was conducted in two steps. After the FCO had initially identified and sent voluntary questionnaires to over 150 price comparison websites in Germany, it then issued formal requests for information to the 36 biggest and most important portals.[4]

The sector inquiry targeted both price comparison websites, such as Booking.com and HRS, and meta-search engines[5], such as Momondo, in the areas of energy, telecommunications, loans, insurances, as well as hotel and flight booking.

Lack Of Transparency And Covert Advertising

The FCO identified a number of features common to many comparison websites as potential areas of concern with respect to consumer protection law:

— Consumers do not receive sufficient information about the comparison websites' actual market coverage. These often compare less than 50% of all offers on a given market, but suggest a broader coverage.

— There is a lack of transparency regarding the way provision payments are made by the listed businesses and how these influence their ranking.[6] Additionally, sponsored offers displayed above the ranked search results ("position 0") are not always labeled as advertisements, which may amount to illegal covert advertising in the FCO's view.

— The wording of disclaimers regarding the exclusivity and limited availability of offers (*e.g.*, "in high demand", "best offer today"), particularly on hotel booking websites is regularly misleading or even plainly false.

— The fact that a number of comparison websites share the same search databases and display identical search results is not always readily discernible. As users tend to use several websites for their searches, they may get the false impression that an offer is rated equally by seemingly independent providers.

While the FCO also investigated user review functions (*i.e.*, in particular for comments and rating), it did not identify any significant issues in this regard. Nevertheless, the FCO listed falsified or manipulated ratings as a potential issue and emphasized the importance of a neutral presentation of user reviews.

FCO Seeking New Enforcement Powers In The Area Of Consumer Protection

Based on its conclusion that infringements of consumer protection law are widespread among comparison websites, the FCO concluded that the current German consumer protection system is insufficient: The German consumer protection system today relies almost entirely on private enforcement.[7] It is not possible for private players to take action against conduct by digital platforms and behavior based on algorithms, as the relevant conduct is complex and cannot be proven without investigative powers and access to internal documents. Further regulation would be unsuited to the fast-paced nature and diversity of platforms.

Against this background, the FCO used its final report to campaign proactively for an expansion of its own competencies. In particular, the FCO seeks the power to conduct consumer protection related investigations against individual companies, to issue prohibition decisions, and to accept commitments. Because of its long-standing experience as the German antitrust enforcer and its expertise regarding the digital economy, the FCO considers itself to be the best candidate to assume public enforcement duties also in this respect.

[4] In principle, the FCO chose these portals based on the number of page visits and/or their revenue value.

[5] Meta-searchers only search price comparison websites, but do not maintain their own database and do not offer booking functions on their website.

[6] In particular, short references to the ranking criteria provided in the form of clickable links or mouse-overs were considered to be too vague and hidden.

[7] Germany does not have a genuine consumer protection authority responsible for the enforcement of consumer protection rules. Instead, enforcement lies mostly in the hands of consumers themselves and consumer associations that file civil law suits against perpetrating companies. Public authorities investigate consumer protection cases basically only if they involve criminal behavior.

Conclusion

The FCO obviously considered the sector inquiry as a first step on its way to becoming Germany's consumer protection agency. While there is a good chance that the FCO's continued advocacy in this regard may, however, eventually pay off, the German legislator's current plans for its upcoming amendment of German competition law do not as yet earmark new enforcement powers for the FCO. In the same vein, it is still uncertain whether the revision of the EU Consumer Protection Cooperation Regulation, which requires the Member States to provide enforcement powers regarding infractions of consumer law with a union dimension, will indeed result in the creation of a genuine consumer protection agency in Germany.

Recent Jurisprudence On *Prima Facie* Evidence Vs. Factual Presumption In Cartel Follow-On Damages Actions

On December 11, 2018, the German Federal Court of Justice ("FCJ") held that, at least in relation to quota fixing and customer allocation cartels, plaintiffs could no longer rely on *prima facie* evidence to establish that a cartel infringement led to causal damage.[8] The FCJ accepted, however, a factual presumption (*tatsächliche Vermutung*)—softer compared to *prima facie* evidence—that cartels would lead to an overcharge, and held that such a presumption was of "high indicative significance". Since then, lower courts have rendered a number of judgments and struggled with applying the new evidentiary standard in practice.

