July 2023

Major Developments in German Competition Law in the First Half of 2023

During the first six months of 2023, the Federal Cartel Office (FCO) initiated, among other things, the first proceedings under the new energy price brake laws and continued to apply Section 19a ARC. In addition, the Supreme Court rendered a number of interesting decisions in particular regarding cartel proceedings and damages.

I. Update on the 11th Amendment to the ARC

Just two and a half years after the 10th amendment to the ARC entered into force at the beginning of 2021, the German Federal Parliament (*Bundestag*) passed the 11th amendment to the ARC in early July. Provided the German Federal Council (*Bundesrat*) does not raise any objections, the amendment will enter into force later this year. Watch this space for a report on the final version.

II. Merger Control

During the reporting period, the FCO concluded a number of Phase II reviews. In these – as well as in a number of noteworthy Phase I decisions – the FCO had to deal with duopolistic market structures.

1. Burda/Funke/BCN

Following a five-month review the FCO cleared **Funke Mediengruppe**'s acquisition of a stake in **Burda Verlag**'s marketing company BCN in March. BCN will be jointly controlled by Burda and Funke and will market the parents' respective advertising inventory. The FCO examined in particular the

advertising market and, in addition, the indirectly affected reader and online advertising markets. It defined a separate product market for advertising in magazines belonging to the categories rainbow press, TV program, TV supplements and pharmacy customer magazines. The inclusion of alternative advertising channels such as the internet, social media, TV, radio, billboards, or classified advertisements was considered. But customers (advertisers) did not consider these alternative channels to be an equivalent substitute because of different target groups and/or higher costs. However, the FCO recognized that alternative advertising channels exerted some competitive pressure since there was some degree of substitutability.

In 2014, the FCO had characterized the **advertising market** for TV program magazines as a non-competitive oligopoly. In 2023, it came to the opposite conclusion notwithstanding the fact that the threshold of the legal presumption for an oligopoly was exceeded. The FCO argued that since 2014, there had been significant shifts in market shares among all market participants and discounts were at a high level. Despite the existence of some factors increasing the risk of collusion, such as shrinking markets and a high level of market transparency, the FCO was not concerned about the creation of a dominant position. In this respect, the authority referred to the asymmetry in the oligopoly - which had been strengthened by the merger - and to the fact that there were four remaining competitors with strong coverage.

The case also gave rise to a rather rare assessment of potential **unilateral horizontal effects** beyond market dominance. The FCO first examined the extent to which incentives for BNC to increase prices could result from the fact that an **additive use** of magazines from different competitors is necessary and customers cannot, or can only with difficulty, do without the advertising inventory of certain publishers. The market survey, however, showed that the remaining competitors offer sufficient alternative products and that substitution competition also will have a disciplinary effect on BNC post-transaction. Another question examined in this context was whether the merger could have possible pull effects in favor of the parties due to **discounts** ("kick-backs"), which could lead to market exits caused by foreclosure effects putting competitors at a disadvantage. Since in the past suppliers with rather small kick-back agreements were able to gain market share over the other publishers, and since the customers surveyed considered it unlikely that they would shift a larger share of their advertising budget to the new entity than they had previously done for BCN and Funke combined, the FCO ultimately did not have serious competitive concerns. However, it expressly reserved the right to examine kick-back agreements under Section 1 ARC and Article 101 of the Treaty on the Functioning of the European Union (TFEU) if, contrary to the current expectations, a significant pull effect from kick-back agreements between BCN and the media agencies were to occur after the merger.

Finally, the transaction was subject to a so-called **double control** under merger control and general antitrust rules. This seems odd given that the planned joint marketing of advertisement space constituted a publishing cooperation pursuant to Section 30(2b) ARC and was as such exempt from the application of Section 1 ARC. The FCO overcame this formal obstacle by arguing that in view of the magnitude of sales to customers from other EU countries, the trade between Member States was affected and Article 101 TFEU, thus, applicable. In the end, however, the Federal Cartel Office exercised its discretion to refrain prohibiting the transaction based on Article 101 TFEU. Previously, the parties had committed to take account of the Federal Cartel Office's concerns regarding provisions in the underlying agreements that the FCO had deemed excessive by adjusting the contracts.

