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MAJOR DEVELOPMENTS IN GERMAN COMPETITION LAW IN THE SECOND HALF OF 2021

Notwithstanding the Corona pandemic, the German Federal Cartel Office continued to be very active in the second half of 2021, issuing a number of interesting decisions on merger control, cartels and abuse control, as well as publishing updated guidelines. In addition, the courts have further developed their case law on cartel damage claims, in particular as regards damage calculation.

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I. Merger Control

Contrary to expectations, the increase of the domestic turnover thresholds in the course of the 10th amendment to the Act against Restraints of Competition (ARC) did not result in a significant decline in merger notifications. Instead of a predicted decrease by 30-40%, the number of notifications in 2021 fell by only 17% (to around 1,000). The number of mergers examined in Phase 2 was rather high, at 14. Of these, one (EDEKA/Real) was cleared with conditions and three were cleared without conditions. In addition, there were one prohibition decision in the media sector and five withdrawals during the main investigation. In four cases, the proceedings are still ongoing.

1. Revised Guidance on the Transaction Value Threshold

At the end of December 2021, the Federal Cartel Office (FCO) and the Austrian Federal Competition Authority published an updated version of their joint guidelines on the transaction value threshold. The guidelines take account of the experience gained by the authorities since the introduction of this additional threshold in 2017. Its significance in Germany remains quite limited – so far it has been relevant in less than 1% of all notifications.

2. Meta/Kustomer

However, the transaction value threshold is not entirely uncontroversial, as was demonstrated in the context of the planned acquisition of Kustomer by Meta Platforms (formerly Facebook). In a noteworthy decision, the FCO determined in December 2021 that the transaction was notifiable under Section 35 (1a) ARC. The target company Kustomer, a US-based provider of a cloud-based customer management platform, generated only marginal revenues of less than EUR 17.5 million in Germany. Nevertheless, the FCO found that Kustomer **had substantial domestic operations** because its services were used by corporate customers based in Germany and also involved the processing of data relating to German end customers.

The parties had vehemently denied substantial domestic activity. The FCO therefore chose the creative solution of a **separate declaratory procedure** in order to examine the relevant requirements in detail and finally adopted a formal administrative act affirming the notification obligation.

In the Meta/Kustomer proceedings the FCO has also taken a clear position on the interpretation of the referral provision of Art. 22 ECMR. In July 2021, Germany had not joined a referral request to the EU Commission submitted by a number of other EU Member States, arguing that a referral pursuant to Art. 22 ECMR requires a **notification obligation under national law** – back then it had not yet been determined that the transaction would be notifiable under the ARC.

In light of the FCO's decision, Meta submitted a notification on 11 January 2022.

3. Mergers in the Media Sector

In the only prohibition case last year, the FCO prevented the acquisition of sole control over Ostthüringer Zeitung by Funke Mediengruppe. The latter is the publisher of Thüringische Landeszeitung, whose circulation area partly overlaps with that of Ostthüringer Zeitung. Despite Funke Mediengruppe's already existing majority shareholding and joint control over Ostthüringer Zeitung, and close cooperation between the two newspapers, the FCO feared that the planned transaction would eliminate the remaining competition and further impair editorial diversity, especially in the regions around Jena and Gera. While the FCO considered the publishing cooperation between the parties to be permissible on the basis of the antitrust exemption in Section 30 (2b) ARC, it therefore objected to the editorial cooperation.

The FCO also had reservations about another publishing transaction, namely the acquisition of **Mittelhessische Druck- und Verlagshaus GmbH & Co. KG** by the **Ippen Media Group**, in the view of critical market share additions in the affected magazine and advertising markets. However, since these were de minimis markets, they fell outside the scope of the FCO's review powers.

4. Clearances in Phase 2 Proceedings

The FCO unconditionally cleared the acquisition of the ready-mix concrete producer **Ganser** by its competitor **Rohrdorfer** after an in-depth review. The parties' combined market shares were particularly high in two regional markets in the Munich area but even there remained below the threshold of 40%, which triggers a statutory presumption of dominance. The FCO also scrutinized the vertical aspects of the deal in light of Rohrdorfer's activities on the upstream cement market but ultimately did not find a significant impediment of effective competition in this regard either.

