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Major Developments in German Competition Law in July-December 2018

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Merger Control

FCO Proceedings

In 2018, as in the previous year, the German Federal Cartel Office ("FCO") examined approximately **1,300 merger notifications**. For only 13 of them, the FCO initiated so-called Phase II proceedings. It cleared four of these cases (one of them subject to conditions) while six cases are still pending. There were no prohibitions in 2018; however, three notifications were withdrawn during the in-depth investigation. Moreover, cases in which the parties abandon the merger after discussions with the FCO during Phase I or even before notification are not reflected in the statistics.

In around 25 instances, the FCO was contacted about the potential applicability of the new filing threshold based on the transaction value, which was introduced in July 2017 by the 9th Amendment to the German Act against Restraints of Competition ("ARC"). However, ultimately less than five notifications resulted from these contacts.

According to the FCO's President, Andreas Mundt, the number of cases subject to notification in Germany is still too high. At the same time, the FCO would have liked to review several transactions, which escaped regulatory scrutiny, such as the takeover of Postbus by Flixbus and some mergers in the waste management industry. Against this background, the FCO has identified the **need to fine-tune** the relevant rules, including the so-called *de minimis* market exception, which prevents the FCO from evaluating merger projects in economically insignificant markets. A recent example where this clause restricted the scope of the FCO's review was the *Cargotec/TTS Group* case (cleared in Phase II).

During the reporting period, the FCO had several opportunities to address the **relationship between brick-and-mortar and online retailing**. However, as in former cases the authority ultimately could leave open whether both distribution channels form part of the same product market. The FCO merely confirmed its previous case law regarding the sale of pharmaceutical products, according to which the relevant market comprised both stationary and online mail-order pharmacies, in *DocMorris/apo-rot*.

In the ***Karstadt/Kaufhof*** proceedings, the FCO rejected the notion of a "department store market" and instead examined a number of non-food product categories. In the course of this examination, the inclusion of online sales was not necessary as even in an isolated analysis of brick-and-mortar retailing the parties' combined market shares were below 40% and thus raised no major competition concerns. However, the FCO did recognize strong and increasing competitive pressure exerted by online retailers. Regarding the procurement markets, the parties' market shares were below the level giving rise to a presumption of market dominance. The clearance of this huge and highly complex merger (the joint undertaking will generate a turnover of more than EUR 5 billion) in Phase I was made possible through intense pre-notification discussions between the parties and the FCO, which enabled the authority to send out detailed questionnaires to other market participants still on the day of the notification.

Also within Phase I, the FCO cleared the merger between **Douglas** and **Akzente**. Again, the authority did not have to determine whether online retailing forms part of the relevant market for the sale of prestige perfumery products as the transaction also would have had to be cleared if both markets had been treated separately. Nonetheless, the FCO once more accentuated the competitive pressure exerted by online retailers.

Federal Supreme Court on Gun Jumping

In its *EDEKA/Kaiser's Tengelmann II* decision of 17 July 2018, the German Federal Supreme Court affirmed its interpretation of the ARC's rules on **gun jumping** irrespective of a certain discrepancy with the judgment rendered by the European Court of Justice ("ECJ") on 31 May 2018 in Case C-633/16 (*Ernst & Young*). The ECJ had limited the scope of the corresponding EU merger control rules to such implementing measures, which contribute directly to a change of control over the target undertaking.

By contrast, the Federal Supreme Court reiterated its stance that any action (partly) pre-emptying the intended **implementation** must be considered as gun jumping (*cf.* Newsletter 1/2018). In an effort to differentiate the situation under the ARC from that at the EU level, the Court put forward two arguments. First, German law subjects the acquisition of minority interests as of 25% and (and even lower shareholdings under the concept of a "competitively significant influence") to merger review while the EU rules are only applicable to the acquisition of control. Second, the ECJ had raised the concern that the extension of the gun jumping doctrine would unduly restrict the scope of application of the prohibition of cartels. According to the Federal Supreme Court, this aspect is not relevant in Germany since the relevant provisions of the ARC can be applied in parallel.

