CLIENT INFORMATION

SZA
SCHILLING, ZUTT & ANSCHÜTZ

January 2020

Major Developments in German Competition Law in July-December 2019

By Silvio Cappellari, LL.M. and Dr. Stephanie Birmanns

The second half of 2019 saw a wealth of interesting developments in German competition law, which are summarized in this newsletter. In addition, we will discuss the most important changes, which according to a draft first published on 7 October 2019 and revised on 24 January 2020 are to be introduced with the next amendment of the Act against Restraints of Competition ("ARC").

Merger Control

Statistics

In 2019, the Federal Cartel Office ("FCO") examined around 1400 notified concentrations. In 14 of these cases, an in-depth investigation was carried out. So far, only one of these mergers was approved (without conditions). In four cases, (*Miba/Zollern*, *Heidelberger Druckmaschinen/MBO, Remondis/DSD* and *Loomis/Ziemann*) prohibitions were imposed; in five proceedings, the parties withdrew their notification; and in the remaining four cases, the FCO's investigation is still ongoing.

Ministerial approval in the *Miba/Zollern* case

As reported in Newsletter 1/2019, the FCO had prohibited the creation of a joint venture between the bearing manufacturers Miba and Zollern in January 2019.

The parties thereupon applied to the Federal Minister of Economic Affairs, Peter Altmaier, for a ministerial approval. Contrary to the recommendation of the Monopolies Commission, he granted such an approval on 19 August 2019 subject to a number of conditions and an investment obligation. This marks only the **ninth ministerial approval** (with 23 applications to date) since this instrument was introduced in 1973.

As the main argument, the Minister emphasized the positive effects of the planned joint venture for the energy transition in Germany. However, the ministerial approval can rather be seen as clear evidence of the Ministry's efforts to take a **stronger industrial policy approach** to merger control. In the recent past, the Ministry has increasingly pursued this approach on an EU level as well, especially after the ban on the *Siemens/Alstom*

merger in February 2019. Against the backdrop of continuing political pressure, Competition Commissioner Vestager recently announced a revision of the European Commission's guidelines on geographic market definition, probably as a first step towards a more politicized merger control.

Prohibition in the *Loomis/Ziemann* case

On 18 December 2019, the FCO prohibited the acquisition of all shares in Ziemann, the second largest **cash service provider** in Germany, by its Swedish competitor Loomis. The business operations of both companies include, in particular, the transport of coins and paper money on behalf of credit institutions, the processing of money in cash centers as well as the filling and maintenance of ATMs. In the FCO's view, the acquisition would have led to a significant impediment of competition in several highly concentrated regional markets where Loomis/Ziemann and the market leader Prosegur would have had joint market shares of around 80% post-merger. In the FCO's view, the commitments offered by the companies (including the sale of customer contracts and the associated infrastructure in the respective regional markets) were not suitable to eliminate the competition concerns. In particular, the FCO's market test showed that customers were reluctant to switch to another service provider, and in any case often considered the market leader Prosegur as their best alternative.

Competitively significant influence

In a decision of 26 August 2018, the Higher Regional Court of Düsseldorf stated that generally neither the acquisition of 9.15% of the shares nor the right to appoint one out of 20 supervisory board members conveys a competitively significant influence within the meaning of Section 37 (1) no. 4 ARC, which would trigger an obligation to notify. However, it is to be remembered that, in particular in the energy sector, the FCO has assumed the existence of competitively significant influence even in case of significantly lower shareholdings (in some cases even below 5%). The Higher Regional Court presumably did not want to challenge this case law. Therefore, despite the obvious disadvantages in terms of legal certainty, a **case-by-case assessment** will continue to be required, especially taking into account the superior financial strength and/or specific industrial know-how of the minority shareholder.

No right of appeal for target companies

In a decision of 10 July 2019, the Higher Regional Court of Düsseldorf stated that the **target company is not entitled to challenge a merger clearance decision** by the FCO. The specific case at issue concerned the increase of a minority shareholding to more than 25% and the associated acquisition of a blocking minority under German corporate law. The Higher Regional Court rejected the target company's appeal against the FCO's clearance as inadmissible on the ground that the parties to the merger are not covered by the protective purpose of the merger control rules. This decision represents an important clarification of the Federal Supreme Court's case law on the admissibility of appeals in merger proceedings.