In June, the FCO had already cleared the acquisition of **Spreewaldhof** by the French Andros after Phase 2 although the parties' combined market shares for certain canned fruit products were between 40% and 50% and there was a large gap to the next competitor. According to the FCO's findings, competitors in Germany and abroad have sufficient spare capacity and also can offer additional quantities

at short notice to large customers (in particular private labels).

5. Clearances after Referrals

During the period under review, the FCO dealt with a number of cases, which originally fell into the EU Commission's competence.

A particularly noteworthy case concerned the establishment of the REKS joint venture between **K+S** and **REMEX**, a company belonging to the Rethmann Group, which was to take over the distribution of hazardous waste for underground dumping and backfilling at K+S' mine sites. Originally, EU Commission had jurisdiction to review the transaction but the FCO made a successful referral request. In order to secure clearance in Phase 1, the parties agreed to implement far-reaching "compensatory measures" during the FCO's ongoing investigation. In particular, REMEX divested its interest in Minex, a competitor of K+S'. In addition, contractual arrangements were made to dispose of certain waste streams of the Rethmann Group via Minex rather than REKS in the future and to make capacity at K+S sites available to third parties. This is an interesting development because (other than at the EU level) commitments in Phase 1 proceedings are not permitted under the ARC. It remains to be seen whether this decision signals a greater readiness of the FCO to accept ("fix-it-first") commitments "through the back door", including in particular also behavioral remedies.

The **Refresco/Hansa-Heemann** case was referred to the FCO at the parties' request with regard to the German markets, while other affected markets in the Netherlands and Poland were examined by the EU Commission. Since the FCO began its investigation immediately upon receipt of the referral request, the transaction could be cleared in Phase 1. The parties are bottlers of non-alcoholic beverages. In individual segments, they achieve significant combined market shares throughout Germany, which, however, do not reach the 40% threshold. Moreover, the FCO concluded that there is no particularly close competitive relationship between the parties and they are sufficiently constrained by competitors' free bottling capacity and the buying power of the big food retail chains.

In October 2021, the FCO also cleared the acquisition of **GABLE Holding** by **STARK Germany** in Phase 1, following a successful referral request in July. Both parties are active in the retail of roofing and cladding products. In the geographical markets defined by the FCO (circles with a radius of 30-50 km around each of the parties' locations), the combined shares were always below 40%. After a thorough investigation involving detailed questionnaires sent to 18 competitors and 120 customers, the FCO concluded that customers will continue to have sufficient supply alternatives. Again, the early start of the investigation while the referral request was still pending probably helped to dispel the authority's initial concerns still in Phase 1.

II. Prohibition of Cartels

1. Acquittals in Beer Cartel Proceedings

On 8 September 2021, the Higher Regional Court of Düsseldorf acquitted three Kölsch breweries of charges of illegal price fixing (the Erzquell brewery/Zunft Kölsch was represented by SZA). The companies had appealed against fines imposed on them by the FCO in 2014 (total fines in this case amounted to EUR 338 million).

After 35 days of hearings with numerous witnesses, the court saw no evidence even remotely confirming the FCO's allegations of an illicit information exchange. **Such acquittals on the merits are very rare.** However, the saga continues – the FCO launched an appeal with the Federal Court of Justice (FCJ).

2. Fining Decisions

With fine decisions issued in January and July 2021, the FCO concluded the proceedings in

the stainless steel cartel case, which had been going on since 2015.

In these proceedings the FCO imposed fines totaling approximately EUR 355 million on ten stainless steel producers, two industry associations and 17 individuals. According to the FCO's findings, the companies had agreed on the calculation method for scrap and alloy surcharges, which constitute important steel price components, and occasionally also on the so-called base price for stainless steel. Moreover, they had exchanged information on other competitively sensitive issues. Once again the FCO made clear its willingness to conclude proceedings through **hybrid settlements** – a settlement was reached with some of the parties while litigious proceedings were continued against other cartel participants.