Background

In an administrative proceeding in 2005, the FCJ held that economic theories postulated that cartels are generally "profitable" from the cartelists' perspective. In the FCJ's view, there is accordingly a high probability that cartels lead to inflated prices for purchasers of cartelized products.[9] Following this ruling, German civil courts developed extensive case law on *prima facie* evidence that a plaintiff needs to put forward in cartel damages litigation. This line of case law routinely enabled plaintiffs, for a wide variety of hardcore cartels, to rely solely on *prima facie* evidence to show that a cartel affected their business transactions and that they suffered loss as a result. For *prima facie* evidence, it typically sufficed to submit an antitrust authority's infringement decision. In the case of non-hardcore cartels (*e.g.*, pure information exchange), on the other hand, courts rejected plaintiffs' reliance on such *prima facie* evidence.

The FCJ's Decision

No Prima Facie Evidence In Relation To Occurrence Of Damage And Causality

In its December 2018 decision, the FCJ rejected the assumption that cartels "typically" cause damage, "in view of the diversity and complexity of agreements restricting competition". The "typicality" required for the principle of *prima facie* evidence could only be established where the underlying elements occur so frequently that there is a very high probability that they are present in every individual case. In particular, according to the FCJ, it could not be established with the requisite very high probability that cartel agreements are always implemented successfully. This depended on numerous factors that may change over time, such as the number of market participants and the parties to the anti-competitive agreements, their ability to exchange the information necessary to implement these agreements, their "cartel discipline," and customers' ability to switch to other suppliers. As

[8] *Schienenkartell* (KZR 26/17), FCJ decision of December 11, 2018, only available in German here. See also our Client Alert of February 1, 2019, available in English here.

[9] *Berliner Transportbeton I* (KRB 2/05), FCJ decision of June 28, 2005, only available in German here.

anti-competitive agreements were ultimately motivated by the cartelists' self-interests, which might lead to widespread deviation from the agreements, it could not typically be assumed that prices would be inflated in all cases. The FCJ, nevertheless, left open the possibility of *prima facie* evidence being appropriate in specific cases where additional "qualified" circumstances typically causing damage are present (*e.g.*, a cartel agreement concerning long-standing and legacy customers and in relation to transactions involving such customers).

The FCJ also reversed the lower courts' case law that, in order to establish causality, it was sufficient to demonstrate a transaction fell within certain parameters in terms of the cartel's relevant products, period, and geographical scope—as typically described in infringement decisions of the antitrust authorities. According to the FCJ, it is not sufficiently certain that anti-competitive agreements are actually implemented in respect of each customer.[10]

Factual Presumption Can Be Applicable

In view of the *effet utile* principle established by the European Court of Justice ("CJEU"), the FCJ nevertheless seems ready to introduce alternative mechanisms to alleviate the evidentiary burden imposed on cartel victims. Even though "typicality" cannot be assumed, the FCJ allows for a softer factual presumption that cartels would lead to higher market prices; it also held that such presumption was of "high indicative significance" when courts come to consider evidence. The main difference between a factual presumption and *prima facie* evidence—as implied by the FCJ—is that the former requires a greater effort on the part of plaintiffs (in the form of circumstantial evidence) to clarify and present the facts on an individual basis, a more intensive factual analysis, and a specific and comprehensive evaluation of the individual case.

The Düsseldorf Court Of Appeals' Decision

In its decision of February 23, 2019,[11] the Düsseldorf Court of Appeals' ("DCA") deviated from the FCJ's position and allowed a plaintiff to rely on *prima facie* evidence to prove that a cartel had caused it to suffer loss and damage, noting, however, that the outcome of the case would not have been different, had it resorted to the FCJ's evidentiary standard.

In the DCA's view, the FCJ had failed to provide persuasive reasons for abandoning *prima facie* evidence in relation to hardcore cartels, thereby putting itself at odds with its own case law. Notably, in another decision of 2018, the FCJ had concluded that a quota fixing agreement (*i.e.*, a hardcore cartel) "generally" results in increased profits of the cartelists.[12] Moreover, according to the DCA, unless there is specific evidence suggesting, for instance, a lack of "cartel discipline", such aspects do not need to be assessed specifically, as they only concern exceptions to the general experience and regular course of events. Finally, the DCA also referred to the fact that the latest amendment to the ARC, implementing the EU Damages Directive[13], introduced a statutory legal presumption of damage (applicable to damage suffered after December 26, 2016).[14] Taking all these factors into account, the DCA saw no reason to require a "very high probability" for *prima facie* evidence or a factual presumption, as suggested by the FCJ.

