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Major Developments in German Competition Law in the second half of 2023

In addition to the entry into force of the 11th Amendment to the ARC, the reporting period saw a number of non-horizontal mergers and unabated enforcement against abuse of dominance. For the second year in a row, the Federal Cartel Office imposed a historically low amount of fines, while the courts continued to develop antitrust damages rules by rendering interesting and sometimes contradictory decisions.

I. 11th Amendment to the ARC

On 7 November 2023, the controversial 11th Amendment to the Act against Restraints of Competition (ARC) came into force. The most important changes include new, far-reaching powers of intervention for the Federal Cartel Office (FCO), simplifications in skimming off benefits from antitrust violations and new investigative powers in the context of the Digital Markets Act.

1. Powers of Intervention Following Sector Inquiries

The 11th Amendment to the ARC enables the FCO to order **remedial measures** of a behavioral or even structural nature **without** requiring a **violation** of the ARC. These new measures can limit considerably the addressee's competitive freedom of action. In order to use these new tools, the FCO first needs to determine particular competition deficits in certain sectors following sector inquiries.

If one of the FCO's future sector inquiries identifies a significant and continuing malfunctioning of competition,

the authority can order the remedial measures specified in Section 32f (3) and (4) ARC. These range from behavioral measures, such as granting access to data, interfaces, or networks or requirements for business relationships between companies in the markets under investigation, to structural remedies. In the latter case (unbundling orders), the FCO can order the sale of company assets or entire parts of the company as a last resort.

Compared to the draft version of 2022 (see Newsletter 2/2022), the legislator has raised the threshold for intervention by the FCO. The draft considered a "*significant, persistent or repeated disruption of competition*" sufficient. With the requirement of a **significant and continuing malfunctioning of competition** the legislator reacted to the justified criticism concerning the broad and vage wording of the draft version. In addition, it added a clarification as to when a malfunctioning of competition has to be regarded as continuing. Nonetheless, it is to be expected that the application of the new rules will be the subject of further controversy (before the courts).

2. Skimming Off of Improper Gains

Section 34 ARC allows the FCO to skim off economical advantages obtained through infringements of antitrust law. However, this instrument has not been used to date, not least due to the high standards of proof required to determine the improper gains (see Newsletter 2/2022). A number of simplifications are now intended to make skimming off improper gains more relevant in practice.

The simplifications come in the form of two newly introduced (rebuttable) presumptions, which are likely to be difficult to rebut in practice. In the future, it will be presumed that any infringement of antitrust law led to an economic advantage for the infringing company. In addition, there will be a presumption that this advantage amounts to 1% of domestic sales of the product or service in question. These two presumptions can only be rebutted by proving that no profits of this amount were made in the relevant period. This rebuttal is likely to succeed only in exceptional cases.

3. Digital Markets Act

By March 2024, 22 companies previously designated by the Commission as so-called "gatekeepers" must implement the requirements and prohibitions of the Digital Markets Act (DMA). Designated gatekeepers are companies such as Microsoft, Apple and Alphabet, which can use their market power to control market access of others. While the enforcement of the DMA is the responsibility of the Commission, it allows the national competition authorities to investigate compliance with certain of its rules in the respective member states. To implement this possibility at national level, the 11th Amendment to the ARC gives the FCO the power to support the Commission by conducting investigations in Germany.

With regard to private enforcement, the 11th Amendment to the ARC provides affected parties a claim for removal or injunctive relief in the event of violations of Articles 5, 6 and 7 of the DMA.

II. Merger Control

In 2023, the FCO examined approx. 800 merger cases. The number of notifications remained stable compared to 2022. Of the seven cases examined in Phase II in 2023, four were ultimately cleared, two of them subject to conditions (Veolia/Friedrich Hofmann and Müller/Campina (see Newsletter 1/2023)). One case is still pending. There was no prohibition last year, but in two cases parties withdrew the notification during the in-depth review. Cases that were abandoned in the first phase are not included in the statistics.

1. Clearances

At the end of November, the FCO approved **Veolia**'s acquisition of **Friedrich Neumann**'s waste disposal business subject to conditions. The transaction should actually have been notified in Brussels, but was referred to the FCO at the parties' request. In the FCO's opinion, it would have led to a significant impediment of effective competition in the household collection of lightweight packaging, glass and waste paper in the greater Nuremberg, Fürth and Erlangen area. The FCO therefore subjected its clearance to the condition of the sale of a centrally located disposal site in Nuremberg to an independent competitor. The FCO appeared to regard the parties' sites as equivalent, as the condition was not related to a specific property.