2. Other Phase II Decisions

In February, the FCO cleared the acquisition of parts of the dairy business of **Royal Friesland Campina** by **Theo Müller** group subject to conditions following an extended Phase II review. According to the findings of the FCO, the Müller group, with popular brands such as Müller and Weihenstephan, already held a dominant position in the German product markets for rice pudding, mixed milk drinks and basic milk drinks (*e.g.* buttermilk). Müller group's pre-merger market share in these markets was over 60%. The

acquisition of the - albeit moderate - shares of Friesland Campina's brands (including Landliebe and Tuffi) would have strengthened Müller's existing dominant position. Against this background, the parties offered commitments, which, in the FCO's view, not only eliminated any problematic overlaps but went even further. They included the divestiture of Friesland Campina's entire "Tuffi" business to an independent competitor. In addition, the parties committed to granting exclusive, irrevocable and perpetual trademark licenses for the sale of rice pudding and fresh milk-based mixed drinks under the "Landliebe" brand. Contrary to the FCO's usual practice to rely on upfront buyer remedies, the commitments in Müller/Friesland Campina took a different legal structure. The parties could close the transaction upon clearance and only then had to comply with the commitments within a certain time period. In return, the parties waived their right to appeal the FCO's decision. It seems doubtful, however, that this case marks a turning point in the FCO's approach favoring upfront buyer solutions.

After an investigation of only four months, the FCO in June cleared the acquisition of **Meranus** by Spanish **Fluidra** despite competitive concerns. The FCO examined the wholesale market for equipment for private swimming pools as well as the market for the manufacture and distribution of cleaning robots for private swimming pools. Due to moderate combined market shares, there were no concerns on the equipment market. But the FCO was concerned that the transaction may strengthen the existing duopoly between Fluidra and Maytronics on the cleaning robots market. However, as this was merely a ***de minimis* market** within the meaning of Section 36 (1) sentence 2 no. 2 ARC, the Bonn authority could not prohibit the transaction. Unfortunately, it is not clear from the FCO's press release to what extent the authority attempted to bundle the two markets in order to create a market sufficiently large not to qualify as *de minimis* market.

Even more quickly, in a little less than four months, the acquisition of control of **va-Q-tec AG** by the PE fund EQT was approved. The target company in this deal offers temperature-controlled containers, which are mainly used for the air transport of biopharmaceutical products. With Envirotainer, EQT already had a portfolio company active in the relevant market. Despite a merger-related expansion of Envirotainer's strong market position, the FCO did not consider a prohibition to be appropriate. In justifying its decision, the FCO pointed out that the relevant market is growing, characterized by **innovations** and has seen successful entries in the past. In addition, customers such as large pharmaceutical and logistics companies have strong countervailing buyer power.

3. Decisions in Phase I

At the end of June, the FCO agreed to further consolidation in the food industry by clearing the takeover of **Galileo** by **Dr. Oetker**. After extensive Phase I investigations, the FCO had come to the conclusion that the market for frozen pizza products was already highly concentrated and essentially dominated by the market leader Dr. Oetker and the Nestlé-Wagner group. Together with Galileo, a major producer of private-label frozen pizza, Dr. Oetker achieved market shares at the limit of the presumption threshold for single firm dominance. Also, the two leading suppliers met the market share threshold of 60% for the legal presumption of an oligopoly. Ultimately, however, the authority did not express any serious competitive concerns. It argued that the increase in market share was small and customers had sufficient alternatives. In addition, the FCO found the market to be dynamic, as evidenced by the market entry of a new player. Finally, the considerable buying power of the food retail chains and frequent promotions at the retail level limit the manufacturers' room for raising prices. The argument concerning countervailing buyer power begs the question of whether the FCO is not falling into a circular argument. While the FCO is alternatively relying on countervailing market power of food retailers on the one hand and manufacturers on the other, consolidation continues to take place at both market levels.