During the reporting period, the FCO also issued two decisions imposing fines against the backpack manufacturer Fond Of (EUR 2 million) and the multimedia company Bose (almost EUR 7 million) for violating the ban on resale price maintenance. **Fond Of** had agreed with its authorized dealers to treat "non-binding" recommended retail prices as fixed resale prices. **Bose** was accused of coordinating with its dealers to raise the retail prices of certain products. In both cases, deviating dealers were warned by the manufacturers and in some cases also sanctioned.

In August 2021, the FCO imposed fines totaling around EUR 21 million on three manufacturers and two dealers of **musical instruments** (as well as some of their employees). They were also accused of resale price maintenance via the setting of minimum resale prices). Moreover, the FCO found compelling evidence that the dealers had also agreed among themselves on price increases for individual musical instruments.

In 2021, the FCO imposed cartel fines totaling approximately EUR 105 million (2020: EUR 338 million; 2019: EUR 848 million). The **number of leniency applications fell for the fifth consecutive year**, to just 9 (down from 13 in 2020). In the FCO's view, this decline is primarily due to the ever-increasing significance of private (follow-on) damage actions. The FCO's President Mundt has therefore repeatedly pleaded for a further strengthening of the privileged status of immunity applicants in such damage proceedings. However, it is doubtful whether the FCO will receive sufficient support for this initiative within the European Competition Network (ECN) in order to be able to initiate the necessary legislative amendment at EU level.

3. New Guidelines on Fines and Leniency

In the fall of 2021, the FCO published revised guidelines on fines and its leniency program.

In the **fining guidelines**, the calculation method was rendered somewhat more flexible but the FCO does not expect the fine level to change significantly. In addition, the guidelines now codify for the first time the possibility of taking account of pre-cartel compliance measures as a mitigating factor.

The **leniency guidelines** were updated primarily due to the fact that the 10th amendment to the ARC finally introduced an explicit legal basis for leniency programs. The revised guidelines emphasize the importance of personal statements by individuals directly involved in the illicit behavior. In addition, the FCO is now expressly required to provide information in the event of proceedings being discontinued.

4. Action against the FCO for Breach of Official Duties

In the aftermath of the crop protection cartel, the agricultural trading company BayWa brought an action for breach of official duties against the FCO and claimed damages of EUR 73 million. In the first instance, the Regional Court of Bonn had rejected this claim in a highly publicized decision (see Newsletter 2/2020). In a ruling of 21 September 2021, the Higher Regional Court

of Cologne dismissed BayWa's appeal. The court did not see the necessary connection between the (assumed) breach of duty and the claimed damage: BayWa should have **first challenged the fining decision** instead of directly filing an action for damages. For the same reason, the judges ruled that the scope of protection of Section 839 of the Civil Code, the main provision relied on by BayWa, was not affected. BayWa has apparently decided not to appeal this judgment to the FCJ. This is to be regretted as a definite clarification of the complex legal issues involved would be desirable.

5. Competition Law and Sustainability

In a number of recent statements, the FCO's President has expressed his expectation that the issue of sustainability will likely gain considerable importance also in the field of competition law. He stressed that competition is a main driver of innovation and therefore supports and supplements sustainability efforts. In this sense, the FCO has emphasized its willingness to take sustainability when assessing cooperative arrangements between competitors. However, during the reporting period, there have been no decisions by the FCO (or the EU Commission) focusing on this aspect.

III. Abuse of Dominance

1. First Decision under Section 19a ARC

Section 19a ARC, which was introduced in January 2021 with the 10th amendment to the ARC, aims at capturing instances of potentially problematic market power in the area of **"digital ecosystems"** and allows the FCO to take earlier and more effective action against practices of large digital groups that might threaten competition. The initial focus lies on determining the existence of a **"gatekeeper"** function; in parallel or in a subsequent second step, the FCO examines the existence of anti-competitive conduct.