With the acquisition of **LeanIX** by **SAP**, the FCO approved in Phase I a project that primarily raised **conglomerate**

questions. SAP did not have its own solutions in the area of enterprise architecture management (EAM) software offered by LeanIX. The FCO came to the conclusion that bundling LeanIX EAM software together with SAP products would not lead to a restriction of competition in the EAM sector. It emphasized that SAP customers would still be able to choose between different EAM products in the future. Furthermore, it regarded the market for EAM products as a dynamic growth market with numerous providers. The authority did therefore not expect that SAP would be able to use bundling strategies to disadvantage EAM competitors to any significant extent.

In November, the FCO allowed **Bosch**, **Infineon** and **NXP** to acquire 10% each of the shares in the European Semiconductor Manufacturing Company (**ESMC**) during a Phase I investigation. The target company was founded by the global market leader, Taiwan's TSMC, and plans to build a large semiconductor factory in Dresden. In the context of its de-risking strategy, Germany will support the project with subsidies of several billion euros.

Bosch, Infineon and NXP are major consumers of semiconductors that have both their own production facilities and use the services of contract manufacturers such as TSMC. As a result of the vertical integration, the FCO saw no risk of input or customer foreclosure. Regarding input foreclosure, the FCO found that the transaction does not make access to semiconductors more difficult for other customers because TSMC's successful competitor Global Foundries also has a foundry in Dresden. In addition, the acquisition of a 10% shareholding only allowed limited access to ESMC's capacities. The FCO did not find an issue with customer foreclosure either. In view of the increasing demand for semiconductors, it did not consider it likely that ESMC's competitors would no longer be able to find sufficient customers.

Vertical aspects were also at the center of **REWE's** acquisition of a 50% stake in **Trinks**, a leading beverage wholesaler for food retailers. Again, the FCO did not expect any significant foreclosure effects as a result and cleared the transaction in the first phase in December. The FCO justified its decision by stating that REWE's competitors had sufficient alternatives in the form of other national and regional beverage wholesalers and the possibility to source directly from beverage manufacturers. In the FCO's view, the expected partial shift in demand away from the combined entity argued against customer foreclosure to the detriment of the remaining beverage wholesalers.

2. Microsoft/Open AI

Following press coverage of Microsoft's USD 10 billion investment in Open AI at the beginning of 2023, the FCO had sent requests for information to the parties in order to check whether the project should have been notified in Germany. An **obligation to notify** could have resulted from acquiring a competitively significant influence pursuant to Section 37 (1) No. 4 ARC in the context of a deal meeting the transaction value-related threshold of Section 35 (1a) ARC.

Microsoft had already invested billions in Open AI in 2019. The two companies deepened their partnership again in 2021. The FCO came to the conclusion that Microsoft had already acquired a competitively significant influence over Open AI in 2019, or at the latest in 2021. At that time, however, the transaction value threshold was not met because Open AI was not yet active on a significant scale in Germany. This has only been the case since the widespread introduction of ChatGPT in 2023.

In 2023, the transaction value threshold was met, but there was no concentration because the 2023 investment did not lead to a further deepening of the already existing competitively significant influence. Ultimately, there was no obligation to notify. However, the authority expressly emphasized that the lack of a notification requirement did not imply any statement on the admissibility of the cooperation in light of the general antitrust rules.

III. Abuse of Dominance

1. German Railways

The prominent June 2023 decision in which the FCO found that Deutsche Bahn (DB) had abused its market power *vis-à-vis* mobility platforms (see Newsletter 1/2023), made headlines again during the reporting period when all of its almost 450 pages were published in August. Meanwhile, DB expressed its "*great incomprehension*" about the decision and announced that it had lodged an appeal. It remains to be seen, which position the Higher Regional Court of Düsseldorf will take.

At the end of November 2023, an interview with the FCO's President Mundt caused a stir. His comments were largely interpreted as a call for DB to be split up by separating the

rail network and rail operations. Whether President Mundt actually wanted to be understood in this sense appears doubtful in view of later statements.

