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German Competition Law Newsletter

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German Government Proposes Significant Reform Of Competition Law

On January 24, 2020, the German Ministry for Economic Affairs published a draft proposal for the 10th Amendment to the German Act against Restraints of Competition ("Draft Proposal"). Its main objectives are (i) to enable and strengthen the protection of competition in digital markets, (ii) to make German competition law and its enforcement more efficient in general, and (iii) to implement the ECN+ Directive[1].

The Draft Proposal provides for a comprehensive revision of German competition law, including new provisions on abusive unilateral conduct, a raised second domestic turnover threshold in merger control, new criteria for the assessment of fines, and far-reaching changes in procedural law, including in relation to cartel damages claims. We highlight the most relevant proposals below.

Strengthening Enforcement In Digital Markets

New Concept Of Abuse In Relation To Big Tech Companies With Paramount Cross-Market Significance

The Draft Proposal introduces an entirely new concept of abuse, targeting companies with so-called "paramount cross-market significance". This concept should enable the German Federal Competition Office ("FCO") to monitor and control large digital players' activities in a (new) specific market at a very early stage and even when they are not (yet) dominant on that specific market. To assess whether the company holds a paramount position with cross-market significance, the FCO would not only look at one single market, but

[1] Directive (EU) 2019/1 of 11 December 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.

could look across markets taking into account a broad array of criteria, including the company's dominance on one or several markets, its financial strength, access to data or other resources, and vertical integration.

If the FCO finds that a company is of paramount significance for competition across markets, it may issue an order to that effect and could then prohibit the company from engaging in a number of practices, including (i) giving preferential treatment to its own products or services to the detriment of those provided by rivals ("self-preferencing"), (ii) hindering competitors on markets in which the company could quickly expand its position if this is likely to significantly impede the competitive process, (iii) using data collected in a dominated market to make market entry to other markets more difficult for other companies, (iv) hampering interoperability or data portability, thereby impeding competition, and (v) making the assessment of service value difficult for commercial customers, for example, by giving insufficient information.

The company would then bear the burden of proof that the behavior in question, which may have both anti- and pro-competitive effects, is objectively justified.

Intermediation Power As A New Market Power Concept

Intermediaries—such as multi-sided digital platforms—have become increasingly important for companies that rely on them for their products or services. Since visibility on such platforms—in particular through "listings" and "rankings"—is crucial for companies' commercial success, these platforms can largely control access to the market. Against this backdrop, the Draft Proposal suggests to add the new concept of "intermediation power" to the catalogue of criteria for assessing market power in digital markets.

Extension Of The Concept Of Relative Market Power

The Draft Proposal provides that the concept of "relative market power" with respect to small or medium-sized enterprises (as trading partners or competitors)—a special feature of German competition law which may apply below the dominance threshold—should no longer be restricted to dependent small- and medium-sized companies. Instead, all companies that are dependent on their supplier or buyer in such a way that they cannot switch to other companies (because the dependency is not offset by corresponding countervailing market or negotiation power) should be protected against abusive conduct by that supplier or buyer. The same applies to companies that are dependent on platforms with intermediary power if they cannot switch to other platforms.

Abolition Of Strict Causality Requirement In Abuse Cases

The Draft Proposal aims to settle a debate among academics—and more recently the FCO and the Düsseldorf Court of Appeals ("DCA") in the *Facebook* case[2]—as to whether the exploitative abuse of a dominant position requires a strict causal link between a company's dominant position and the ability to determine the contractual terms deemed exploitative. Under the new law, it would be sufficient to show that a company's conduct proved to be anticompetitive is the result of its dominant position ("normative causality"). This change could significantly broaden the scope of application of the rules of dominance even in cases where there is no (clear) connection between dominance and violation. For example, contractual terms that violate data protection law could be investigated as an exploitative abuse of a dominant position—even if such terms are also used by smaller competitors—because the (unlawful) collection of substantial amounts of data by a dominant company can effectively be considered anticompetitive.

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

Access To Data, Platforms And Interfaces

In order to strengthen a competition law-based right of access to data, the Draft Proposal introduces two separate instruments.

First, the Draft Proposal rephrases and broadens the provision on the current essential facility doctrine which no longer only applies to access to physical infrastructures. Under the amended essential facility doctrine an abuse might occur if a dominant company refuses to grant another company access to its physical infrastructure or data (or only in exchange for unreasonably high fees), if the facility or the data constitutes an essential facility, *i.e.*, if without access it is impossible for the other company, for legal or practical reasons, to be active on the upstream or downstream market as a competitor of the dominant company. Dominant players could refuse access only if there is an objective justification. However, they may request an adequate consideration for granting access.

Second, in cases of relative market power, non-dominant companies may also be required to grant access to data if a supplier's or customer's business model depends on access to this data. This may be the case, for example, in value-creation network or multi-stakeholder scenarios where several companies have contributed to the generation of data. Usually, these companies will find contractual terms to govern the sharing and common use of this data. This may not be the case if such data is owned by the stronger player due to an imbalance in market power and/or bargaining power. The right to access may even include data that so far has only been used internally. Any request for data access will require a balancing of all relevant circumstances in each individual case, including costs, data protection rules, contributions to data collection, etc.