In the **Holcim/TER** case, the presumption of a dominant duopoly was met with regard to the relevant regional market for ready-mix concrete. Despite a significant increment, the combined market share of the parties to the merger remained below 40% and, thus below the presumption of single firm dominance. In its decision of May 2023, the FCO considered the presumption of oligopoly to

be rebutted. It based its clearance decision on its market investigation, which showed fluctuations in market shares and diverging average prices. In addition, the FCO predicted that the economic downturn that had already begun and that the expected decline in demand would further intensify price competition in the future.

III. Abuse of Dominance

1. Energy Price Brake/Abuse without Market Dominance

As part of **energy-specific abuse control**, the FCO initiated investigation proceedings in the areas of natural gas, heat and electricity on the basis of the so-called Energy Price Brake Acts. The regulations, which came into force at the end of 2022, provide for abuse control even absent a dominant market position and, in particular, prohibit abusive use of the relief rules. The proceedings relate to energy suppliers who had applied for advance payments under the price brake legislation. In accordance with its statutory mandate, the FCO checks whether the energy suppliers have obtained excessive state compensation by increasing their end-customer prices for gas, heat or electricity without objective justification (for example, due to increased costs).

2. Deutsche Bahn vs. Mobility Platforms

In a decision dated 26 June 2023, the FCO determined that various practices and contractual clauses of Deutsche Bahn ("DB") *vis-à-vis* **mobility platforms** constitute an abuse of DB's market power. More than three years after attempts to bring the proceedings to an amicable conclusion had failed, the Bonn-based authority saw itself forced to impose a package of behavioral measures on DB. In addition to the ban on contractually enforcing anti-competitive advertising and discount bans, the order also obliges DB to pay a service fee for the booking and payment processing of DB tickets by mobility service providers. In addition, DB must provide forecast data such as delays or cancellations on a non-discriminatory basis. It is worth noting that with regard to forecast data, the FCO goes beyond the EU Passenger Rights Regulation, which has been in force since 7 June 2023, and, among other things, also sets out requirements for the technical design of data access.

Overall, the FCO's order is intended to prevent DB from further expanding its already dominant position - its market share in long-distance passenger rail services is 90 percent - by giving preference to its own portals "bahn.de" and "DB Navigator". At the same time, the intention is to **strengthen competition for smart mobility services** (*e.g.*, combining different means of transport in one booking process). It is yet unknown whether DB will file an appeal against the decision with the Higher Regional Court of Düsseldorf.

3. News on Section 19a ARC

After the FCO established Alphabet's and Google's paramount significance for competition across markets in December 2021, several decisions under Section 19a ARC were issued against Google in the reporting period. In a warning notice dated 23 December 2022 (published in January), which was expressly formulated as an interim step, the FCO communicated its preliminary legal assessment that various **data processing conditions** should be adjusted. In particular, the FCO takes issue with Google's ability to process the data of services such as Google Search, YouTube and Google Maps across services and the lack of users' choices as to whether and to what extent they agree to this data processing.

In May, the FCO presented the final report of its **sector inquiry** into **non-search-based online advertising**. In particular, the report shed light on so-called programmatic advertising, which describes the complex automated trade in advertising space based on user data. In this respect, the FCO found insufficient transparency for market participants and the users themselves. It further emphasized that Alphabet has an outstanding position at all stages of the advertising value chain. It remains to be seen what concrete practical consequences the authority will draw from the results of this sector inquiry.

At the end of June 2023, the FCO also issued a warning against Alphabet/Google in the matter of **Google Automotive Services** and **Google Maps**. After initiating proceedings in June 2022, the Office came to the preliminary conclusion that the licensing of services for infotainment systems in vehicles was incompatible with Section 19a ARC and that a

prohibition should therefore be considered. The Google Automotive Services in question are a package consisting of Google Maps, Google Play and the Google Assistant voice assistant, which is only offered to vehicle manufacturers as a bundle and also contains specifications for prioritizing these services in the respective infotainment system. In addition, the FCO raised questions the interoperability with third-party services.