Already during the first half of 2021, the FCO initiated proceedings under Section 19a ARC against Facebook/Meta, Amazon, Alphabet/ Google and Apple. On 30 December 2021, the authority then issued its first formal decision based on the new provision, affirming that **Alphabet and its subsidiary Google** are to be considered as gatekeepers. This finding comes as no surprise, and Alphabet also promptly waived its right to appeal. However, given the novelty of the proceedings, the details of the FCO's reasoning are interesting. Particular emphasis is placed on Google's creation of its own digital ecosystem, which enables the company to set the rules for other players (especially users and advertisers) across different markets; in this respect, the FCO attributes an **"infrastructure character"** to the services offered by Google. In addition, the authority emphasizes Google's interconnection advantages, which result from the fact that its services are offered across different markets and supplement each other, which in turn facilitates the penetration of new markets.

The FCO also relies on other criteria specifically tailored to the digital economy, including Google's diverse and wide-reaching range of internet services and software products (including numerous advertising services) and its **superior access to user information and other competitively relevant data**, which the company can use across markets for targeted advertising and the further development of its services. In addition, the FCO mentions a number of "classic" factors routinely examined in abuse proceedings, such as a dominant or at least strong market position in many areas, Google's vertical integration and its considerable financial strength. Finally, the FCO emphasizes the overriding importance of Google's search engine, which extends beyond the economic sphere to social life as a whole – according to the FCJ, this aspect also needs to be taken into account under German competition law.

The FCO's considerations clearly indicate its determination to conduct a comprehensive analysis of all relevant factors. However, there is no weighting of the individual aspects. On the basis of this decision alone, it is therefore hardly possible to draw up reliable guidelines for less straightforward cases, in which only some of the criteria mentioned are met.

The decision is limited to **five years**. In parallel to its investigation of Google's market position, the FCO had already begun in May 2021 to review Google's conditions for data processing and Google News Showcase, a news service, for their conformity with German competition law (in the Showcase matter, Google meanwhile has proposed remedies that are currently undergoing a market test).

The FCO's President has announced that the authority will issue further decisions under Section 19a ARC in the first half of 2022. In this context, he sharply criticized the currently circulating drafts of the **Digital Market Act**, pursuant to which the national competition authorities will be granted only investigative powers but no decision-making powers. In his view, the DMA must not curtail the FCO's powers to enforce Section 19a ARC. It will be interesting to see to what extent the German government adopts this view in the upcoming negotiations.

2. On the Prohibition of Discrimination

In its *wilhelm.tel* ruling of July 2021, the FCJ made an important clarification regarding the ban on discriminatory behavior by dominant companies. For the first time, the court held that a discrimination may be found even if an (objectively unjustified) unequal treatment is only **suitable** to impair the competitive position of the disadvantaged party; proof of an **actual disadvantage**, as previously required by some lower courts, was not deemed necessary. This easing of the burden of proof may considerably expand the scope of application of the ban on discrimination. It should be noted, however, that in the specific case at hand the judges found a *"significant"* unequal treatment. It is unclear whether the FCJ has lowered the requirements regarding the (potential) existence of adverse effects only for this scenario.

IV. Cartel Damages

In the area of cartel (follow-on) damage action, the courts' main focus was again on the **plaintiffs' burden of proof regarding the existence and scope of the alleged damages**. The courts are clearly trying to strike a balance between two extremes, i.e., the best possible approximation to the "competitive price" by taking into account the special circumstances of each individual case and the most time- and cost-effective enforcement of the damage claims.

It follows from the FCJ's *rail cartel* rulings that the courts must carry out a comprehensive assessment of all relevant aspects in order to determine the existence and amount of any damage. Irrespective of this guidance, the judgments of the lower courts still differ as regards the **significance of circumstantial evidence** and the extent to which the courts may assess circumstantial evidence themselves without the time-consuming and costly involvement of economic experts. However, there seems to be a certain tendency among the courts to continue relying on such economic expertise. The approach by the Regional Court of Dortmund for the judges to rely only on their own estimates (see Newsletter 2/2020) does not appear to have gained much traction so far.