Facilitation Of Interim Measures

As digital markets are very dynamic, the Draft Proposal aims to allow for the possibility to intervene before it is too late. Therefore, it seeks to make it easier for the FCO to order interim measures. Under current law, interim measures can only be imposed to prevent serious and irreparable harm to competition. The Draft Proposal would allow interim measures to be applied when they are necessary to protect competition or prevent immediate and serious harm to a company, thereby significantly lowering the intervention threshold.

Additional Changes To The Procedural Framework

In order to speed up procedures, especially in digital markets, the Draft Proposal allows the FCO to issue oral statements of objections ("SOs"). Preparing written SOs often ties up considerable resources and can take several months, if not years. However, this procedural change may affect the right of companies to be heard in proceedings and could create uncertainty about a particular conduct under investigation.

Half-Hearted Efforts To Streamline Merger Control Procedure

The Draft Proposal intends to reduce the costs of merger control proceedings in Germany for both companies and authorities. The second domestic turnover threshold for notifiable mergers is to be raised from €5 million to €10 million. The FCO expects this to reduce the number of notifications by 20%. The threshold for *de minimis* markets is to be raised from €15 million to €20 million, while the assessment of *de minimis* markets will no longer be carried out on a single-market basis, but rather on a combined-market basis. Changes also include the acceptance of annual financial statements prepared in accordance with IFRS standards for calculating a company's turnover figures.

The Draft Proposal also intends to focus merger control proceedings on cases of greater economic importance. In this respect, the maximum duration of the Phase II review period will be extended from four to five months, while any additional extensions of the review period, by consent of the parties, will be limited to one month only.

Finally, the Draft Proposal modifies the preconditions for obtaining ministerial approvals. In the future, applications for ministerial approval

will require that the FCO's prohibition decision and competitive assessment has been confirmed by a competent court, either on appeal, or in an interim proceeding. Hence, a ministerial approval can only be the last resort, once all other legal avenues have been exhausted.

While the Draft Proposal generally aims at reducing the number of annual notifications by raising the domestic turnover threshold, the Draft Proposal also includes a provision empowering the FCO to examine concentrations below the turnover and transaction value thresholds, if further concentration in the industry concerned might impede competition in Germany. If the FCO sees "indications that future concentrations will impede competition" on a particular market, it can order companies to notify all concentrations in this sector for the following three years. This provision only applies to acquisitions of companies that generate two-thirds of their turnover in Germany and are likely to target regional markets (such as waste management), but could also affect so-called killer acquisitions, *i.e.*, companies buying innovative targets to discontinue the development of their innovative products that may otherwise compete with the acquirer's own products in the future.

Informal Consultation Regarding Cooperation

The already existing instrument of a so-called "guidance letter", used to assure companies that the FCO has no objections to their cooperation with a competitor ("no-action decision"), will now be codified in the ARC. The transformation of the guidance letter into a codified instrument will give companies greater legal certainty. Companies will see their legal position further improved as they will be entitled to a no-action decision within six months if they have a substantial legal and economic justification for the cooperation.

Additional Criteria For Assessment Of Fines

The Draft Proposal attempts to reconcile the different approaches to the calculation of fines used by the courts and the FCO. As the courts' approach regularly results in companies receiving higher fines on appeal than in the FCO decision, many are deterred from appealing in the first place. However, the legislator is prohibited from prescribing a specific calculation method to the courts, as this would compromise their judicial independence. The proposals are therefore limited to additional criteria for setting fines. It remains to be seen whether the courts will take these criteria into account and adapt their approach to that of the FCO.

Implementation Of The ECN+ Directive

The ECN+ Directive was adopted to ensure that national competition authorities in the EU have the instruments, resources and sanctioning powers to apply Articles 101 and 102 TFEU effectively. To transpose the ECN+ Directive into German law, the Draft Proposal sets out the following measures:

Extension of Disclosure Requirements

The Draft Proposal puts forward legislative changes enabling the FCO to request all information from companies and individuals necessary for an investigation. Companies would be required to disclose all relevant and accessible documents available within their economic entity, and the FCO could even require individuals to disclose self-incriminating information, provided that the FCO has undertaken not to pursue the individual. It is unclear whether this obligation can also apply to criminal prosecution. Refusal or failure to disclose information requested by the FCO would be punishable by a fine.

Higher Fines For Trade Associations And Liability Of Members

The Draft Proposal would see fines for trade associations no longer being calculated on the basis of an association's annual turnover, but based on the combined annual turnover of all the members of the association operating on the market affected by the infringement. This will likely increase the level of fines for trade

associations. In addition, associations themselves will be liable for the association's fine if they were active on the market affected by the infringement and cannot prove that they did not commit the infringement, were unaware of it or distanced themselves from it before the investigation began.

Codification Of FCO's Leniency Program

The Draft Proposal introduces several new provisions that essentially codify the FCO's leniency program, which was until now based exclusively on the FCO's administrative practice and a subordinate administrative regulation. The new provisions do not bring about any significant changes to the leniency system as such, but they do give leniency applicants greater legal certainty.