The FCO is also pressing ahead with other proceedings under Section 19a ARC. In April, the authority found Apple to have a paramount cross-market position. The FCO justified the application of the extended abuse control by Apple's operation of a global digital ecosystem and its key position for competition. After Amazon filed an appeal with the Federal Court of Justice and the first hearing took place at the end of June, Apple also appealed the FCO's decision. However, a court decision is not to be expected in the near future. The presiding judge of the antitrust panel at the Federal Court of Justice already emphasized the case's "enormous complexity".

By contrast, the proceedings against **Microsoft** have only just started. In March, the FCO announced that it would also examine the applicability of Section 19a ARC to this company. President Mundt sees the very strong market positions in operating systems, office software, the cloud services Azure and OneDrive, Teams and career networks such as LinkedIn as indications for the existence of a paramount cross-market position.

4. Proceedings against PayPal

In January, the FCO published that proceedings against PayPal had been initiated for allegedly obstructing competitors and restricting price competition. At the core of the case are the company's **terms of use**, which stipulate in particular that sellers may not offer their goods at lower prices if customers choose a cheaper payment method. They also prohibit the (visible) preferential treatment of other payment methods on the part of PayPal's contractual partner. Given that PayPal is one of the higher-priced payment providers and that the corresponding fees are usually added to the price of the goods without being shown separately, the conditions could ultimately harm consumers.

5. Delayed Market Entry of 1&1

At the beginning of June, the FCO announced that it would investigate a complaint by 1&1 against Vodafone and Vantage Towers (an affiliated company of Vodafone). Allegedly, the two companies had used their market power to hinder 1&1 in the shared use of radio towers. In December 2021, 1&1 had contractually agreed on shared use with Vantage Towers (the distributor and manager of the mobile sites owned by Vodafone). However, the actual provision is significantly delayed. As a result, 1&1 is unable to offer its own mobile communications services in a sufficiently resilient manner and to establish its position as the fourth German mobile communications provider alongside Telekom, Vodafone, and o2. The FCO will now examine whether there is an objective justification for the delay.

IV. Prohibition of Cartels

1. Fining Decision in Road Construction

In February, the FCO published a case report on fines totaling one million euros imposed on four construction companies in Dortmund. The fines for agreements in **tenders for road construction works** were already issued at the end of 2022. While the fine against a fifth company was fully waived under the leniency program, the amount of the fines was comparatively low, also due to full cooperation and comprehensive settlements. The construction companies had met for personal meetings following invitations to tender by the City of Dortmund. At these meetings, the competitors decided case by case which company should submit the most favorable bid.

The decision shows that even comparatively small companies cannot rely on remaining under the radar of the Federal Cartel Office. In addition, it confirms that **fining decisions** are showing an overall **downward trend**. After total fines of 358 million euros in 2020 and 24 million euros in 2022 (see Newsletter 2/2022), the Federal Cartel Office is heading for a new mid-year record low. President Mundt nevertheless keeps emphasizing that the number of post-pandemic dawnraids is rising steadily and that the first half of 2023 has been "promising".

2. Beer Cartel Decisions

After the 4th Cartel Senate of the Higher Regional Court of Düsseldorf acquitted the three **Kölsch breweries Früh** and **Gaffel** and our client **Erzquell** of the charge of illegal price fixing in September 2021, the Federal Court of Justice (*BGH*) has now finally confirmed in its ruling of 21 December 2022 that the **acquittals do not contain any fundamental legal errors**.

Contrary to the FCO's fining decision in 2014, the Higher Regional Court of Düsseldorf found no evidence of an anti-competitive exchange of information after 35 days of hearings and extensive questioning of witnesses. The decision at the time was rightly called a sensation, as first-class acquittals following administrative fine proceedings by the FCO were a novelty. The Federal Court of Justice has now finally confirmed this decision.