10th amendment to the ARC

In the area of merger control, the primary objective of the 10th amendment to the ARC is to enable the FCO to focus on the most relevant mergers in terms of competitive impact. Against this background, the draft legislation provides for two important **changes to the notification thresholds**.

First, it is suggested to double the second domestic sales threshold from EUR 5 million to **EUR 10 million**.

Second, the so-called *de minimis* clause (*Bagatellmarktklausel*), which provides for a notification requirement but does not give the FCO the power to prohibit concentrations, shall be amended in two respects. On the one hand, the relevant threshold for the market-wide minimum turnover of EUR 15 million shall be

raised to EUR 20 million. At the same time, however, the possibility of considering several *de minimis* markets together and to treat them as one integrated market shall be codified for the first time. The FCO has developed extensive case law on this issue (so-called "bundle theory") but the authority's approach has often been criticized as inconsistent and, thus, unpredictable.

The revised draft legislation of 24 January 2020 also suggests the introduction of a new Section 39a, which might have a major impact on the FCO's review powers. Pursuant to the new provision, the FCO shall be empowered to request a company with a worldwide turnover of more than EUR 250 million for a period of three years to notify any merger in one or more specific economic sectors where the FCO sees indications that further concentration may be harmful to competition. An exception should only apply if the target company achieved total sales of less than EUR 2 million or if it generates more than one third of its revenues outside of Germany. According to the explanatory notes accompanying the draft legislation, the new provision is supposed to capture cases where an already powerful company gradually takes over small competitors, where a sector inquiry by the FCO has brought up competition concerns or where "mavericks" in already concentrated markets are being acquired. It will be interesting to see whether this new approach will survive the legislative process as it is difficult to reconcile with the existing system of German merger control.

Cartels

Statistics

In 2019, the FCO imposed fines of approximately **EUR 848 million** for illegal cartel activity. Via the FCO's leniency program, 16 companies have provided the FCO with information on infringements in their industry. This marks a further decline in leniency applications for the third year in a row. This development primarily stems from the increased risk of private antitrust damage claims following the implementation of the EU Damages Directive of November 2014, which affects all cartel participants including leniency applicants.

Court Decisions

During the review period, the Federal Supreme Court published two decisions, which heavily criticized the Higher Regional Court of Düsseldorf for procedural errors. First, the Federal Supreme Court overturned rulings by the Higher Regional Court against various **confectionery manufacturers**, in which the court had increased the fines from EUR 14 million to EUR 21 million. The Federal Supreme Court considered the assessment of evidence by the court to be incomplete as there was no discussion of the statements of the companies concerned during the court hearing. The Federal Supreme Court considered this deficiency as so serious that it also overturned judgments against those companies that had not lodged an appeal. Second, in the case of the drugstore chain **Rossmann**, which had seen its fine increased by the Higher Regional Court of Düsseldorf from around EUR 5.5 to 30 million, the Federal Supreme Court found an absolute ground for appeal (*absoluter Revisionsgrund*) due to the fact that the Higher Regional Court of Düsseldorf had not filed its judgment of 28 February 2018 within the statutory eleven-week period. Another senate of the Higher Regional Court of Düsseldorf will now have to restart both proceedings.

Furthermore, in a decision concerning the wallpaper cartel, the Federal Supreme Court clarified that the **limitation period for price cartels** only starts once that goods covered by the illicit price arrangements are no longer available on the market.

Decisions of the FCO

In November, the FCO imposed fines of EUR 100 million on German car manufacturers for anti-competitive practices in the **purchase of long steel products**. The FCO found that the

OEMs had agreed on the adherence to a uniform calculation method for scrap and alloy surcharges, thereby eliminating competition among themselves with regard to these essential price components.

In December 2019, the FCO imposed fines of around EUR 646 million on a number of steel manufacturers, also for anti-competitive coordination on the calculation of surcharges (in this case for **quarto plates**).

Finally, it is worth mentioning that in November, the FCO dropped proceedings against **packaging companies for potatoes and onions** after it had already imposed fines of EUR 13.2 million on two companies and their responsible employees for price fixing in May 2018. In the so-called interim proceedings triggered by the companies' appeals, the FCO had conducted further investigations, which resulted in a reassessment of the gravity of the infringements and, ultimately, the discontinuation of the proceedings. This was one of the rare instances, the FCO revised its own decision upon appeal of the parties.