Facilitating Cartel Damage Claims

The previous amendment to the ARC introduced a rebuttable presumption that cartels cause harm, as required by the EU Cartel Damages Directive[3]. The Draft Proposal introduces a further rebuttable presumption that goods or services are deemed to have been affected by a cartel if they were purchased from a business participating in the cartel during and within the geographic and material scope of the infringement. According to the Government's reasoning for the Draft Proposal, the presumption is necessary to ensure effective compensation.

Further, the Draft Proposal removes the urgency requirement where the request for access to the competition authority's decision is made by way of an interim injunction. Moreover, in order to protect confidential information, courts may entrust experts—bound by professional secrecy—with the assessment of the necessary redactions.

Conclusion

The changes proposed in the Draft Proposal affect almost all areas of German competition law and will have a major impact on the FCO's enforcement practice in the digital sector and on digital companies. In particular, there is a high risk that the changes concerning abusive unilateral conduct could increase the number of investigations, create legal uncertainty throughout the digital industry, and ultimately reduce incentives to innovate.

In general, higher fines for business associations and extended liability for their members, combined with extensive disclosure requirements, may expose companies to an increased risk of being penalized for competition law infringements. Further, the new rebuttable presumption concerning goods and services affected by a cartel infringement may prove useful for companies claiming follow-on damages.

The Draft Proposal still needs to be approved by the German parliament and may yet be subject to changes in the course of parliamentary debates. The final 10th Amendment to the ARC is expected to come into force in the course of 2020.

[3] 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.

The FCO's Activities In 2019

On December 27, 2019, the FCO published a summary of its activities in 2019.[4] In 2019, the FCO

— imposed fines in cartel proceedings totaling approximately €848 million in five cartel proceedings,

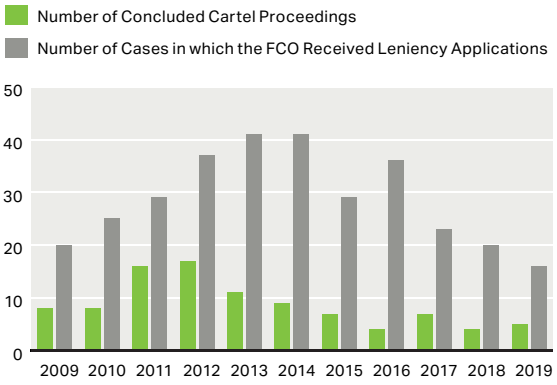
— examined around 1,400 notified mergers,

— conducted numerous abuse of dominance proceedings (including against Facebook and Amazon), and

— received 104 applications for review in public procurement cases.

Cartel Prosecution

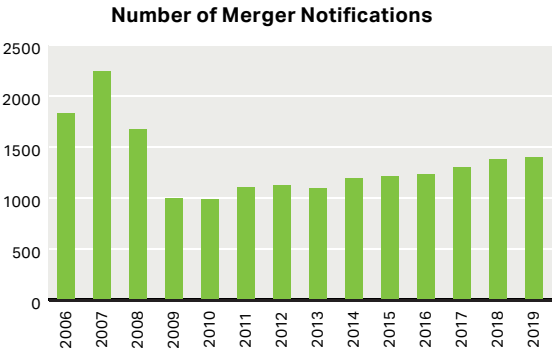
The FCO's president, Andreas Mundt, stressed that, as before, cartel prosecution remains a key area of focus to protect competition and consumers. With fines imposed in cartel proceedings of approximately €848 million in 2019 and thus more than double as high as in 2018,[5] 2019 was the second most successful year for the FCO in more than ten years.[6] The extraordinary level of fines imposed in 2019 is mainly driven by a fine totaling €646 million imposed just recently on steelmakers for fixing the price of steel plates over a 14-year period.[7]



While in contrast to 2018, the overall number of concluded cartel proceedings slightly increased from four in 2018 to five in 2019, 2019 confirms the overall decrease in the number of cases in which the FCO received leniency applications from a peak of more than 40 in 2013 to only 16 in 2019.

Merger Control

Merger control also remained a key area for the FCO in 2019. In 2019, the FCO received around 1,400 notifications, and thus slightly more than in 2018.



[4] FCO Press Release, December 27, 2019, available in English here. For the FCO's 2018 Annual Report, see German Competition Law Newsletter May - June 2019, p. 1 *et seq.*, available in English here.

[5] In 2018, fines of approximately €376 million were imposed.

[6] In 2014, the FCO's most successful year in terms of fines imposed in cartel proceedings, the FCO had imposed fines totaling €1.1 billion.

[7] For more details, see our article on the FCO's decision to fine steel manufacturers for price fixing in this newsletter; see also FCO Press Release, December 12, 2019, available in English here.

In 2019, four mergers were prohibited and in an additional five cases, the merging parties withdrew their projects in Phase II proceedings.[8] Hence, the FCO's latest prohibition of Loomis AB's acquisition of Ziemann Sicherheit Holding GmbH[9] draws the line under what has been a year stamped by prohibition decisions and withdrawals of filings in the FCO's merger practice.[10] It remains to be seen whether the FCO will maintain this course also in 2020.