In contrast, the 6th Cartel Senate of the Higher Regional Court of Düsseldorf imposed a fine of 50 million euros on **Carlsberg** more than 9 years after the FCO's fining decision of May 2014. After the 4th Cartel Senate of the Higher Regional Court of Düsseldorf discontinued the proceedings in spring 2019 due to the statute of limitations, but the Federal Supreme Court did not consider the statute of limitations requirements to be met in an annulment decision of 13 July 2020, the case was referred back to the Higher Regional Court of Düsseldorf. The main hearing, which had initially begun in November 2022, then had to be discontinued due to the long-term illness of a member of the Senate and now came to a conclusion after 21 hearing days in May 2023.

While the Higher Regional Court took into account the long duration of the proceedings and the fact that the infringement was only committed once, the nationwide effect of the agreement had a negative impact on the amount of the fine. Nevertheless, the Court reduced the FCO's original fine by approximately EUR 12 million.

3. Sports and Competition Law

Sports law issues not only arise before the courts of the EU (for example in the *Meca-Medina* and *International Skating Union (ISU)* decisions or the still pending *European Super League* case), but are also increasingly finding their way into national antitrust case law.

In particular, the **Regional Court of Dortmund** dealt with the **FIFA Football Player Regulations** (FFAR) in May in a ruling in preliminary injunction proceedings and classified them as a hardcore cartel in the form of a price or purchasing cartel, respectively. FIFA had adopted the FFAR, a global set of rules for working with player agents, in December 2022. The FFAR are scheduled to come into force for national transactions in October 2023. The plaintiffs claimed that the regulations, which among other things provide for a general licensing obligation and submission to association statutes, are in violation of antitrust law. This was also the conclusion reached by the 8th Civil Chamber of the Regional Court of Dortmund, which prohibited the application, implementation and enforcement of the FFAR. According to the Court, the regulations do not fall under the factual restriction according to the basic principles of the three-stage model of the Meca-Medina case law of the ECJ, as the Court did not consider the FFAR to be a sports regulation from the outset. In addition, an exemption within the meaning of Article 101 (3) TFEU could not be assumed due to the lack of prevailing positive effects on competition. Also the autonomy of the association does not justify a different result. The Dortmund decision is in direct contrast to an arbitral award of the Court of Arbitration for Sport (CAS) of 24 July 2023, which is, however, not binding for state and interstate courts.

A final decision on the issue may be reached in preliminary ruling proceedings of the ECJ, which have now been initiated by the Regional Court of Mainz at the end of March 2023. The Regional Court justified the referral with the argument that the dispute may be more effectively solved by the ECJ given the worldwide scope of the FFAR.

Despite the comprehensive application of antitrust law, the **special position of sports** and football in particular becomes clear not least in the Federal Cartel Office's handling of the **50+1 rule of the German Football League (DFL)**. Antitrust concerns regarding the uniform application and enforcement of this rule were already raised as early as 2021 but remained without consequences. In the opinion of the Federal Cartel Office's President, Andreas

Mundt, the DFL's commitment of 8 March 2023, according to which the critically viewed funding exceptions for individual clubs will be eliminated for the future, may now already be sufficiently suitable to remedy the antitrust concerns.

4. Sustainability Initiatives

Sustainability cooperations were yet again subject to the FCO's activities in the first half of 2023. In May, it was made public that the animal welfare initiative **Initiative Tierwohl** would abolish the existing animal welfare fee as of 2024 following concerns expressed by the agency. This fee is a mandatory price surcharge for the buyers of participating producers. The FCO welcomes the replacement of this mandatory charge with a non-binding funding recommendation. In this context, President Mundt emphasized the possibility of finding an interest-oriented solution for financing additional costs at the interface of sustainability and competition. The cooperation, which aims to improve livestock husbandry conditions and is financed in particular by the food retailers Edeka, Rewe, Aldi and the Schwarz group, has outgrown the introductory phase and is now sufficiently established to choose a competitive financing model.