10th amendment to the ARC

The draft legislation provides for a number of far-reaching changes in the area of cartel proceedings. While it does not explicitly address the controversy whether the **upper fine limit of 10 %** of the worldwide turnover set out in the ARC is meant as a cap (as the FCO claims) or rather as the upper end of the fine range (as the Federal Supreme Court and the Higher Regional Court of Düsseldorf maintain), the explanatory notes refer to the Federal Supreme Court's *Grauzement I* decision of 2013 and thus seem to side with the courts. It remains to be seen whether the FCO will amend its fining guidelines accordingly.

Moreover, the draft legislation codifies for the first the **criteria for setting fines**. Starting from the ARC's existing reference to the duration and gravity of the infringement, the draft closely follows the approach in the FCO's Fining Guidelines and the ECN+ Directive (EU) 2019/1. As particularly important factors for assessing the gravity of the offence, the draft mentions the nature of the infringement, the affected turnover, the importance of the products and services concerned, previous cartel infringements by the cartel participants and their behavior after the infringement (*e.g.* efforts to detect and compensate for damages as well as compliance measures taken post-infringement). However, the draft does not elaborate on the respective weight of these factors and does not comment on the FCO's approach to take the cartel-affected turnover as starting point for the fine calculation. Thus, it is to be feared that the tension between the FCO and the Higher Regional Court of Düsseldorf as regards the doctrinal framework of the fine calculation will remain, with all its negative consequences for legal certainty and the companies concerned.

For the first time, the draft legislation also codifies a **leniency program** for horizontal cartel arrangements, which closely mirrors the FCO's existing leniency guidelines. However, the draft legislation specifies the scope and gradation of any fine reductions. Moreover, the new rules shall apply only to FCO proceedings so that the Higher Regional Court of Düsseldorf can continue to assess the cooperation of companies completely differently from the authority. Again, the negative impact on legal certainty is obvious.

Finally, the draft legislation softens the **absolute period of limitation** of 10 years laid down in the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*): In the future, it shall be extended by the period during which the fining decision is subject to appeal proceedings. The practical consequences of this amendment will be considerable.

Cartel damages

Publications of the FCO

In a ruling of October 8, 2019, the Federal Supreme Court stated that it is permissible for the FCO in its fining decisions, press releases

and case reports on cartel cases to **identify companies**, which were involved in the offence but ultimately **not fined**. The Court relied in this respect on the purpose of Section 53 (5) of the ARC, which consists, *inter alia*, in improving the position of potential cartel victims in follow-on damage actions. The Federal Supreme Court's decision is an important clarification at least for the specific scenario at hand where the FCO had discontinued the proceedings against one of the cartel participants for discretionary reasons. However, the ruling does not seem to touch on the situation that an FCO publication covers two or more separate cartels and lists a company, which had participated in only one of the infringements, without qualifying that company's lack of involvement in the other cartel. Thus, legal uncertainty remains in this important area.

10th amendment to the ARC

As described in our Newsletter 2/2018, in a landmark ruling on the rail cartel in December 2018 the Federal Supreme Court had found that quota-fixing and customer-sharing in themselves do not suffice as prime facie evidence but only trigger factual assumptions that the cartel caused damage and that it affected individual orders. In the aftermath, numerous lower court judgments particularly on the rail and truck cartels showed a considerable divergence in the interpretation of the Supreme Court's decision, which was seen as more defendant-friendly than most of the prior rulings. It is against this background that the draft legislation for the 10th amendment to the ARC now provides for a new provision (Section 33a (5) ARC), which introduces a **rebuttable presumption** that all transactions falling within the material, geographical and temporal scope of a cartel **are affected by that cartel**. The corresponding reversal of the burden of proof goes even beyond the prima facie evidence propagated by the Higher Regional Court of Düsseldorf and a number of other courts, which "only" required the cartelists to demonstrate an atypical course of events.

If adopted, the new provision will supplement the legal presumption for the existence of a causal link between a cartel and damages suffered by the cartel victims laid down in Section 33a (2) ARC, which was already introduced with the 9th amendment to the ARC. The suggested approach is testament to a more plaintiff-friendly policy intended to facilitate successful claims for cartel damages. While it does away with the legal uncertainty created by the Federal Supreme Court's ruling, the downside is an increased risk of **free-riding**. Importantly, Section 33a (5) ARC will only be applicable to claims that arise after the 10th amendment to the ARC has entered into force – thus, damage proceedings already pending at that time will remain unaffected.