Common Shareholdings

On 3 July 2018, the German **Monopolies Commission** released its 22nd Biennial Report. The Report addresses for the first time the question to what extent minority stakes simultaneously held by institutional investors in competing companies require legislative and/or regulatory intervention. This discussion stems from concerns that such institutional investors, while not reaching the level of "control", may be able to exert some influence on the strategic decisions of the companies concerned. In two recent cases (*Dow/DuPont* and *Bayer/Monsanto*), the European Commission has brought up this issue – albeit in rather abstract fashion – and specifically emphasized potential negative implications for competition on innovation.

The Monopolies Commission not only refers to possible **coordinated behavior** as a potential risk to competition but is also apprehensive of **unilateral effects**, for example if a price increase by one portfolio company benefits another portfolio company as well. However, ultimately the Monopolies Commission does not recommend, at least for the time being, an extension of merger control or a fixed cap

concerning minority stakes. However, taking up the European Commission's approach, the Report suggests a separate examination as to whether the existence of indirect horizontal links due to multiple shareholdings is likely to contribute to a significant impediment to effective competition.

Foreign Investment Control

In early August 2018, after several months of examination by the Federal Ministry of Economic Affairs and Energy, the Federal Government decided to **veto** the takeover of German machine tool manufacturer *Leifeld Metal Spinning* by a Chinese investor due to concerns that the transaction would impair public safety and order. This is the first prohibition decision after the entry into force of the foreign investment review in 2004 and approximately 500 investigations. In light of the political opposition, the investor withdrew its application and abandoned the deal.

Previously, Germany had thwarted plans by a Chinese state-owned company to obtain a 20% stake in the German transmission system operator 50Hertz by having the German Development Bank acquire that stake. Not least under the impression of this case, the Federal Government **reduced** the relevant **notification threshold** for foreign investments in critical infrastructures and particularly sensitive industries **from 25% to 10%**. This change to Sec. 56 para. 1 of the German Regulation on Foreign Trade and Payments entered into force in December 2018.

Cartels

In 2018, the FCO imposed total **cartel fines** of around EUR 376 million on 22 companies and trade associations and 20 individuals. At the same time, several cartel proceedings (*inter alia* regarding pharmaceutical products and insulating materials) were closed without decision in light of insufficient evidence. The FCO received 21 **leniency applications**, representing a significant decline compared to 2017 (37) and 2015 (76). According to FCO President Mundt, this trend, which is not limited to Germany, is a consequence of the increasing number of private cartel damage claims.

Parallelism of Sec. 1 ARC and Art. 101 TFEU

In its *Almased* judgment of October 2017, the German Federal Supreme Court had mirrored EU case law by holding that resale price maintenance constitutes a hardcore infringement and, thus, a restriction of competition **by object** also under Sec. 1 ARC, with the consequence that there is no need to assess separately the appreciability of the infringement (*cf*. Newsletter 2/2017).

In a judgment of 12 June 2018 (*Bus Service Altmarkkreis*), the Supreme Court now also concurred with the ECJ's method to determine "by object" infringements through reference to the **type of restriction**, *i.e.* an objective criterion. By contrast, the parties' intentions do not constitute a necessary part of the assessment. In a further nod to EU case law, the Supreme Court called for a **narrow interpretation** of a "by object" restriction. Thus, unlike in the area of merger control (see above), the interpretation of the prohibition against cartels under German and EU law is largely in sync.

Continuation of the *Coty* Saga

In a judgment of 12 July 2018 (Coty), the Higher Regional Court of Frankfurt/Main held that a **distribution ban for third-party platforms** (in this case Amazon Marketplace) in a selective distribution system regarding luxury cosmetics is admissible. The decision is in line with the ECJ's position taken in its preliminary ruling in the same case (*cf*. Newsletter 2/2017). According to the German judges, such a ban does not constitute a hardcore restriction as long as the manufacturer permits the use of search engines or price comparison tools.

