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SZA
SCHILLING, ZUTT & ANSCHÜTZ

July 2018

Major Developments in German Competition Law in January-June 2018

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Merger Control

Guidance paper on new notification threshold

In the recent past, the turnover-based merger notification thresholds in both Germany and Austria were supplemented with a threshold based on the transaction value. The new criterion is meant to enable the competition authorities to analyze mergers (especially in the digital economy) where the target company does not (yet) achieve a relevant turnover but has considerable market potential, which is reflected in the transaction value – as was, for example, the case for Facebook's takeover of WhatsApp.

In Germany, the new rule was introduced as part of the 9th Amendment to the Act against Restraints of Competition ("ARC"). The relevant provision establishes an obligation to notify if (i) the aggregate worldwide turnover of all undertakings concerned was more than EUR 500 million; (ii) the turnover in Germany of one undertaking concerned exceeded EUR 25 million; (iii) the "consideration" for the acquisition is in excess of EUR 400 million; and (iv) the target undertaking has "substantial operations" in Germany.

On 9 July 2018, the German Federal Cartel Office ("FCO") and the Austrian Federal Competition Authority published a joint guidance paper of 36 pages with the primary objective of assisting in the interpretation of the terms "consideration" and "substantial domestic operations".

As regards the issue of "consideration", the guidance paper clarifies that it comprises all assets and other monetary benefits that the seller receives from the buyer in conjunction with the transaction at issue. Besides cash payments, securities and tangible assets, this also comprises intangible assets (such as licences, rights of use and trademark rights) as well as considerations that are contingent on certain conditions (such as earn-out clauses), which may necessitate a present value calculation based on an appropriate discount rate, and the assumption of liabilities of the target company and/or the seller. Potentially due to some criticism received during the public consultation, the competition authorities explicitly left open the determination of the consideration in case of the creation of a new joint venture.

In the notification, the valuation method has to be explained and, if necessary, supplemented with a valuation report. Even if the calculations result in the absence of a notification requirement, it is strongly recommended to document diligently the calculation method used in order to prevent a gun-jumping fine – in particular if the consideration at issue is close to the statutory threshold and/or subject to strong fluctuations.

With respect to the "substantial domestic operations" criterion, the guidance paper sets out a three-step approach. First, there needs to be a local nexus, which can be assumed if customers in Germany use the target company's products and services (even if they are offered free of charge). Second, sufficient *market relevance* must be established. This is the clearly the case if the target company requests a financial consideration. However, this condition is also fulfilled if payment can only be expected in the future if the target is remunerated by non-financial means (*e.g.*, the supply of data or the consumption of advertising). Finally, the domestic activities must be *significant*. In this regard, the target company's turnover is unlikely to matter in the scenarios addressed by the new provision. Instead, other criteria such as the user numbers of an app or the access frequency of a website will be taken into account.

The guidance paper contains instructive qualitative instructions. However, the central quantitative question as of which point the domestic activities are sufficiently significant to trigger a notification obligation remains unanswered. For instance, there is no indication regarding a minimum number of app users or website accesses in Germany. Until the development of case law in this respect, the only option, which is repeatedly referred to in the guidance paper, will be informal discussions with the competition authorities.

The FCO's cooperation with the Austrian competition authority is further evidence of the authority's endeavours to enlarge its international footprint. On 19 June 2018, the FCO launched a joint project with the French *Autorité de la Concurrence* on algorithms and their implications for competition policy. In May 2016, these two authorities had already published a joint paper on the topic of "big data".

Federal Supreme Court on gun jumping

In its judgement in re *Edeka/Kaisers Tengelmann* of 14 November 2017 (the detailed reasoning was published only during the reporting period), the Federal Supreme Court decided that the prohibition to implement a notifiable transaction prior to clearance also applies to those measures, which themselves are not subject to a notification obligation but are connected to the intended merger and may bring about at least some of its effects. The case at issue concerned a framework contract between the merging parties regarding, inter alia, the procurement of goods. The FCO had extended the scope of its prohibition decision against the merger to cover also the execution of that contract, and the Federal Supreme Court now sanctioned this approach.