The DCA also objected to the FCJ's position on *prima facie* evidence in relation to whether business transactions with a cartel participant had specifically been affected by the anti-competitive conduct. Unlike the FCJ, the DCA did not consider the "mere abstract possibility" of "practical difficulties" during the implementation of a cartel infringement sufficient to rebut the presumption

[10] Again, there might well be still cases where cartel victims could successfully invoke the principle of *prima facie* evidence in proving that their business transactions had been affected by the cartel agreements (see above).

[11] *Schienenkartell* (VI-U (Kart) 18/17), DCA decision of January 23, 2019; as of publication of the newsletter, the decision has not yet been published.

[12] *Grauzementkartell II* (KZR 56/16), FCJ decision of June 12, 2018, only available in German here.

[13] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

[14] Section 33a (2) ARC implements Article 17(2) of Directive 104/2014/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

that a cartel affected a customer's specific business transaction with a cartelist.

The Stuttgart Regional Court's And Stuttgart Court Of Appeals' Decisions

In a series of decisions concerning the Trucks Cartel, the Stuttgart Regional Court followed an approach similar to the DCA's. Although the court ultimately left open whether the FCJ's ruling also applies to price fixing cartels, it concluded that if the FCJ's stricter requirements for a factual presumption are satisfied, the requirements for *prima facie* evidence under the previous case law must also be satisfied.[15] Similarly, in its decision of April 4, 2019, the Stuttgart Court of Appeals confirmed that the specific circumstances of the Trucks Cartel meet both the FCJ's stricter requirements for a factual presumption and the typicality requirement for the application of *prima facie* evidence.[16]

Conclusion

The FCJ decision requires plaintiffs to submit to the court detailed accounts of how their business transactions with cartelists were affected by the cartel and that they suffered damage as a result. The latter, however, is only relevant for those cases (albeit still pending for several years) in which damage occurred prior to the end of 2016, as the legislator has since adopted a legal presumption of damage (see above). Despite this decision, plaintiffs will be able to rely on a factual presumption, which continues to ease their burden of proof to a certain degree.

As illustrated by the lower courts' recent decisions, the long-awaited FCJ decision has still not put an end to the discussions around fundamental evidential issues in follow-on cartel damages actions. It almost seems as if the FCJ's shift towards a factual presumption has rather led to a mere terminological change—the same factors which defendants used to put forward to rebut *prima facie* evidence may now need to be assessed in the context of applying the factual presumption. The burden of proof for those factors rebutting a factual presumption still lies with the defendant.

News

FCO

Gruner + Jahr's Abandons Renewal Of National Geographic License

On January 21, 2019, publishing company Gruner + Jahr ("G+J") withdrew its notification of the proposed re-acquisition of the license to publish the German edition of "National Geographic" following the FCO expressing competition concerns.[17]

G+J has held the (time-limited) publishing license since "National Geographic" first entered the German market in 1999. Besides "National Geographic", which is by turnover the second largest German-language science magazine covering, *inter alia*, nature, geography, history and ethnology, G+J publishes its closest competitor "Geo" as well as "P.M.", both ranking number 1 and 3, respectively.

Based on its in-depth investigation, the FCO found G+J to be dominant in the national market for popular science publications with a market share of more than 40%. In the FCO's view, neither any other vendor's magazines nor any online or TV publications are able to exert sufficient competitive pressure on G+J. This is evidenced

[15] *LKW Kartell* (45 O 5/17), Stuttgart Regional Court decision of February 11, 2019; (45 O 13/17), Stuttgart Regional Court decision of February 18, 2019; (30 O 47/17) Stuttgart Regional Court decision of February 28, 2019; (30 O 310/17), Stuttgart Regional Court decisions of February 28, 2019; (30 O 311/17), Stuttgart Regional Court decisions of February 28, 2019; (30 O 11/18), Stuttgart Regional Court decision of February 28, 2019; (30 O 7/18), Stuttgart Regional Court decisions of February 28, 2019; and (30 O 39/17), Stuttgart Regional Court decision of February 28, 2019.

[16] *LKW Kartell* (2 U 101/18), Stuttgart Court of Appeals decision of April 4, 2019. At time of publication, only the press release was available (in German here).