2. Google (Alphabet)

Google (Alphabet) continues to be the focus of several enforcement proceedings. In October, the FCO announced that Google had made **commitments** to give users more choice in the processing of their data. The commitments relate in particular to situations in which Google merges personal data from one Google service with personal data from another Google service or from non-Google sources or wishes to continue using this data in separately provided Google services. The proceedings were originally initiated in May 2021, led to a warning at the end of 2022 (see Newsletter 1/2023) and are based on the provision of Section 19a ARC, which has been in force since January 2021 and grants the FCO far-reaching powers, especially *vis-à-vis* large digital companies.

In December, the FCO announced a further interim step in the proceeding in the **Google Automotive Services** and **Google Maps** case (see Newsletter 1/2023). In response to the warning issued at the end of June 2023, Google submitted proposals for solutions to address the FCO's competition concerns. The Office has now contacted vehicle manufacturers and Google's competitors to obtain their view on the effectiveness of these proposals and further information on technical issues. Based on the results of this market test, the FCO will assess whether Google's proposal will be sufficient. The decisive question is likely to be whether the proposed measures may result in an unbundled offering of Google's services in the automotive sector.

3. Energy Supply

The **report on market power in the electricity generation markets 2022/23** was presented at the beginning of August 2023. This report examines the competitive situation in the generation of electrical energy in the period from 1 October 2021 to 31 March 2023. The FCO concludes that RWE in particular, but also EnBW and LEAG as important electricity producers, have a dominant market position. While the FCO emphasized that the question of market dominance can only be answered in the context of specific case-by-case decisions, the market power report will likely be an important indicator for such decisions.

In November, the FCO opened **proceedings against several municipal utilities and district heating suppliers** on suspicion of abusively excessive price increases between January 2021 and September 2023. The proceedings relate to price adjustment clauses in customer contracts. The FCO is investigating whether the specific clauses used were unfairly drafted or used and thus led to higher consumer prices. In particular, it wants to clarify whether the basis for price increases (link to the general price trend in the heat supply) is tenable under antitrust law given the market power of the energy suppliers.

In a press release from December, the Office finally provided information on the status of its activities supervising **energy price brakes**. They are based on provisions in the relevant price cap laws that prohibit energy suppliers from abusing the relief rules. In particular, companies shall be prevented from increasing customer prices and receiving state compensation payments at the same time. To date, the FCO has initiated investigation proceedings against almost 60 suppliers in the gas, heating and electricity sectors. It remains to be seen whether sanction decisions will actually be issued. It seems more likely that the FCO will issue the warnings provided for by law.

4. Further Abuse Proceedings

The FCO closed market abuse proceedings against **Lieferando** - the leading platform for take out deliveries in Germany - in July. The investigation concerned the question whether Lieferando illegally exploited its market power by using a **best-price clause**. According to this clause, the prices charged to Lieferando must correspond to the prices in the restaurants' own sales channels. The FCO (provisionally) refrained from continuing the proceedings for reasons of discretion, particularly in view of the dynamic developments on the market for take out deliveries.

In mid-November, abuse proceedings were initiated against **Coca-Cola.** According to FCO President Mundt, there are indications that Coca-Cola is hindering other beverage manufacturers in their competitive opportunities through its terms and conditions *vis-à-vis* food retailers. The main focus of the investigation is to determine whether Coca-Cola has unlawfully incentivized supermarkets to purchase and advertise the entire product range outside of the Coke product line through its discount structure. The results of these proceedings are

likely to be of particular interest to those retail chains (Edeka) that are involved in high-profile supply disputes with the US company.

IV. Prohibition of Cartels

In 2023, the FCO's cartel fines totaled just under EUR 6 million and were once again significantly lower than the previous year's figure of approx. EUR 24 million. This is a far cry from the record sums of ten to fifteen years ago, when fines were in the hundreds of millions. FCO President Mundt attributes this development to the challenging enforcement conditions during the coronavirus pandemic, which have an impact on the current case load. It remains to be seen whether the decline in fines imposed is indeed just a "corona dip"

In 2023, the FCO received 14 leniency applications and carried out 12 dawn raids. Both numbers are almost on par with last year's figures. However, President Mundt never seems to tire of emphasizing the **effectiveness of the FCO's cartel prosecution**. The FCO is constantly refining its own investigative methods, including modern screening techniques. It also receives valuable information via the external reporting point under the Whistleblower Protection Act established at the FCO in mid 2023.

1. Road and Industrial Construction

Fines just shy of EUR 1 million were imposed on four Dortmund road construction companies for collusion in tenders. In addition, 14 construction companies and twelve individuals received fines totaling approx. EUR 4.8 million for bid-rigging in industrial construction contracts. Both proceedings were the result of leniency applications by companies involved in the cartel.