The Higher Regional Court of Hamburg had previously found that also in a selective distribution system for dietary supplements

and cosmetics a sales ban regarding certain online sales platforms (here eBay) can be admissible in order to preserve the product image and customer-oriented service (decision of 22 March 2018). On 6 March 2018, the Higher Regional Court of Dusseldorf even extended the ECJ's *Coty* principles to **trademark** law insofar as an EU trademark owner may oppose the distribution of his products, thereby preventing the exhaustion of his rights conferred by the trademark (both decisions were published during the reporting period).

Thus, the German courts clearly tend towards strengthening the position of suppliers of high-quality branded products. The FCO, by contrast, favors a narrow interpretation of the *Coty* case law. In particular, the authority maintains that the ECJ's judgment is confined to the distribution of luxury goods.

Proceedings re *Sausages* and *Special Steel*

The FCO imposed fines of approximately EUR 290 million – by far the highest penalties shelled out by the authority in 2018 – on seven **special steel** companies, a trade association and ten individuals. Most, if not all the parties concerned, cooperated with the FCO. Three other companies and a trade association, which are apparently not willing to settle, are still under investigation. This case is the latest in a long string of proceedings in the steel industry, and there is no end in sight as the FCO presently also investigates a suspected cartel in the flat steel sector. In a company statement, ArcelorMittal said that the conduct at issue extended over 30 years. Should this indeed be the case, further heavy fines are to be expected.

In a judgment of 2 October 2018 pertaining to the ***sausage cartel***, the Higher Regional Court of Dusseldorf once again significantly increased the fine for a company, this time by almost 20% compared to the FCO's verdict. The decision is also noteworthy because of the Court's extensive fact-finding – the trial lasted 44 days, and the judges heard 28 witnesses and evaluated more than 300,000 documents. As regards substance, the judges recognized the "sandwich position" of the sausage manufacturers between meat suppliers and food retailers as a mitigating circumstance in calculating the fine. This line of argument has been put forward frequently by defendants (*e.g.* by suppliers of automotive parts) but so far had been met by the courts with significant skepticism.

Turmoil in the Print Media Industry

In its ***DuMont/Bonner Generalanzeiger*** decision of 3 September 2018, the FCO imposed fines of EUR 16 million. According to the authority's findings, the two newspaper publishers had agreed reciprocally to reduce or even cease their local reporting in certain regions in favor of the other. The companies safeguarded their arrangement, which clearly amounted to hardcore market partitioning, via cross-shareholdings and a pre-emption right.

The case is noteworthy for two reasons. First, in its case summary the FCO discusses the scope of the exemption from Sec. 1 ARC for **cooperation between press companies**, which was introduced by the 9th Amendment to the ARC in order to protect media pluralism. The prevailing view is that these changes render it possible for publishers, *inter alia*, to agree on advertising prices, to allocate territories and customers and to exchange commercially sensitive information. However, the FCO now takes the opposite position and assumes that such restrictions continue to be illegal also under the new legal framework. Given that the FCO itself acknowledges the irrelevance of this aspect for the case at issue (since it had to be decided on the basis of an older version of the ARC), it seems that the authority tries to introduce its concerns – which it had voiced unsuccessfully during the legislative procedure – "through the back door" into its decision-making practice. This creates considerable legal uncertainty, especially for publishers who, relying on the new provision, already agreed on extensive cooperation.

Second, the FCO also **imposed a fine on DuMont's lawyer**. He had drawn up the contractual arrangements and was also in charge of the communication with the FCO, during which the pre-emption right had deliberately been concealed. This is the first time that the FCO sanctioned a lawyer for aiding and abetting a cartel.