[17] FCO Press Release, "G+J withdraws notification of purchase of "National Geographic" licence after Bundeskartellamt expresses concerns", April 1, 2019, available in English here. FCO Case Summary (B7-176/18), "Bundeskartellamt prüft Auswirkungen eines Zusammenschlusses auf dem Lesermarkt für populäre Wissenszeitschriften in Deutschland", April 1, 2019, is only available in German here.

by the fact that—irrespective of a massive decline in demand for popular science magazines—G+J has been able to continuously increase prices for its publications over the last ten years. While the re-acquisition of licensing rights—the current license held by G+J expires at the end of 2019—would not have further strengthened, but only perpetuated G+J's market position, competition would be improved in the alternative scenario where a third party acquired the licensing rights. Comparing the hypothetical future scenarios, the FCO took the preliminary view that the license renewal would have resulted in very limited options for readers to switch to other publishers' products in the future, and that it would thus have significantly impeded competition between science magazines.

Interestingly, this is the second time the FCO has effectively prevented G+J from acquiring licensing rights for the German edition of "National Geographic". The FCO's prior attempt in 2004,[18] however, was rejected by the DCA. The DCA—as confirmed by the FCJ—found that the transaction did not constitute a notifiable concentration as National Geographic had not been published in Germany before and thus had no pre-existing position on the domestic market which could have further strengthened G+J's position in the German market for popular science magazines.[19] However, now that the German edition of "National Geographic" has been established and has built up a market position in Germany, the FCO concluded that the (re-)acquisition of the license underlying the magazine's current market position would thus constitute a notifiable acquisition of control over a substantial part of the assets of another company.

G+J also marks one of four cases over the last few months where parties withdrew their merger filings after the FCO had expressed preliminary concerns in phase II (in-depth review of the transaction) and informed the parties of its intention to block the transactions (see below for reports on the other cases). Despite the parties' withdrawals, the FCO published its preliminary views on the effects of the transactions in press releases and extensive case summaries.

Total Abandons Planned Acquisition Of Eleven Gas Stations

On March 26, 2019, Total Germany ("Total") abandoned its acquisition of eleven gas stations in the Trier area from family-managed Autohof Görgen after the FCO had expressed preliminary concerns that the transaction would have strengthened BP's, Shell's, and Total's joint dominant position in the regional gas station market[20] resulting in a combined post-transaction market share of 80%.[21] In addition, based on data provided by its Market Transparency Unit for Fuels, the FCO found that the leading gas station operators in the area generally set prices very uniformly and that the fuel price level in the Trier area clearly exceeded the national average price level.

Ameos Abandons Planned Acquisition Of Sana Kliniken Ostholstein

On March 28, 2019, hospital operator Ameos Psychiatrie Holding ("Ameos") withdrew its notification of the proposed acquisition of the majority stake in Sana Kliniken Ostholstein.[22] After carrying out an in-depth investigation, the FCO preliminarily concluded that Ameos and Sana Kliniken would have obtained a dominant

[18] The FCO retroactively prohibited the acquisition after it had become aware of the first license agreement. See FCO's Press Release, "Bundeskartellamt prohibits Gruner + Jahr purchase of license for "National Geographic", August 9, 2004, available in English here and *Gruner + Jahr/G+J/RBA* (B6-45/04), FCO decision of August 3, 2004, only available in German here.

[19] See *Gruner + Jahr/G+J/RBA* (VI-Kart 24/04 (V)), DCA decision of June 15, 2005, only available in German here. The FCJ confirmed the DCA's judgment in 2006; see *National Geographic I* (KVR 32/05), FCJ decision of October 10, 2006, only available in German here.

[20] According to the FCO, the regional market did not cover gas suppliers in Luxembourg where gas prices are generally much lower than in the Trier area. In the FCO's view, these did not provide a viable alternative source for a considerable proportion of consumers in the Trier area because driving to Luxembourg to fuel their cars was not cost effective for them.

[21] FCO Press Release, "Total withdraws notification of its acquisition of eleven petrol stations in Trier region after Bundeskartellamt expresses concerns", April 9, 2019, available in English here; FCO Case Summary (B8-65/18), "Rücknahme der Anmeldung des beabsichtigten Erwerbs von elf Tankstellen im Raum Trier durch Total", April 9, 2019, only available in German here.