To enable the FCO to focus on the cases that really matter to consumers and on Phase II cases which require an enormous amount of time and effort, the Draft Proposal for the 10th Amendment to the ARC increases the second domestic turnover threshold for notifiable mergers from €5 million to €10 million and intends to reduce thereby the number of notifications by approximately 20%.[11]

Digital Economy

Andreas Mundt emphasized the FCO's continued goal to maintain an open market by preventing big tech companies and platforms from abusing dominant positions.

— On February 6, 2019, the FCO concluded its proceedings against Facebook and found that Facebook's data collection practices amounted to an exploitative abuse of its dominant position. It thus ordered Facebook to change its data collection practices.[12]

— On July 17, 2019, the FCO terminated its probe into Amazon, after Amazon had committed to making several changes to its (worldwide) business terms towards sellers on its market places.[13]

— In addition, the FCO published a joint study with the French Competition Authority on "Algorithms and Competition".[14]

— The FCO's continued focus on digital economy will also be reflected in the 10th Amendment to the ARC as new rules on abuse control, in particular for digital platforms, will be implemented.[15]

Consumer Protection

In the area of consumer protection, the FCO concluded its first sector inquiry into comparison websites in April 2019[16] and intends to conclude two additional sector inquiries in 2020, namely one into the use of consumer data by smart TVs (launched already in December 2017)[17] and another one into the authenticity and validity of user reviews on online platforms (launched in May 2019)[18].

Public Procurement

Finally, with respect to public procurement, the FCO will continue working towards the establishment of the so-called Federal Competition Register for Public Procurement, which is intended to enable contracting authorities to check whether a company has previously committed relevant violations of commercial law. The Federal Competition Register for Public Procurement is intended to be operational by the end of 2020.

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[8] In comparison, in 2018, none of the 1,383 notified mergers were prohibited, 99% of the notified transactions were cleared in Phase I, eight mergers were cleared after an in-depth review in Phase II and three projects were withdrawn due to competitive concerns expressed by the FCO; see also German Competition Law Newsletter May - June 2019, p. 1 *et seq.*, available in English here.

[9] For more details, see our article on the FCO decision to block the 3-to-2 merger of cash handling service providers in this newsletter.

[10] See also the FCO's prohibition decisions *Miba/Zollern* (B5-29/18; see also German Competition Law Newsletter January – February 2019, p. 6, available in English here), *Heidelberger Druckmaschinen/MBO* (B5-185/18; see also German Competition Law Newsletter May – June 2019, p. 6 *et seq.*, available in English here), and *Remondis/DSD* (B4-21/19; see also German Competition Law Newsletter July – August 2019, p. 6, available in English here).

[11] For more details on the Draft Proposal for the 10th Amendment to the ARC, see our article in this newsletter.

[12] Case B6-22/15. See German Competition Law Newsletter January - February 2019, p. 1 *et seq.*, available in English here. On August 26, 2019, the DCA, in an interim decision, suspended the FCO's decision against Facebook (see German Competition Law Newsletter July - August 2019, p. 1 *et seq.*, available in English here). The FCO appealed the DCA's decision. The case is now pending before the Federal Court of Justice and a decision is expected for 2020.

[13] Case B2-88/18. See German Competition Law Newsletter July - August 2019, p. 3 *et seq.*, available here.

[14] FCO Press Release, November 6, 2019, available in English here. The complete study is available in English here.

[15] For more details on the Draft Proposal for the 10th Amendment to the ARC, see our article in this newsletter.

[16] FCO Press Release, April 11, 2019, available in English here. See also German Competition Law Newsletter March - April 2019, p. 1 *et seq.*, available here.

[17] FCO Press Release, December 13, 2017, available in English here.

[18] FCO Press Release, May 23, 2019, available in English here.

FCO Clears Joint Venture Of Telekom And EWE For Fiber-Optic Deployment Following Commitments

On December 30, 2019, the FCO approved the creation of a joint venture by Telekom Deutschland GmbH ("Telekom") and EWE AG ("EWE") for the expansion and operation of fiber-optic networks (FTTB/H)[19] in parts of north-west Germany after an in-depth review.[20]

Background

The parties had first informed the FCO of their intended cooperation at the end of 2017. They formally notified the joint venture to the FCO in March 2019. In advance of the merger control clearance, the FCO had already examined the intended cooperation under cartel prohibition provisions (Section 1 in connection with Section 32 ARC) and closed those proceedings with a commitment decision on December 4, 2019.[21] In the merger clearance decision for the planned joint venture, the FCO relied on these commitments noting that they will have positive effects on the competitive conditions in the relevant telecommunication markets, including in rural areas, and thereby eliminate any competition concerns.

Commitment Decision

In its preliminary assessment, the FCO found Telekom and EWE to be two of the strongest competitors in north-west Germany. It took the view that, in light of the currently still limited demand from end-customers for gigabit-ready broadband access, the parties' key motivation to build FTTB/H currently is to secure a first-mover advantage. The FCO, therefore, concluded that a cooperation of the parties would reduce their incentives to make the necessary significant investments.