Noteworthy in the latter proceedings is the first-time use of a provision introduced in 2017. It allows the authority to take action against the legal successor or parent company of a company that no longer exists and to demand a so-called **liability contribution.** In contrast to the imposition of a fine, this does not imply any infringement of the adressee. In certain restructuring scenarios the applied provision of Section 81e ARC makes it possible to impose liability amounts on parent companies even if the infringement had already ended when the 9th Amendment to the ARC came into force on 9 June 2017. This provision, which ultimately served to **close the famous "sausage gap"**, was rightly criticized for being a rather obvious circumvention of the constitutional prohibition of retroactivity.

2. Case Law of the Higher Regional Court of Düsseldorf

In July, the Higher Regional Court of Düsseldorf issued a noteworthy ruling in the so-called stainless steel cartel, rejecting the liability of natural persons for corporate fines. It held that a **possibility of recourse against the responsible bodies** (management board or managing director) would be contrary to the purpose of the corporate fine, as it is precisely the legally independent assets of the company that should be affected by the imposition of the fine. By contrast, the Regional Court of Dortmund - after having already affirmed recourse in parallel proceedings - felt compelled to reaffirm its stance in August 2023, thereby taking a critical look at the Higher Regional Court of Düsseldorf's reasoning. The last word on the issue of recourse of fines has therefore not yet been spoken. It will be ultimately on the Federal Court of Justice to answer this important question.

The main proceedings against Bahlsen, CFP Brands and Griesson de Beukelaer for the well-known **confectionery cartel** were opened in October and ended extremely quickly with a plea bargain. The companies were sentenced to pay fines totaling approx. EUR 6.3 million. The alleged infringement consisted in exchanges of information on list prices and negotiations with food retailers dating back to the year 2000. After the FCO had imposed fines of EUR 13.4 million on the three companies, these were initially increased to EUR 20.5 million by the 4th Cartel Senate of the Higher Regional Court of Düsseldorf, which then saw its ruling overturned by the Federal Court of Justice in 2019. The reason was, among other things, an inadequate assessment of evidence to the detriment of cartelists. The current decision was made by the 6th Cartel Senate of the Higher Regional Court of Düsseldorf, to whom the case was referred back.

In this case, the lengthy proceedings have paid off in several ways. The plaintiffs are now not only paying significantly lower fines. They were also found to have committed an infringement of only *"minor significance in breach of antitrust law"* and the accusation was limited to a few years. This will likely also limit the scope of possible follow-on damages claims.

3. Wire Harnesses Cooperation in Automotive Industry

The FCO had no serious competitive concerns regarding a cooperation within the automotive industry for so-called wire harnesses, i.e. the **entirety of the cables in a motor vehicle**. The cooperation between players from several market levels of the value chain aims to advance the automated production of wire harnesses. Due to their complexity, wire harnesses are currently planned separately for individual vehicle types and are mainly produced manually. As the project is not only intended to result in the standardization of technical DIN standards, but also affects the area of research and development, the FCO demanded a stricter separation in order to meet different antitrust requirements. The companies have promised to restructure their plans accordingly. In particular, the FCO wants to ensure that the standardization process is carried out in a non-discriminatory, transparent and open manner.

4. Price Coordination for the Supply of Medical Aids

In November, the coordination of prices for the supply of medical aids by the **Arbeitsgemeinschaft von Hilfsmittelverbänden (ARGE),** which the FCO considered to be anti-competitive, was brought to an end. Providers of medical aids such as medical supply stores, orthopaedic technicians and others had come together to form nationwide associations in order to conduct joint negotiations with health insurance companies, among others. Over 80% of service providers were organized via ARGE.

The FCO considered that this cooperation exceeded the acceptable limit because it had brought competition to an almost complete standstill. The authority held that even unforeseen cost increases, such as those resulting from the COVID19 pandemic, could not justify attempts to impose across-the-board price increases via supply monopolies. The ARGE members had demanded price increases for practically all products and services from the health insurers without calculating real cost increases on a performance-related basis. The parties ultimately decided not to enter into a legal dispute with the FCO and dissolved ARGE.