In contrast, the FCO announced in June 2023 that it sees no reason for an in-depth review in the **Forum Sustainable Cocoa** case. This sustainability initiative mainly serves to promote living wages in the production countries Ghana and Côte d'Ivoire and provides for the members of the Forum to voluntary commit to ensuring better prices for the producers. This voluntary nature, the lack of uniform price markups and the absence of sanction mechanisms were key factors in the authority's refusal to intervene.

V. Cartel Damages

As regards antitrust damages, a number of judgments were handed down in the first half of 2023 which are likely to be well received by plaintiffs. For example, there were more awards for payments of specific damages, including for the first time in the truck complex. In addition, the German Federal Court of Justice has noticeably lowered the threshold for the enforcement of claims for the disclosure of information.

1. German Federal Court of Justice on the Claim for Disclosure of Evidence

In April, the German Federal Court of Justice had the opportunity to deal in detail with the prerequisites of the **claims for the disclosure of information** as laid down in Sections 33g, 89b ARC in the context of an action brought by a private rail operator against subsidiaries of Deutsche Bahn. The provisions, which were introduced by the 9th amendment to the ARC as part of the implementation of the EU Antitrust Damages Directive intend to allow cartel victims to request information and evidence from the infringers in order to substantiate their claims for damages.

§ 33g ARC requires, among other things, that the claimant demonstrate to the satisfaction of the court that he has a claim for cartel damages. In general civil law such a *prima facie* demonstration (Sec. 294 of the Code of Civil Procedure) requires that the asserted claim is more likely than not to exist. The Federal Court of Justice considers this threshold to be too high in the context of competition law and incompatible with the requirements of the Antitrust Damages Directive. Therefore, the BGH created an **independent concept of *prima facie* evidence** for antitrust claims for information. According to the Court, it shall be sufficient that the claim is conclusively presented and that, based on concrete indications, there is a "certain probability" that the plaintiff is entitled to damages.

The ruling is likely to encourage companies that have potentially suffered antitrust damages and is expected to lead to a further increase in cases. However, it remains to be seen how the courts of instance will apply the new criterion of a "certain probability" in practice. It should also be noted that even after the Federal Court of Justice ruling, a conclusive presentation of a claim for damages is required in order to enforce the request for information. In practice, quite a few lawsuits fail because of this requirement, for example because the transactions causing the damage are not sufficiently identified (see a recent ruling of the Regional Court of Cologne of February 2023 in the context of the wallpaper cartel).

2. Far-reaching Estimation of Damages by the Regional Court of Berlin

In a series of rulings on actions against the rail cartel, the truck cartel and the EC card cartel, the Regional Court of Berlin made use of the procedural option to estimate damages itself and decided against obtaining impartial expert economic opinions. In doing so, it places itself in the camp of those courts of instance that are confident to have the necessary economic expertise to assess even complex party expert opinions themselves and to determine a specific amount of damages. Other courts, for example the Regional Courts of Cologne, Munich I, Nuremberg-Fürth or Stuttgart, are generally more reserved and rely on the expertise of court-appointed experts.

Specifically, the Regional Court of Berlin ordered some of the participants in the **rail cartel** to pay damages and based its assessment on an economic expert opinion prepared by the plaintiff. The Regional Court was unimpressed by the defendant's doubts about the suitability of the expert opinion and refrained from seeking an assessment by a court-appointed expert. According to the court, it was sufficient that the plaintiff's regression analysis was said to be an "at least possible approximation of the counterfactual scenario of a hypothetical competitive price". The doubts raised by the defendants, *e.g.* as to the suitability of the underlying data, were perceived by the court as a "demand for a 'best possible' regression analysis for the damage assessment". The court refused to obtain an objective analysis due to the cost and time involved as otherwise "antitrust damages proceedings would hardly be justiciable". This finding is all the more remarkable as several other courts of instance have had the very same expert opinion subjected to an expert assessment in various pending parallel proceedings without expressing any doubts about the justiciability of the parties' submissions.