The FCO also found that the parties jointly provided a substantial part of the end customers in the cooperation area with internet and telephone services which they could migrate to the new fiber-optic network. The FCO held that this advantage would eliminate any incentive that each cooperating company would otherwise have to grant other telecommunication companies access to the new network in order to make full use of the network capacity.

To eliminate the FCO's concerns, Telekom and EWE have undertaken the following commitments, which are binding for six years:

— The joint venture will build at least 300,000 FTTB/H connections in the concerned area within four years without public funding, to some extent also in rural areas. This number exceeds both the parties' original proposal and the number of connections the FCO expected to occur if the parties were to make investments independently of one another.

— In contrast to their initial plans, Telekom and EWE committed to continue to participate independently in tenders for public funding of FTTB/H connections, especially in rural areas, where commercial network expansion would not be profitable. This commitment is expected to further increase the total number of connections to be deployed by the parties.

— Telekom and EWE committed to refrain from focusing only on urban areas which already have cable networks and in which cable providers exert a certain competitive pressure.

[19] The fibre-optic cables connect to a building (Fiber-to-the-Building, "FTTB") or to an apartment (Fiber-to-the-Home; "FTTH") rather than ending at a distribution box in the street.

[20] *Telekom/EWE* (B7-21/18), FCO decision of December 30, 2019, only available in German here. FCO Press Release, December 30, 2019, available in English here.

[21] *Telekom/EWE* (B7-21/18), FCO decision of December 4, 2019, only available in German here. FCO Press Release, December 5, 2019, available in English here.

— The parties also committed to refrain from strategic defense measures *vis-à-vis* competing companies, such as short-notice announcements to develop a certain area in order to deter a competitor to develop that area.

— The parties will grant other telecommunication companies non-discriminatory access to the joint venture's new network and to high-quality technical upstream services. Within a specific period, a certain share of the connections will be handed over to competitors for their marketing to end customers.

The commitments do not set prices and conditions for a third-party access to future networks. The FCO recognized that it remains an open question whether and to what extent the FNA should regulate fiber-optic networks.

Outlook

While the immediate impact of the cooperation between Telekom and EWE is limited to an area in north-west Germany covering less than 10% of all German households, the cooperation and commitments could serve as a model for network expansion in other parts of Germany.

Joint Study On Algorithms By German And French Competition Authorities

On November 6, 2019, the FCO and the French Competition Authority ("ADLC") presented a joint study on "Algorithms and Competition."[22] The study focuses on algorithms used for dynamic price setting and their potential effects on competition, particularly in the form of collusion, and contains important insights for companies utilizing third-party algorithms.

Differentiating Between Algorithms

Algorithms utilized today in private industry are extremely varied, differing in terms of their purpose, data sources, methods of operation, and source. From a competition law perspective, algorithms that involve prices are particularly relevant, whether they pertain solely to the collection of price inputs or are directly used to set prices. For this reason, the study focuses in large part on algorithms used for dynamic pricing: adjusting prices, potentially in real-time, in response to changes in input costs, supply and demand, and competitor pricing. Moreover, for competition purposes it is particular relevant whether the algorithm was developed internally or was provided by third-parties, which might sell the same or similar algorithms (also) to competitors. The latter may create avenues for coordination among competitors, perhaps unwittingly.

Theoretical Impact Of Algorithms Remains Unclear

The study discusses the theory of how dynamic pricing algorithms could impact, or even inadvertently cause, horizontal collusion. The authors, however, acknowledge that the effects on competition are ambiguous and will depend on market conditions.

Inter alia, the study analyzes whether a competition law violation could "organically" arise from the use of machine-learning algorithms unilaterally designed and implemented by each competitor in the absence of any human agreement. Apart from questions about the technical feasibility of this scenario, the study concludes that any form of convergence that arises in this way would likely be categorized as permissible parallel behavior.

Facilitating Traditional Anticompetitive Practices

The study further explores two different scenarios in which algorithms may be used for anticompetitive purposes. The first such scenario involves the use of algorithms to support or ease the implementation of anticompetitive practices that have already been established. Two illustrative examples are provided

[22] FCO/ADLC, Algorithms and Competition, November 2019, available in English here.

from regulatory decisions issued in the United Kingdom. In the first, two companies selling posters used an algorithm from third-party software to implement their agreement to not undercut each other on price on an online marketplace.[23] In the second, two energy suppliers that had agreed not to recruit the other's customers used an algorithm to share customer details and avoid actively targeting each other's customers.[24]

As these examples make clear, algorithms could greatly facilitate the enforcement of anticompetitive agreements by providing a means of monitoring prices or competitor activities, as well as automatically correcting prices or "punishing" deviations from the anticompetitive agreement. These applications are equally applicable to both horizontal collusion and vertical agreements.[25] While the algorithms are not necessary in order to establish that an anticompetitive agreement exists, they are key to understanding the scope of an agreement's negative effects—and thus relevant for fine calculations.