[22] FCO Press Release, "Hospital operators in Schleswig-Holstein and Cologne withdraw merger notifications in two cases after Bundeskartellamt expresses concerns", April 4, 2019, available in English here.

position on the regional market for stationary hospital services in Eastern Holstein. Eventually, the Carlyle Group—a US-based private equity company—which controls two investment funds of which Ameos and its largest competitor Schön Klinik are portfolio companies—would have controlled all general hospitals of the regional market in the eastern Holstein area.

Cellitinnen Nord Abandons Planned Acquisition Of Cellitinnen Süd

The foundation Cellitinnen zur heiligen Maria ("Cellitinnen Nord") already abandoned its plans to acquire the foundation Cellitinnen Süd on December 17, 2018. Both foundations operate hospitals, medical centers and care facilities in Cologne. After an in-depth investigation that included, *inter alia*, the evaluation of more than 14 million case files and interviews with more than 200 physicians, the FCO arrived at the preliminary conclusion that the transaction would have strengthened Cellitinnen Nord's single dominant position in the regional market for stationary hospital services in Northern Cologne along the left bank of the Rhine.[23]

Courts

DCA Annuls Carlsberg's Fine In German Beer Cartel

On April 5, 2019, the DCA annulled a €62 million fine that the FCO had imposed on Carlsberg Deutschland GmbH ("Carlsberg") in 2014 for its participation in price-fixing agreements in 2006 (draught beer) and 2008 (draught and bottled beer) in Germany.[24] In addition to Carlsberg, the FCO had fined ten other breweries, one trade association and 14 individuals in the total amount of €338 million (including Carlsberg's fine).[25]

The DCA held that Carlsberg had not been part of an overall price-fixing agreement, but had only participated in an information exchange on a single occasion in March 2007. Further, it held Carlsberg's cartel infringement to be time-barred. Under German competition law, cartel infringements are subject to an absolute statute of limitations of ten years, which begins to run when the infringement was committed (or, in the case of a single and continuous infringement, from the date it ceased). The DCA found that Carlsberg's participation in the anti-competitive information exchange ended with the conclusion of the March 2007 meeting and thus triggered the statutory limitation period. Given that the appeal process did not suspend the statutory limitation period, it expired in 2017 and the DCA was prevented from issuing a revised fining decision against Carlsberg and had to annul the FCO's decision.

Radeberger Gruppe KG ("Radeberger"), another brewery, which had also appealed the FCO decision, withdrew its appeal shortly before the first oral hearing and agreed to pay its €160 million fine. Radeberger wanted to avoid a possible fine increase in the appeal proceedings.[26] The General Prosecutor's Office Düsseldorf has appealed the decision to the FCJ.

Stuttgart Court Of Appeals Rules On The Beginning Of The Suspension Of Limitation Periods

On April 4, 2019, the Stuttgart Court of Appeals confirmed the Stuttgart Regional Court's judgment that found Daimler liable for damages as a result of its participation in the Trucks Cartel.[27] In particular, the Stuttgart Court of Appeals held that the limitation period for damages arising from the Trucks Cartel had been suspended as of the European Commission's ("EC") dawn raid of the defendant's premises in 2011.

[23] FCO Press Release, "Hospital operators in Schleswig-Holstein and Cologne withdraw merger notifications in two cases after Bundeskartellamt expresses concerns", April 4, 2019, is available in English here. FCO Case Summary (B3-122/18), "Rücknahme der Fusionsanmeldung zweier Stiftungen von Cellitinnen in Köln", April 4, 2019, is only available in German here.

[24] DCA decision (V-4 Kart 2/16 (OWi)) of April 5, 2019. At time of publication, the decision had not been published yet.

[25] FCO Case Summary (B10-105/11), "Bußgelder gegen Brauereien", April 2, 2014, only available in German here.

[26] Find more information on the risk of the DCA increasing fines in this issues' article "DCA Finally Publishes Rossmann Judgment That Significantly Increased Fine For Vertical Price Fixing".

[27] *Trucks Cartel* (2 U 101/18), Stuttgart Court of Appeals judgment of April 4, 2019, not yet published. A press release is only available in German here.