Private Enforcement

During the reporting period, customers potentially harmed by cartels continued to bring massive **damage claims** before German courts. On 14 December 2018, the German Freight Transport Association and a legal service provider launched an action on behalf of more than 3,800 companies before the Regional Court of Munich relating to the truck cartel, presumably driven by concerns that otherwise the statute of limitations might apply.

Landmark Ruling on *Prima Facie* Evidence

In a groundbreaking decision of 11 December 2018 concerning the *rail cartel*, the Federal Supreme Court limited the extent to which claimants can rely on ***prima facie* evidence**. The Court held that quota-fixing and customer-sharing in themselves do not suffice as *prima facie* evidence that the cartel caused damage and that it affected individual orders. Previously, most lower courts had assumed such a concept of double *prima facie* evidence. In its December 2018 decision, the Federal Supreme Court clarified its *Grauzement II* ruling of June 2018, pursuant to which quota-fixing triggers (only) factual presumptions that damage was inflicted and individual orders were affected. The Court now explicitly distinguishes these factual presumptions from the further-reaching concept of *prima facie* evidence, which results in a reversion of the burden of proof.

The Court's ruling is likely to have far-reaching consequences for large follow-on damage cases, such as the currently pending sugar, trucks and rail proceedings. In order to determine whether any damage occurred and, if so, which orders were affected by the cartel, extensive and protracted **taking of evidence** – including expert opinions – will be indispensable. Since the Court explicitly limited its ruling to quota-fixing and customer-sharing, it remains unclear to what extent *prima facie* evidence might be derived from a (pure) price-fixing scheme. However, such constellations are rare.

It should be noted that, in the particular case decided by the Court, the damage claims were based on Sec. 33 para. 3 ARC in the version of 2005. The 9th Amendment of the ARC introduced Sec. 33a para. 2 ARC, which, in accordance with the prerequisites of the EU Damages Directive, implements a "***rebuttable presumption***" regarding the occurrence of a damage. It will be interesting to see to how the ruling of the Federal Supreme Court will influence the interpretation of this provision concerning "new cases".

Claimant-friendly Approach to Liability Issues

In yet another judgment of 22 August 2018 concerning the *rail cartel*, the Higher Court of Dusseldorf held a member of a **submission cartel** liable for an individual order that was not subject to the cartel agreement. The judges used an *a fortiori* argument based on the case law concerning so-called umbrella effects, according to which cartel members are even liable for artificially inflated prices of cartel outsiders.

A decision of 28 June 2018 by the Higher Regional Court of Munich concerning the *turnout cartel* constitutes another example of the German courts' often claimant-friendly approach. According to the court, the liability for cartel damages does not necessarily require that **individual orders** are subject to an explicit cartel arrangement. Without a factual assessment of its own, the court relied on *prima facie* evidence regarding an inflated price level which, according to the judges, also influenced individual orders that were not discussed among the cartelists. This decision seems hardly compatible with the above-

mentioned ruling of the Federal Supreme Court of 11 December 2018.

Developments on the "Passing-On-Defense"

With reference to the Federal Supreme Court's landmark *ORWI* judgment of 2011, courts continue to apply **strict standards** regarding the passing-on defense. In particular, it still appears almost impossible to rely on this doctrine in situations where the product at issue was sold to a large number of customers or was modified prior to its resale.

Furthermore, the Higher Court of Dusseldorf held that a pass-on in the sense of *ORWI* presupposes that the immediate customer operates on a **break-even basis**, with the burden of proof lying on the defendant (decision of 22 August 2018 concerning the *rail cartel*). Pursuant to the Higher Regional Court of Celle, a cartel member must prove that the pass-on did not result in disadvantages for the customer, such as a decline in demand (decision of 14 August 2018 regarding the *rail cartel*). And in two decisions concerning the *truck cartel*, the Regional Courts of Stuttgart (27 June 2018) and Dortmund (30 April 2018) held that the passing-on defense requires a sufficient **causal link** between the cartel violation and the passing-on of price overcharges. Both courts denied such causality where the downstream use of the cartelized product differs significantly from its use on the market directly affected by the cartel.