1. *Truck II* Judgment of the Federal Court of Justice

In the fall of 2021, the FCJ's *Truck II* judgment of 13 April 2021 was published. In this ruling, the court further elaborates on its view that a **comprehensive weighing** of all indications speaking for and against the occurrence of a damage is required.

In this context, the judges reiterate the necessity closely to examine any regression analyses submitted by the parties but do not take a clear position as to whether such an examination must be carried out with the help of an expert. However, if the parties have submitted an expert opinion, the lower courts must not disregard this opinion without a detailed examination of the underlying data, the methodological approach and the final result. Against this background, the **involvement of court-appointed experts will likely remain necessary** in most cases where the parties submit expert opinions.

In *Truck II*, the FCJ also specifies the requirements for a successful **pass-on defense**. The Court of Appeal had rejected the defendants' arguments in this context because the cartelists were not exposed to significant damage claims by their indirect customers. The FCJ does not fundamentally question this proposition but demands specific findings on the sales markets in question and, in particular, on the use of the trucks concerned. Such an analysis had not been carried out by the lower court.

2. Higher Regional Court of Stuttgart on the Truck Cartel

In a ruling of 9 December 2021, the Higher Regional Court of Stuttgart clarified that it still considers the involvement of court-appointed experts necessary in order to evaluate regression analyses submitted by the parties. In line with the *Truck II* ruling, the Higher Regional Court also requires parties using such a regression analysis to disclose the underlying data.

Moreover, the judges rejected the often-used approach to conduct separate proceedings regarding the existence of a damage and the subsequent determination of the specific damage amount. In the court's view, such a separation leads to uneconomically long and expensive proceedings, in particular because the parties often introduce economic expert opinions at both stages.

3. Higher Regional Court of Düsseldorf on Damage Estimation

It was eagerly awaited how the 1st Senate of the Higher Regional Court of Düsseldorf would react to the free damage estimation carried out by the Regional Court of Dortmund in three proceedings relating the rail cartel, which has taken inspiration from an essay by the former Chairman of the 1st Senate, Prof. Dr. Kühnen.

Following Kühnen's recent departure, the newly composed Senate appears to be quite skeptical about such free damage estimates. This follows from an as yet unpublished reference decision in a case where SZA represents one of the appellants. In particular, the court generally does not see itself in a position to assess a plaintiff's damage claim without obtaining the **opinion of a court-appointed expert**. Moreover, other than their colleagues in Dortmund, the judges do not consider the existence of a **liquidated damage clause** in the underlying sales contract as sufficient basis to prove the existence and the specific amount of a potential damage. While the Düsseldorf court does not reject outright the option to estimate damages without an expert opinion, it requires that the type, content and scope of the cartel arrangements, *"coupled with an overall view of the other relevant facts"*, provide sufficiently strong indications that render it possible to determine whether and to what extent a damage claim is justified. In practice, such clear-cut cases are likely to remain the exception.

4. Damage Estimation by the Higher Regional Court of Celle

In a ruling of 12 August 2021 concerning the particleboard cartel, the Higher Regional Court of Celle took a different view. In this case, the court estimated the damages to be awarded to the plaintiff by comparing the average particleboard prices during the infringement

period with prices paid before and after that period, taking advantage of comprehensive price statistics compiled by a specialized industry service. Based on this analysis, the court estimated the cartel-related surcharge at 13%, which partly exceeded even the damage amount claimed by the plaintiff.

Unlike the Higher Regional Courts of Stuttgart and Düsseldorf, the court in Celle considered itself capable of evaluating (and ultimately rejecting) an expert opinion submitted by the defendant without consulting a court-appointed expert.