BACKGROUND

The German rules applicable prior to the revision of the ARC in June 2017[28] provided for a suspension of the limitation period for cartel damage claims once the FCO initiated proceedings against a cartelist. As no formal act or decision is required by the FCO to initiate such proceedings under the ARC, courts commonly considered the FCO's first actions against potential perpetrators or third parties to determine the start of proceedings and therefore the beginning of suspension. Actions in this regard included, *inter alia*, the issuing of a search order (in preparation for a dawn raid) or a Request for Information ("RFI").

However, it was unclear whether a similar approach could be adopted with cartel damage claims arising from an investigation by the EC. In contrast to the FCO, the EC initiates cartel investigations formally by adopting a decision under Article 2 of Commission Regulation (EC) No. 773/2004.[29] Because the EC can conduct dawn raids, issue RFIs, *etc.*, even before adopting such a formal decision, there are often long delays (sometimes years) between the EC's initial actions against potential perpetrators and the start of formal proceedings. Consequently, claimants have tended to argue that the suspension of the limitation period would start with the EC's first investigative measure. Defendants, meanwhile, commonly advocate in favor of the beginning of formal proceedings being the appropriate starting point.

STUTTGART COURT OF APPEALS' DECISION

In the Trucks Cartel, the EC dawn raided the defendant's premises in 2011, but did not adopt the formal decision to open proceedings until 2014. The Stuttgart Court of Appeals followed the claimants' line of argument and held that the suspension of the limitation periods started with the dawn raids in 2011. Had the court decided that the start of the suspension depended on the EC's formal decision, a large part of the claimants' damages would have been time-barred. Instead, the court opted for a claimant-friendly interpretation, but also emphasized that the FCJ will have the final say on the issue.

The decision is currently on appeal before the FCJ. Claimants may be optimistic that the FCJ will uphold the Stuttgart Court of Appeals' interpretation in light of the CJEU's recent judgment in *Cogeco*.[30] There, the CJEU held that EU competition rules and the principle of effectiveness preclude a national limitation rule that does not include any possibility of suspending the limitation period during a competition authority's proceeding.

DCA Confirms FCO's Decision To Block CTS Eventim/Four Artists Merger

On December 5, 2018, the DCA rejected CTS Eventim's appeal of the FCO's 2017 decision prohibiting CTS Eventim's acquisition of Four Artists.[31]

The FCO had found that the acquisition of booking and concert agency Four Artist by CTS Eventim—a platform that connects concert organizers with ticketing offices, but also sells tickets and organizes concerts itself—would have strengthened CTS Eventim's already dominant position in the German market for ticketing services.[32] Allowing CTS Eventim to market tickets for concerts organized by Four Artists exclusively via its booking platform would have diminished competing ticketing services' opportunities to expand.

The decision marks one of the first instances in which a German court had to apply the new rules for the assessment of market power on multi-sided markets that only entered into force in June 2017. The DCA's decision, *inter alia*, bases on the assumption that CTS Eventim already enjoys very strong network effects, which are—in

[28] The Ninth Amendment to the ARC implemented, *inter alia*, the provisions of the Damages Directive Directive 2014/104/EU.

[29] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

[30] *Cogeco Communications Inc. v Sport TV Portugal SA and others* (Case C-637/17) ECLI:EU:C:2019:263.

[31] *Ticketvertrieb* (VI-Kart 3/18 (V)), DCA decision of December 5, 2018. As of publication, the decision is not yet publicly available.

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

the DCA's view—symptomatic of multi-sided platforms: the more booking offices are connected to the platform, the more attractive the ticketing system becomes for concert organizers, and *vice versa*. In its appeal, CTS Eventim referred in particular to Four Artists' *de minimis* market share (less than 1.5% of all concert tickets sold in Germany), arguing that such a minimal increment of its own market share would not have led to a significant impediment to effective competition. However, under the German merger control rules, a significant impediment to effective competition can always be assumed when a dominant position is strengthened further, and the DCA confirmed the FCO's view that the actual increase in market power need not be significant at all. Instead, even a *de minimis* increase, such as in the case at hand, is sufficient to block a transaction. This particular interpretation of the German merger control laws differs significantly from the understanding of the EU Merger Control Regulation that typically requires a significant increase of market power to identify a significant impediment of effective competition.