From a procedural point of view it is noteworthy that, in the view of the Stuttgart and Dortmund courts, the passing-on of a cartel overcharge does not affect the finding that a damage has occurred. Instead, the passing-on defense shall only be relevant for the subsequent determination of the exact compensation amount.

Procedural Issues

In its decision of 11 December 2018, the Federal Supreme Court also clarified several aspects regarding the **admissibility of declaratory motions**. The Court emphasized that such motions are generally inadmissible if the claimant is able to bring an action for performance. This primacy applies even if the claimant has to commission an economic expert opinion regarding the potential cartel overcharge. In the case at hand, the Federal Supreme Court considered the declaratory motion to be admissible only because the claims at issue were threatened to become time-barred.

On 3 August 2018, the Regional Court of Mainz **suspended** a cartel damage claim pertaining to the *trucks cartel* due to the fact that the defendant had brought an action for annulment of the European Commission's fining decision before the EU's General Court. The Regional Court opted to wait until the EU courts' final verdict in that matter. This appears to be the first suspension ruling in Germany. The Regional Court's reasoning is coherent with the principles developed by the ECJ in its *Masterfoods* decision in 2000 and is also endorsed in the legal literature since the findings in the fining decision are legally binding only once that decision has become final (Sec. 33b ARC). However, it must be noted that the proceedings before the EU courts usually take several years. A suspension over such a long time period may be problematic not only for the claimants but, in light of the substantial interest burden, also for the defendants.

Abuse of Dominance

Facebook and *Amazon* Proceedings

In its high-profile investigation against **Facebook**, the FCO announced a decision for early 2019. The procedural rules applicable in this case do not allow for the imposition of a fine but Facebook's business practices could be markedly affected. The FCO's concerns focus on the collection of user data generated from third sources, *inter alia* from Facebook's subsidiaries WhatsApp and Instagram. A senior official of the FCO recently described the obligation imposed on users to accept

Facebook's general terms including the consent to the transfer of such data as a "clear-cut abuse of dominance". Furthermore, the constitutional right to informational self-determination might also be impaired.

In November 2018, upon receipt of numerous complaints, the FCO initiated abuse proceedings against **Amazon**. The investigation will focus on the company's terms of business *vis-à-vis* third party sellers on its German marketplace amazon.de, especially liability provisions, choice of law clauses, rules on product reviews and the prerequisites for blocking a seller's account. FCO President Mundt referred to Amazon as a "hybrid undertaking" due to its position as a gatekeeper through its sales platform and its own retail activities. In parallel, there is also an ongoing investigation by the European Commission, which primarily concerns Amazon's collection of transaction data and the potential use of these data to the disadvantage of competing marketplace sellers.

Outlook: Reform of Abuse Control

The German Federal Ministry of Economic Affairs and Energy apparently plans to publish a draft of the **10th amendment to the ARC** in the course of 2019. In this context, the FCO intends to push for a reform of the rules on abuse control. According to President Mundt, the authority is in favor of extending the scope of the relevant provisions in a number of ways. First, the FCO would like to supplement the conventional categories of market power on the supply and purchase side with the criterion of **"intermediary market power"** in order to have a better handle on digital "gatekeepers" such as Amazon. Second, the FCO advocates for the introduction of rules addressing (digital) **"market tipping"**, *i.e.* situations where a market risks to turn permanently into a single platform market. In this scenario, the authority would like to be able to interfere even before a company reaches a dominant position based on the traditional criteria. Third, the FCO urges the legislator to extend the scope of the abuse control regime also to so-called **"enveloping" strategies**. This term describes the sequential expansion of its clout by a "super-dominant" company to other markets, in particular through the use of network effects. As an example, President Mundt mentioned Amazon's potential entry into the market for payment systems. However, it is to be noted that the FCO's reflections are still at an early stage, and the companies concerned will be able to present their views in the course of the legislative process.

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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