V. Cartel Damages

1. Federal Court of Justice on Lessees' Claims (Truck Cartel III)

In December, the Federal Court of Justice confirmed the opinion of the Higher Regional Court of Naumburg that not only buyers of products affected by a cartel but also lessees of such products can suffer cartel-related damages. Since experience shows that cartels lead to prices that are on average higher than those in the counterfactual scenario of unrestricted competition, it seems likely that the fees paid by a lessee to a financing company for cartelized products are also excessive, provided that the leasing agreement is aimed at fully covering the respective purchase price. The comparative market analyses submitted by the defendant, according to which the cartel only caused an insignificant effect, did not preclude the assumption that any damage had occurred.

The Federal Court of Justice thus also confirms the case law of the Higher Regional Court of Stuttgart. During the reporting period, the latter had taken the view that lessees may also be entitled to compensation. The court based its decision on the consideration that the purchase price of a leased object regularly has an influence on the calculation of leasing offers. Furthermore, the court dealt with the determination of indirect damages at the level of the lessee. Unlike the previous instance, the court did not consider it necessary to specifically demonstrate the cartel-related price mark-ups at the first market level, *i.e.*, the level of the lessor as the direct purchaser. In the court's view, the lessee (and other indirect purchasers) are free to independently prove their own cartel-related mark-up just like a direct purchaser, using tools such as regression analyses. The court also considered such evidence to have a quasi "backward" ascertaining effect for the direct purchaser level. It was thus conclusively established that the damage also existed at the upstream buyer level in at least the proven amount and was passed on through an increase in the leasing rates.

2. Judicial Estimation of Damages

The Regional Court of Berlin continued its tendency to **estimate** cartel damages **on its own** and without economic opinions from court-appointed experts. Just as in its decisions in the rail, truck and EC card cartels (see Newsletter 1/2023), the court based its current decision in the escalator cartel solely on an economic expert

opinion introduced by the plaintiff, without having a neutral court-appointed expert carry out an independent assessment. The court dismissed the defendant's criticism regarding the suitability of the expert opinion and the data basis of the regression analysis. It found that the regression analysis was "*at least a possible approximation of the counterfactual scenario of a hypothetical competitive price*" and that judicial cartel damages proceedings would hardly be practical if the best possible regression analysis were demanded in each individual case.

The Higher Regional Court of Schleswig has now partially endorsed this practice in a ruling concerning a **cartel of manufacturers of personal care, washing and cleaning products**. Although the court considered that there were damages, it considered their quantification by experts to be "*practically impossible*". As a result, the court determined the damages freely "*in accordance with an experience-based estimate*". In doing so, the court also referred to a meta-study on average cartel mark-ups. In the court's opinion, the difficulties in clarifying the facts as well as the risks involved in estimating the damages were to be born by the cartelists.

3. Missing Proof of Damage

The Higher Regional Court of Düsseldorf's November ruling on the **wallpaper cartel** clearly shows that cartels do not necessarily cause damage to all parties on the other side of the market. In its ruling, the court dismissed the action brought by a German DIY chain in its entirety. The intervener, represented by SZA, was able to prove to the court's satisfaction that the infringements did not necessarily result in price increases and thus adverse effects on the customers, at least in the case of individual price negotiations with the customers. The court also ruled that an umbrella effect cannot be assumed for goods explicitly not covered by the cartel. The Higher Regional Court of Düsseldorf therefore considered the empirical principle postulated by the Federal Court of Justice according to which prices achieved within the framework of a cartel are on average higher than those that would have existed without the restrictive agreement, to be refuted by the circumstances of the individual case. The case once again clearly demonstrates the need for precise case-by-case assessment in damages actions.

4. Duty of Inquiry between Cartelists

In a further ruling on the truck cartel, the Higher Regional Court of Düsseldorf on appeal dismissed the claim of a haulage company, which had sued the jointly and severally liable co-cartel members instead of its own supplier. The defendants had contested the plaintiff's claims on the ground that they were not involved in the relevant sales transactions and had no knowledge about them and, in particular, the prices paid by the plaintiff. The Higher Regional Court of Düsseldorf declared this defense based on lack of knowledge to be admissible. In its view, the fact that the cartel members are in principle jointly liable does not imply any obligation to obtain information from other cartel members about disputed sales transactions. There is also no attribution of knowledge to other cartel members. Thus, the plaintiff had not sufficiently proven the requirements for a claim for damages. The Higher Regional Court of Düsseldorf thus clearly opposes the case law of the Higher Regional Court of Karlsruhe and the Regional Court of Dortmund, which previously assumed an obligation to make inquiries with other cartelists.

This client information contains only a non-binding overview of recent developments in German competition law and is not meant to replace legal advice. In case of comments or questions, please contact:

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