DCA Finally Publishes Rossmann Judgment That Significantly Increased Fine For Vertical Price Fixing

On February 28, 2018, the DCA significantly increased the fine that the FCO had imposed on drug store chain Dirk Rossmann GmbH ("Rossmann") nearly sixfold.[33] However, at the time, the DCA only issued a press release which left ample room for speculation about the precise reasoning behind the court's decision to increase the fine. The DCA now published a non-confidential version of its judgment that provides further insights.

Back in 2015, the FCO found coffee producer Melitta Kaffee GmbH (now Melitta Europa GmbH & Co. KG, "Melitta") and five retailers, including Rossmann, had fixed the prices for roasted coffee. Consequently, the FCO imposed a fine of €5.25 million on Rossmann,[34] which the DCA increased upon Rossmann's own appeal by around 470% to €30 million. This was not only the first fine increase in a vertical case but also the highest percentage increase ever imposed by the DCA. The DCA had previously once increased a fine by about 250%[35], whereas in all other cases the increases were between approximately 5-50%.

Such a *reformatio in peius*, *i.e.*, a situation where an appellant is put in a worse position than if it had not appealed, is possible because the DCA not only reviews the FCO's decision, but also conducts its own complete assessment of the case, including setting an appropriate fine. In Rossmann's case—but also in other similar cases—the main reason for the significant gap between the FCO's and the DCA's fines was that the court did not apply the FCO's 2013 Fining Guidelines. This meant that the court did not calculate its fine based only on Rossmann's German turnover affected by the anticompetitive conduct—as the FCO had done—but took into account 10% of Rossmann's total worldwide revenues as a basic range for its fine.[36] Especially in the case of multi-product companies and large corporate groups, such as Rossmann, this difference in methodology typically leads to substantially higher fines. Rossmann has appealed the decision to the FCJ.[37]

The DCA's Rossmann decision is in line with the court's case law on the determination of cartel fines since 2012, when it began to calculate fines based on companies' worldwide turnover.[38] Since then, it has imposed fines for 21 infringements,

[33] DCA decision (4 Kart 3/17 OWi) of February 28, 2018, only available in German here.

[34] FCO Case Summary (B10-50/14), "Bußgelder wegen vertikaler Preisabsprachen beim Vertrieb von Röstkaffee", January 18, 2016, only available in German here.

[35] The DCA increased the FCO's fine against CFP Brands amounting to €1.4 million by about 250% to €5 million, see DCA decision (V-4 Kart 6/15 OWi) of January 26, 2017, only available in German here.

[36] The DCA then conducts adjustments within this range based on mitigating or aggravating factors.

[37] See Rossmann's Press Release of March 3, 2018, only available in German here.

[38] Prior to the Seventh Amendment of the ARC in 2005, fines could amount up to three times the additional revenues gained through the infringement (*kartellbedingter Mehrerlös*).

increasing the FCO's fine 11 times and reducing it 10 times. Given the uncertainty associated with a complete reopening of the case by the DCA and the application of a different standard for the calculation of fines, companies have started to think twice before appealing FCO fining decisions to the DCA. In addition, some companies, *e.g.*, Radeberger, have even withdrawn their appeal during the proceedings before the DCA.

AUTHORS

Tobias Rump
+49 221 80040 127
trump@cgsh.com

Sebastian Heite
+49 221 80040 154
sheite@cgsh.com

Beatrice Fischer
+49 221 80040 220
bfischer@cgsh.com

Friedrich Andreas Müller
+49 221 80040 136
frmueller@cgsh.com

Philipp Kirst
+49 221 80040 157
pkirst@cgsh.com

EDITORS

Katharina Apel
+49 221 80040 133
kapel@cgsh.com

Julian Alexander Sanner
+32 2 287 2169
jsanner@cgsh.com

PARTNERS, COUNSEL AND SENIOR ATTORNEYS – GERMAN ANTITRUST PRACTICE GROUP

Dirk Schroeder
dschroeder@cgsh.com

Rüdiger Harms
rharms@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Niklas Maydell
nmaydell@cgsh.com

Romina Polley
rpolley@cgsh.com

Katharina Apel
kapel@cgsh.com

Thomas Graf
tgraf@cgsh.com

Bernd Langeheine
blangeheine@cgsh.com

Patrick Bock
pbock@cgsh.com

Lars-Peter Rudolf
lrudolf@cgsh.com

Stephan Barthelmess
sbarthelmess@cgsh.com

Michael Mayr
mmayr@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

19.0529.02_053019