Third-Party Algorithms As A "Hub"

The second scenario involves a situation in which a third party provides the same algorithm, or algorithms that are somehow coordinated or connected, to multiple competitors that themselves have no direct (human) communication or contact. Such algorithms could, for example, function on the basis of common principles, such as the formula for setting prices, or share data in a way that allows competitors to track each other's pricing and sales.

The study notes that even a well-intentioned third party attempting to calculate prices for each individual competitor could potentially draw on confidential data from multiple competitors, thereby introducing convergence on the market.

The above described behavior does not pose novel legal issues, but likely falls under established precedents regarding "hub-and-spoke" arrangements and third-party cartel facilitators. Liability for competitors would not arise unless at least two of the competitors were aware of or could have reasonably foreseen the third party's anticompetitive acts. Nonetheless, the study suggests that companies need to exercise great caution when relying on third-party algorithms that may be used by competitors or have been developed (or "trained") with competitor data, particularly in the sensitive area of price or price inputs.

Conclusion

The study makes clear that the FCO and ADLC are highly alert to the fact that algorithms have the potential to make collusive arrangements more effective and thus increase their harm to competition. Aside from theoretical considerations of "self-colluding" algorithms, the study suggests that existing legal concepts are well-adapted to deal with the anticompetitive use of algorithms. Companies should thus apply particular scrutiny before utilizing data sets or third-party algorithms also used by competitors or developed with their input.

[23] *Online sales of posters and frames* (Case 50223), Competition and Markets Authority ("CMA") decision of August 12, 2016, available in English here.

[24] *Economy Energy, E (Gas and Electricity) and Dyball Associates*, Office of Gas and Electricity Markets, July 26, 2019, available in English here.

[25] The study references a number of cases in which the European Commission ("Commission") and the CMA competition authorities have identified the use of monitoring algorithms in vertical agreements, see *Philips* (Case AT.40181), Commission decision of July 24, 2018, available in English here; *Pioneer* (Case AT.40182), Commission decision of July 24, 2018, available in English here; *Asus* (Case AT.40465), Commission decision of July 24, 2018, available in English here; *Denon & Marantz* (Case AT.40469), Commission decision of July 24, 2018, available in English here; and *Digital piano and digital keyboard sector* (Case 50565-2), CMA decision of August 1, 2019, paras. 3.97 *et seq.*, available in English here.

News

FCO – Cartels

FCO Fines Steel Manufacturers For Price Fixing

On December 12, 2019, the FCO imposed fines of €646 million on steel manufacturers Ilsenburger Grobblech GmbH, thyssenkrupp Steel Europe AG, voestalpine Grobblech GmbH and three individuals for price fixing.[26] A fourth manufacturer, Dillinger Hüttenwerke, was granted immunity from fines for cooperation under the leniency notice.

The FCO found that, from mid-2002 until August 2008, the four steel manufacturers agreed on supplements and surcharges on the base price for quarto plates that account for about 20-25% of their total price.[27] In the subsequent years, until June 2016, the companies continued to calculate these price components using uniform formulae or copied them from one another.

The FCO conducted dawn raids at the manufacturers' German headquarters in summer 2017 as part of a wider investigation into cartels allegedly formed after the end of the European Coal and Steel Community in 2002. The three manufacturers reached a settlement with the FCO. Voestalpine also received a fine reduction by cooperating with the FCO.

FCO Imposes Further Cartel Fines

On December 19, 2019, the FCO imposed fines of €195,000 on four German suppliers of liquid gas for geographic market sharing between 2006 and 2016.[28] In setting the fines, the FCO notably considered the low impact of the cartel arrangements due to the suppliers' small market shares.

Further, on December 23, 2019, the FCO imposed fines totaling €8 million on six German companies embossing vehicle registration plates and five individuals for market sharing and other anti-competitive practices.[29] The FCO found that, between 2000 and 2015, the companies exchanged sensitive information, agreed which company was in charge to operate a local sales office on 40% of about 700 local markets in Germany, and shared profits and losses of these offices.

On January 13, 2020, the FCO imposed fines of €154.6 million on seven German crop protection wholesalers and the employees involved for distributing gross price lists and agreeing on discount schemes and individual prices between 1998 and 2015.[30] The leniency applicant received full immunity and escaped a fine, seven cartelists eventually settled with the FCO. An additional company settled with the FCO in early February and accepted a €4 million fine; proceedings are ongoing against one other company.

FCO – Mergers

FCO Blocks 3-To-2 Merger Of Cash Handling Service Providers

On December 18, 2019, the FCO prohibited cash handling service provider Loomis AB's acquisition of its competitor Ziemann Sicherheit Holding GmbH ("Ziemann").[31] Loomis AB and Ziemann are the third and second-largest cash handling service providers in a number of regional markets in the west and north of Germany behind market leader Prosegur.

[26] FCO Press Release, December 12, 2019, available here.

[27] Quarto plates are hot-rolled flat stainless steel products used inter alia in steel construction, bridge building, building construction, shipbuilding, general mechanical engineering, wind tower and pipeline construction.

[28] FCO Press Release, December 19, 2019, available here.

[29] FCO Press Release, December 23, 2019, available here.