The Regional Court of Berlin also took a similar approach in actions against the **truck cartel** and the **EC card cartel**. As far as published decisions go, this makes it the first German court to order participants in the truck cartel to pay specific damages. The proceedings relating to the EC card cartel were characterized by the additional feature that they were not based on a typical follow-on constellation. The starting point of the proceedings was a commitment decision under Section 32b ARC. Unlike decisions imposing fines, these do not contain any findings of a cartel infringement and therefore cannot have any corresponding binding effect in civil proceedings. Therefore, the Regional Court itself had to decide whether the uniform setting of ticket fees by the defendant companies constituted a violation of Section 1 ARC. The Regional Court of Berlin answered in the affirmative and also estimated damages using a before and after comparison based on the parties' expert opinions submitted. Nevertheless, the Regional Court of Berlin rejected the vast majority of the claim as being time-barred. Similar to the Regional Court of Frankfurt in the action brought by Deutsche Bahn against the rail cartel (see Newsletter 2/2022), the court assumed that the plaintiffs were aware of the illegal practices at an early stage. The companies involved in the electronic cash system were said to have been aware of the joint setting of card fees at an early stage.

3. Contrary Assessments of the Sugar Cartel

In contrast to the Regional Court of Berlin, the **Regional Court of Mannheim** conducted a comprehensive and particularly time-consuming taking of evidence when assessing claims for damages against the **sugar cartel**, including a court-appointed expert opinion and detailed questioning of the experts. On this basis, it came to the conclusion that the plaintiff had suffered damage as a result of the cartel. The economic discussion centered in particular on the cartelists' argument that, among other things, the state regulation of the sugar market, would not have allowed real competitive prices even without the cartel conduct. The Regional Court of Mannheim took this argument into account but nevertheless concluded that there remained sufficient residual competition with a scope for price-setting that would have permitted lower prices in the counterfactual scenario.

The **Regional Court of Dortmund** took a different view. It dismissed a similar claim with reference to the sugar market regulation and special features of the market structure. Alongside the rail cartel, the

sugar cartel is therefore another example of how differently the courts of instance judge seemingly identical constellations. Claimants for damages will therefore probably pay even closer attention in the future to the courts in which they file their claims. German procedural law generally allows for a variety of jurisdictions in antitrust damages actions.

4. Assignment Models subject to a Referral to the ECJ

In the first half of 2023, the question of the admissibility of assignment models in the antitrust context continued to be the subject of court decisions. As already reported in Newsletter 2/2022, several courts had denied the admissibility of such models for the bundled assertion of cartel damage claims, in particular in connection with the **log cartel**. In this set of proceedings, the Regional Court of Dortmund has now referred the question to the ECJ for a preliminary ruling as to whether European Union law and the principle of effective enforcement of antitrust law enshrined therein require the admissibility of such models if other means of legal recourse are not procedurally practicable or objectively unreasonable from an economic point of view. In the affirmative case, the corresponding provisions of the German Legal Services Act, the current interpretation of which has caused many lawsuits to fail, would either have to be interpreted in conformity with EU law or would have to remain inapplicable.

The answer from Luxembourg is eagerly awaited. It will be of great importance for the future of cartel damages actions in Germany far beyond the log cartel.

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:

Hans-Joachim Hellmann
Partner, Mannheim
Antitrust & Competition Law

T +49 621 42 57 212
E Hans-Joachim.Hellmann@sza.de

Dr. Stephanie Birmanns
Partner, Brussels
Antitrust & Competition Law | Foreign Trade Law

T +32 2 89 35 121
E Stephanie.Birmanns@sza.de

Dr. Christina Malz
Counsel, Mannheim
Antitrust & Competition Law

T +49 621 42 57 212
E Christina.Malz@sza.de

Sebastian Gröss
Principal Associate, Brussels
Antitrust & Competition Law | Commercial | Litigation & Arbitration

T +32 2 89 35 124
E Sebastian.Groess@sza.de

Fabian Ast
Senior Associate, Mannheim
Antitrust & Competition Law

T +49 621 42 57 225
E Fabian.Ast@sza.de

Silvio Cappellari
Of Counsel, Brussels
Antitrust & Competition Law

T +32 2 89 35 120
E Silvio.Cappellari@sza.de