Relevant date for turnover calculation

According to a case report published on 29 January 2018, the FCO has raised considerable competition concerns against the intended acquisition of the British company Sepura by Hytera Communications (China). The case involved devices for professional mobile communications of administrative authorities and organisations with particular security-related duties. When the FCO's in-depth review of the transaction was already well under way, it turned out that, contrary to prior years, Sepura's audited turnover in the last business year preceding the merger had not reached the thresholds triggering the obligation to notify. In consequence, the parties withdrew their notification and implemented the transaction regardless of the

concerns expressed by the FCO. This case can serve as a reminder that the relevant year for purposes of turnover calculation must be determined by reference not to the date of the notification but rather to the envisioned implementation date.

Numerous withdrawals of notifications

During the reporting period, three more notifications were withdrawn after the FCO had started in-depth investigations. In these cases, however, the withdrawals were likely prompted by the prospect of impending prohibition orders. In each of these cases – Raiffeisen Warenzentrale/Landgard (horticulture), Horizon/Brink (trailer hitches) and Reinplus/ NWB (bunker services) –, the FCO had summarized its competition concerns in a Statement of Objections sent to the notifying parties. On this basis, the latter apparently did not see a realistic chance to change the FCO's stance or to agree on mutually acceptable remedies. Against this background, the FCO's annual merger statistics, which show only a very small number of prohibitions (*e.g.*, just one prohibition in 2016 and 2017), need to be put somewhat in perspective.

Cartels

Constitutional Court on search of law firms

On 6 July 2018, the Federal Constitutional Court rendered two decisions concerning the search of law firm offices, which have significant practical implications also for internal cartel investigations. In the case at hand, Volkswagen had retained a US law firm to assist in the internal investigation regarding the Diesel case. In March 2017, the public prosecutor's office had searched the offices of the law firm and seized various files and electronic data. Both Volkswagen and the law firm had challenged the search and seizure before the Federal Constitutional Court but were turned down. Regarding Volkswagen, the judges did not see a violation of the right to informational self-determination or of the right to a fair trial. As regards the US law firm, the court denied legal standing to lodge a constitutional complaint since – in contrast to law firms established in the EU – it could not claim protection by the fundamental rights set out in the German Constitution.

In the aftermath of these important decisions, companies organizing an internal investigation will have to take into account the risk that the offices of non-EU law firms may be raided by the public prosecutors.

Questionable fining practice of the Higher Regional Court of Düsseldorf

During the reporting period, the latent discord concerning the fining practice of Higher Regional Court of Düsseldorf has become even more acute. The concerns focus on the court's tendency to impose (heavily) increased fines in appeal proceedings against fining decisions issued by the FCO. The underlying reason is that the FCO and the Düsseldorf court use different methods when determining a fine: while the FCO starts from the turnover attributable to the competition law infringement, the court – following the Federal Supreme Court's *Grauzementkartell I* judgment – takes 10% of the worldwide group turnover as the upper fine limit. As a consequence, especially multi-product companies and large groups are facing the risk that their fines may increase significantly in case of an appeal even if they manage to rebut part of the FCO's accusations during the court proceedings.

Recently this issue drastically manifested itself in the Higher Regional Court of Düsseldorf's judgment of 28 February 2018 against the drugstore chain Rossmann for its participation in vertical concertation regarding roasted coffee. The FCO had imposed a fine of EUR 5.25 million, which the court increased, on essentially the same facts, almost six-fold to EUR 30 million. This decision fits into a

general pattern in recent years, which saw the court increasing the fines in the liquid gas cartel from EUR 180 million to EUR 244 million while the fines for appellants in the confectionery and wallpaper cartels went up by more than 40% and by 30-50%, respectively.

Against this background, criticism is mounting that the court's approach undermines the guarantee of effective judicial review pursuant to Art. 19 para. 4 of the German Constitution. Often attorneys cannot advise their clients in good faith anymore to launch an appeal against a fining decision by the FCO even if they see promising points of attack. This in turn increases the pressure to reach a settlement with the FCO – on the authority's terms.