[30] FCO Press Release (B10-22/15), January 13, 2020, available in English here.

[31] Case B9-80/19. FCO Press Release, December 18, 2019, available in English here; FCO Case Summary, February 10, 2020, only available in German here.

The FCO held that the proposed merger would have reduced the number of significant competitors from three to two in several already highly concentrated regional markets in the west and north of Germany.[32] The FCO found that other competitors were only regionally active small and medium-sized companies with low market shares and thus not able to exert a significant competitive constraint on the merging parties. The FCO found that already today, there is only limited competition on prices and conditions. In addition, switching options for customers are limited and the market is characterized by a high degree of customer loyalty. The FCO concluded that the transaction would thus permit the merging parties to raise prices or to otherwise impair their offering conditions.

While the parties had offered to sell customer contracts and the pertaining infrastructure to remedy the FCO's concerns, the FCO did not consider these commitments suitable to eliminate the competition concerns. In particular, the FCO's market testing revealed that (i) a significant number of customers would likely not be willing to switch the provider and (ii) many of those who were willing to do so, would likely rather switch to the market leader Prosegur than to the prospective buyers of the customer contracts. The FCO considered this as detrimental to competition as the proposed merger itself. The FCO's decision is final and draws a provisional line under the ongoing market consolidation in this industry.[33]

This case shows that the sale of customer contracts may well be suitable to remedy competition concerns, but only where there are reasonable options to switch to the prospective buyer from a customer perspective.

FCO – Policy

FCO Finds No Market Dominance In The Electricity Generation Sector

On December 19, 2019, the FCO published its first report on market power in the electricity generation sector ("Market Power Report").[34] The report is intended to provide market participants with more legal clarity as to their own position in the market, thereby complementing the recently published FCO/FNA Guidelines on the control of abusive behavior in the electricity generation and wholesale trade sector[35].

The FCO analyzed the electricity sales market and its competitive landscape between October 1, 2018 and September 30, 2019. In the FCO's view, the product market for electricity sales comprises the generation and first sale of electrical energy for general supply. Due to increasing price divergence, the FCO no longer considers Germany, Luxembourg, and Austria to be part of the same geographic market, but rather Germany and Luxembourg on the one hand and Austria on the other to constitute separate geographic markets.

With respect to the assessment of market power, the FCO deemed that market shares based on generation volume are only limited indicators of market power.[36] It therefore additionally applied the Residual Supply Index ("RSI"), which quantifies whether an electricity provider is indispensable to meet demand. In the sector inquiry on electricity generation and wholesale, a dominant position was presumed if an electricity provider was indispensable to meet the demand for at least 5% of the hours of one year (*i.e.*, in at least 438 hours/1.752 quarters of an hour).[37] The FCO

[32] Together with Prosegur, the parties would have held around 80% of the overall market volume whereas the remaining 20% would have been distributed over 30 smaller cash handling service providers with different regional focuses.

[33] See *inter alia Prosegur/Brink's* (B4-18/13), FCO decision of July 18, 2013, only available in German here, and *Ziemann/Unicorn* (B4-44/13), FCO decision of July 18, 2013, only available in German here. In 2018, Loomis acquired Kötter Security's cash handling business. A Press Release dated January 17, 2018 from Kötter is only available in German here.

[34] The Market Power Report is only available in German here; the accompanying FCO Press Release, December 19, 2019, is only available in German here. The instrument of the Market Power Report was introduced with the 2016 Electricity Market Act. Previously, the report was part of the annually published monitoring report of the FCO and the Federal Network Agency ("FNA").

[35] See German Competition Newsletter September - October 2019, p. 7 *et seq.*, available here.

[36] This is because electricity is unsuitable for storage, consumption and generation are volatile, and because of the short-term inelasticity of demand and the systemic importance of the security of supply.

[37] The RSI was previously also used by the FCO and the European Commission in their respective reviews of RWE AG ("RWE")'s acquisition of a minority stake in E.ON SE. See German Competition Newsletter May - June 2019, p. 7 *et seq.*, available here.

further noted that the Return on Withholding Capacity Index ("RWC"), which measures electricity producers' incentive to withhold capacity, might become a useful additional screening instrument going forward.[38]

The FCO concluded that market leader RWE does not currently hold a dominant position. However, even a relatively minor shortage of supply capacities in the course of the nuclear and coal phase-out could push RWE over the dominance threshold. The FCO is therefore considering whether to publish the next Market Power Report after one year, instead of the statutory two-year interval.

Other Developments

Monopoly Commission Publishes Sector Report On Postal Markets

On December 3, 2019, the Monopoly Commission, an advisory board of the German Government, published its eleventh sector report on postal markets.[39] The Monopoly Commission's findings correspond to a great extent to those of its 2017 report[40].

— Deutsche Post still dominates all significant national postal markets with market shares of about 86% on the licensed letter-post market and 44% on the (oligopolistic) parcels market.

— Competition has been increasing in the parcels market and may intensify further by vertical-integrated companies such as Amazon establishing their own delivery network.