V. Other

1. Competition Register

At the end of 2021, the new competition register became operational. The register is maintained at the FCO and provides contracting authorities with information on whether a company must or may be excluded from **public procurement proceedings** due to their involvement in certain illegal behavior. Since 1 December 2021, prosecuting authorities have been under an obligation to report relevant wrongdoings to the register and contracting authorities may request access to this information; as of 1 June 2022, they will be obliged to make such requests. According to the FCO, some **30,000 contracting authorities** are already registered. The FCO expects a considerable amount of work and therefore has hired 30 additional employees for a newly created department.

The ARC lists a large number of violations that require registration, which apart from cartel agreements also include money laundering, corruption, fraud against public budgets, tax evasion and the withholding and embezzlement of social security contributions. In the future, violations of the new Supply Chain Act will also be covered.

In case of an optional ground for exclusion (e.g. cartel involvement), a company can be excluded from a bidding process for up to **three years**, while the period for a mandatory ground for exclusion is as long as **five years**.

Affected companies may request information about the entries concerning them and are also entitled to apply for early deletion. However, they then need to prove sufficient **"self-cleaning"**, which must include the acknowledgement and rectification of past misconduct as well as the introduction of suitable compliance measures to prevent future violations. On 25 November 2021, the FCO published guidelines in this regard as well as Practical Guidelines for the submission of cancellation requests.

2. Sector Inquiries

In the recent past, FCO has put particular emphasis on the conduct of sector inquiries. These investigations are very resource-intensive and pursue different objectives. This is exemplified by a look at three proceedings, on which the FCO reported in the second half of 2021.

The sector inquiry on **household waste** was completed in December 2021 and concerned the transport of private packaging and household waste. According to the FCO, this sector has witnessed a strong consolidation process, particularly at regional level, which has resulted in a significantly lower number of participants in public tenders. This sector inquiry is presumably connected with the newly introduced **Section 39a ARC**. Under this provision, the FCO can oblige companies to notify merger projects in certain sectors even if the conventional turnover thresholds are not met, provided that a sector inquiry has been carried out beforehand. And indeed, in the meantime the FCO has announced that it will initiate a further sector inquiry based on the aforementioned investigation that is tailored to the requirements of Section 39a ARC in order to create the conditions for an order against the Rethmann Group.

Another sector inquiry concerning the **charging infrastructure for electronic vehicles** is also motivated by competition law considerations. However, as is clear from the FCO's preliminary "status report" of October 2021, here the focus lies on **ensuring non-discriminatory market access** in a newly emerging, dynamic sector with a view to ensure nationwide coverage, reasonable prices and sufficient choice.

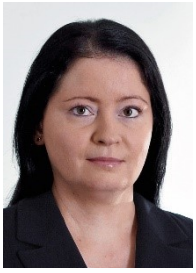
Finally, in November 2021, the FCO published an interim report on its sector inquiry in the area of **messenger and video services**. This investigation is based on the additional powers granted to the authority in the area of **consumer protection** by the 9th amendment to the ARC (2017). The FCO has already carried out a number of sector inquiries on this basis, which concerned other aspects of the digital economy. However, it is not yet possible for the FCO to take concrete measures to stop and punish violations of consumer protection law, which it has discovered in the course of these investigations. The new German government has announced that it will examine an expansion of the agency's powers in this regard.

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:

SILVIO CAPPELLARI, LL.M.
PARTNER
phone +32 2 8935 120
fax +32 2 8935 102
Silvio.Cappellari@sza.de
www.sza.de

HANS-JOACHIM HELLMANN, LL.M.
PARTNER
phone +49 621 4257-212
fax +49 69 621 4257-297
Hans-Joachim.Hellmann@sza.de
www.sza.de

DR. STEPHANIE BIRMANNS
COUNSEL
phone +32 2 8935 121
fax +32 2 8935 102
Stephanie.Birmanns@sza.de
www.sza.de



DR. CHRISTINA MALZ, LL.M.
COUNSEL
phone +49 621 4257-212
fax +49 621 4257-297
Christina.Malz@sza.de
www.sza.de