This problematic development is currently highlighted by appeal proceedings in the context of the so-called beer cartel. In 2014, the FCO had imposed fines totalling EUR 338 million, with the largest part (EUR 222 million) attributed to the large breweries Carlsberg and Radeberger. Both companies had filed an appeal with the Higher Regional Court Düsseldorf. However, in June 2018 Radeberger withdrew its appeal at the last minute even though it explicitly reiterated that it still considered the FCO's analysis as flawed. However, given the risk that the court could increase the fine in an extreme scenario to up to EUR 1 billion, the company grudgingly took the business decision to pay the fine calculated by the FCO.

The only way to remedy this situation may be a legislative amendment, which eliminates the discrepancy between the fine calculation methods used by the FCO and the Düsseldorf court. This could be done in the context of the 10th Amendment to the ARC, which is currently prepared by the German Federal Ministry for Economic Affairs and Energy (with the main focus on the competition law implications of digitalization).

Unusual spate of aborted cartel investigations

After opening a formal investigation, the FCO rarely terminates cartel proceedings without imposing fines. However, during the reporting period this happened in no fewer than three cases initiated against insulation manufacturers, agricultural cooperatives and pharmaceutical wholesalers.

One can only speculate about the reasons underlying this apparently more cautious approach of the FCO. The authority may have been influenced by the remarkable success of one of the alleged participants in the sausage cartel, which for the first time ever achieved the complete abolition of its fine in the appeal proceedings before the Higher Regional Court of Düsseldorf. The judges particularly criticized that the evidence relied upon by the FCO was not strong enough to establish the company's involvement in the cartel under the applicable legal standard. The FCO might have taken this court defeat as a warning sign that it should only pursue cases with a sufficiently strong factual basis. Another explanation could be the "trend towards paperless cartels", which renders it increasingly difficult for leniency applicants to provide the FCO with sufficient evidence for a competition law infringement. For instance, in the course of its investigation against insulation manufacturers the FCO had received three leniency applications, which were, however, so contradictory that one alleged cartelist was able to defend itself against allegations in one of these applications through reference to opposing statements by another applicant. Finally, the FCO might simply have resource problems and therefore concentrates on cases, which appear easy to prove and/or are prone to catch public attention.

Private Enforcement

Plaintiff-friendly ruling on statute of limitations

A particular point of contention in recent years concerned the scope of application of the rules governing the suspension of the limitation period due to the initiation of a cartel investigation (Section 33h para. 6 ARC; previously Section 33 para. 5). More precisely, there were diverging court decisions as to whether the suspension also applies to "old" claims already in existence before Section 33 para. 3 ARC entered into force in July 2005, which for the first time codified liability for cartel damages. In view of the absolute limitation period of ten years, these claims would have been subject to the statute of limitation on 30 June 2015 at the latest.

In its *Grauzementkartell II* judgment of 12 June 2018, the Federal Supreme Court held that the suspension of the limitation period also applies to such "old" claims. The judges based their ruling on the general principle under German law that amendments to any provision regarding the statute of limitations also applies to claims, which already existed prior to the amendment and were not time-barred at that point. Hence, the court confirmed its tendency towards a plaintiff-friendly approach, which had already manifested itself in the *Lottoblock II* decision of July 2016 regarding the standard of proof in cartel damage cases.

The *Grauzementkartell II* judgment is likely to lead to a series of additional cartel damage claims. In the run-up to the judgment, several alleged cartel victims had indicated that they would bring damage suits in case the Federal Supreme Court assumed a retroactive effect of the suspension.

Access to the fining decision

Section 33g ARC, which was introduced by the 9th Amendment to the ARC in June 2017, establishes a substantive right (for both claimant and defendant) to the disclosure of evidence and other relevant information. Pursuant to Section 89b para. 5 ARC, any potential victim of a cartel can obtain a preliminary injunction ordering an alleged cartelist to surrender the fining decision of a competition authority if the conditions set out in Section 33g ARC are fulfilled. In a decision of 3 April 2018, the Higher Regional Court of Düsseldorf made a number of important statements regarding the scope of these provisions.