— In contrast, in the slowly declining letter-post market, competitors still are virtually exclusively active in the business customer segment with the next largest competitor being Postcon holding only 5-10% of the market shares.

— The Monopoly Commission does not expect significant changes to the competitive landscape at least in the licensed letter-post market in the medium term.

Therefore, and as Deutsche Post has been facing several complaints both by competitors about predatory pricing and by consumers about damaged, delayed or lost postal items, the Monopoly Commission once again concludes that Postal Law needs to be amended significantly. The key aspects of an amendment of the Postal Act meanwhile published by the Ministry for Economic Affairs and Energy[41] would, however, not go far enough. In particular the Monopoly Commission recommends to additionally strengthen the Federal Network Agency's powers in abuse control, inter alia by enacting higher fines, profit disgorgement and more extensive information rights. In addition, while it would be essential to keep the cost-oriented price regulation, it should be based on costs of a hypothetical efficient company instead of currently used Deutsche Post's actual costs. Further, the Monopoly Commission recommends eliminating Deutsche Post's privileges as universal postal service provider such as its value-added tax exemption. Finally, to improve consumer protection, the Monopoly Commission suggests to oblige postal service providers to participate in dispute resolution procedures.

Monopoly Commission Publishes 11th Sector Report Into Telecommunication

On December 3, 2019, the Monopoly Commission published the eleventh edition of its biennial sector report on telecommunications markets.[42] The report observes that the state has to intervene increasingly in the telecommunications markets because investments of private telecommunication companies do not meet the political networks development targets in Germany. The Monopoly

[38] The Monopolies Commission has been using the RWC as an additional tool in its Sector Reports Energy since 2015.

[39] Monopoly Commission, "11th Sector Report Post (2019): The Amendment to the Postal Act: New Opportunities for Competition", November 14, 2019, only available in German here. See also Press Release, December 3, 2019, available here.

[40] Monopoly Commission, "10th Sector Report Post (2017): Eliminate privileges, design regulation effectively!", only available in German here. See also Press Release, December 4, 2017, available here.

[41] Federal Ministry for Economic Affairs and Energy, "Key Points for an amendment of the Postal Act", August 1, 2019, only available in German here.

[42] Monopoly Commission, "11th Sector Report on Competition in Telecommunications Markets: Governmental Restraint in Network Deployment", December 2019, only available in German here. A Press Release in English is available here.

Commission advises that subsidies should be moderate and targeted to areas where development by private parties is insufficient in order to minimize crowding out of private investments.

With respect to the deployment of gigabit networks, the Monopoly Commission notes that developments are hampered by the lack of profitability in many places, bureaucratic hurdles and scarce engineering capacities. It advocates for the systematic removal of bureaucratic hurdles, the creation of an investment friendly regulatory framework and the imposition of non-discrimination obligations to reduce access regulation for fiber-optic networks. In particular, Deutsche Telekom as the still dominant provider should be obliged to grant competitors the same network access as it grants its own end-customer.

The Monopoly Commission cautions against the extension of subsidies for networks in areas where a fast infrastructure already exists to avoid a suppression of private investments. To direct funding into areas that need it most, minimum bandwidth thresholds should be established below which an area becomes eligible for funding.

With respect to mobile networks, the Monopoly Commission advocates for a continuation of auctions for spectrum. It takes a critical view of the Federal Government's considerations to extend usage rights in return for deployment commitments or without an auction. The Monopoly Commission identifies voluntary infrastructure sharing as an instrument to facilitate private investments under certain conditions. It suggests to award subsidies for the development of mobile networks in currently unsupplied areas at local level or to organize reverse auctions (awarding subsidies to the companies with the lowest subsidy needs).

Working Group On Competition Law Discussed Changes To The European Vertical Block Exemption Regulation

On October 10, 2019, the Working Group on Competition Law held its annual meeting in Bonn. The FCO and more than 120 competition law experts discussed revisions to the European Vertical Block Exemption Regulation ("VBER")[43] in light of the digital transformation of the economy.[44] In preparation for this meeting, the FCO had published a comprehensive background paper,[45] setting out the need for adaption and possible adjustments to the VBER to address online distribution and other challenges posed by the digital transformation of the economy.

The VBER (in its current version) and the corresponding Guidelines[46] will expire on May 31, 2022. Already in October 2018, the European Commission initiated an extensive evaluation including, in particular, a public consultation to gather evidence on the functioning of the VBER (and the relevant Guidelines) and to determine adequate revisions in light of the new market developments. As part of the evaluation, the European Commission will also consult with the national competition authorities, including the FCO.

The FCO traditionally has a relatively strict position towards vertical restraints (*e.g.*, with regard to the assessment of best price clauses, selective distribution, or online distribution). It remains to be seen whether, and to what extent, the FCO's proposed amendments and revisions, as set out in its background paper, will find their way into the new version of the VBER.

[43] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

[44] FCO Press Release, October 15, 2019, available in English here.

[45] FCO Background Paper, October 10, 2019, only available in German here. The speakers' presentations are only available in German here.

[46] Commission Notice – Guidelines on Vertical Restraints, OJ C 130, May 19, 2010, pp. 1-46.

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