According to the Düsseldorf court, Sections 33g and 89b para. 5 ARC apply only to cartel damage claims, which arose after the 9th Amendment to the ARC had entered into force; thus, according to the court there is no retroactive effect regarding claims already in existence prior to this date. This interpretation, which also applies to disclosure rights of alleged cartel participants pursuant to Section 33g ARC, appears highly questionable from a practitioner's point of view.

Moreover, while the judges left open whether Section 89b para. 5 ARC refers to the confidential or non-confidential version of the fining decision, they made clear that the provision solely establishes a right to the surrender of the fining decision as such and does not extend to documents or other pieces of evidence mentioned therein. Finally, the court held that Section 89b para. 5 ARC may already be invoked isolated proceedings prior to bringing the main damage action. However, according to the court the presumption of urgency inherent in Section 89b para. 5 ARC is rebutted if the applicant does not pursue interim relief within four weeks.

Abuse of Dominance

Important court ruling on "marriage rebates"

In a ruling of 23 January 2018 the Federal Supreme Court provided eagerly anticipated clarifications regarding the scope of application

of the ARC provisions, which prohibit companies with a dominant market position or superior market power from using their clout to extract advantages from other companies without an objective justification.

In the case at issue, the food retail chain Edeka had requested so-called marriage rebates from its suppliers following the acquisition of the discounter Plus. The FCO started an investigation, focusing on Edeka's demands *vis-à-vis* four producers of sparkling wine, and in 2014 found several competition law infringements. In particular, the FCO opposed Edeka's request to be granted the same purchasing conditions as Plus if those were better than its own and the demand that the suppliers should make financial contributions to the modernization of Edeka's sales outlets/stores.

Contrary to the Higher Regional Court of Düsseldorf, the Federal Supreme Court confirmed the FCO's decision in large parts. The judges maintained that a flagrant imbalance between performance and consideration creates the presumption of a lack of an objective justification and, thus, of anti-competitive behavior. In particular, the request for a financial contributions without secured consideration was seen as abusive. The court also rejected Edeka's argument that a competition law infringement in this context presupposes the request to be better treated than other customers. Finally, the judges took issue with the fact Edeka engaged in some kind of cherry-picking when it demanded the transfer of particularly advantageous purchasing conditions granted to Plus for some products without taking account of the overall deal between Plus and the suppliers in question. These findings of the Federal Supreme Court can be expected to have far-reaching consequences for future negotiations between the food retail chains and their suppliers.

No excessive pricing case against Lufthansa

Following the insolvency of Air Berlin in the autumn of 2017, the FCO received numerous complaints against price increases by Lufthansa and its subsidiary Eurowings on a number of intra-German routes. According to some press reports, the price hikes amounted to as much as 300%. The FCO therefore started an informal investigation comprised of two steps. First, the authority compared the airfares charged by Lufthansa/Eurowings immediately after Air Berlin had ceased its operations to the companies' rates on the same routes in the autumn of 2016. Second, the FCO also looked at the prevailing price levels in February 2018 after Britain's easyJet had bought 25 Air Berlin aircraft and the associated starting and landing slots.

The FCO found an average increase of the airfares by 25-30% in 2016/2017. However, in early 2018 the rates had gone back to the level of autumn 2016. Based on these data, the FCO decided against the opening of formal proceedings. In the authority's view, the price increase was only of a transitional nature, and the rates would have gone up to some extent irrespective of the number of remaining suppliers due to the capacity crunch caused by Air Berlin's insolvency.

The FCO's approach can be seen as evidence of the general reluctance of competition authorities, including the European Commission, to take up cases potentially involving excessive pricing. This is understandable in view of the complexities inherent, e.g., in price-cost comparisons and the potential need for ongoing price controls following the finding of an illicit pricing strategy. However, at the same time this lenient attitude grants considerable leeway to dominant companies, which may look disconcerting to some from a competition policy perspective.

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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