The draft legislation also deals with a number of rulings issued by the Higher Regional Court of Düsseldorf, pursuant to which the duty to hand over evidence and to provide certain information in follow-on damage action, as introduced with the 9th amendment to the ARC, does not apply to claims that arose before the amendment came into force. The draft takes the opposite position and maintains that the **additional procedural obligations** are applicable independently of the time when the asserted damage claims arose.

Abuse of Dominance

Facebook

On February 6, 2019, the FCO had prohibited Facebook to impose certain conditions on private users for the use of its social network in Germany (see Newsletter 1/2019). Facebook immediately lodged an appeal against the FCO's decision and also applied for **interim measures**. The Higher Regional Court of Düsseldorf issued the requested order for suspensive effect by decision of 26 August 2019 and on that occasion also made a number of general statements, which may well prejudge the outcome of the main proceedings.

In particular the Higher Regional Court stated, contrary to the FCO's view, that the existence of an **exploitative abuse** to the detriment of the Facebook users cannot be derived solely from a potential violation of data protection law. In addition, the judges demanded a causal link in the sense that the dominant company can enforce its (allegedly abusive) general business terms only because of its market power. The court expressed serious doubts as to the causality regarding the consent to be given by Facebook's users upon their initial registration. In any event, the court held that the FCO had not met its burden to provide evidence on this point.

The judges dealt in somewhat less detail with the FCO's finding that Facebook had also committed an **exclusionary abuse** to the detriment of competing operators of social networks. However, they concluded that the FCO's order to prohibit Facebook from collecting, linking and using the data in dispute is inappropriate as a remedy in case that the user does not give its specific consent to this use of his data.

Amazon

In November 2018, following up on numerous complaints by merchants, the FCO had initiated fine proceedings against Amazon on suspicion of the use of abusive terms and conditions on the German marketplace amazon.de (see Newsletter 2/2018). In this context, the FCO's President Mundt had referred to the *"**problematic hybrid function**"* of Amazon as *"gatekeeper"* of its own platform on the one hand and as a merchant on the other hand.

In July 2019, Amazon responded to the FCO's concerns by committing itself to substantial revisions of its terms and conditions for third-party merchants on all its online marketplaces. In particular, Amazon accepted liability for intent and gross negligence as well as for the violation of essential contractual obligations. In addition, Amazon's previously unrestricted right to terminate and block the accounts of merchants with immediate effect and without giving reasons will be defined more narrowly, and the company must now observe a period of 30 days for ordinary terminations. Furthermore, the so-called "**parity requirement**" is no longer applicable, according to which merchants had to provide Amazon marketplaces with product-related information materials that was of the same quality as the materials they used in other distribution channels. Finally, Amazon agreed gradually to open its internal evaluation program "Vine" to those merchants who are owners of a trademark registered with Amazon.

In return for Amazon's concessions, the FCO **closed** its proceedings without imposing a fine. A parallel investigation by the European Commission, which focuses on the collection and use of transaction data by Amazon to the detriment of competing marketplace traders, is still ongoing.

Deutsche Bahn

In November 2019, the FCO initiated administrative proceedings against Deutsche Bahn regarding the sale of tickets via so-called **mobility platforms**. On such platforms, travellers can request information and compare means of transport and book tickets. The FCO's investigation focuses on the question whether Deutsche Bahn imposes undue restrictions on mobility platforms with regard to their advertising. Moreover, the authority examines allegations that Deutsche Bahn tries to prevent the platforms from granting discounts on DB tickets. Finally, it aims to clarify to what extent mobility platforms must be given access to real-time departure and delay data.

10th amendment to the ARC

The draft legislation for the 10th amendment to the ARC provides for three far-reaching changes in the area of abuse control:

First, by means of a new provision (Section 18 (3b) ARC) the draft extends the definition of dominance by including the concept of **"power**

of intermediation". This change aims to take account of the increasing importance of intermediaries (typically multi-sided digital platforms) and the brokerage services they provide regarding the access to procurement and sales markets as users of such platforms often depend on the most advantageous "listing" possible.

Second, as regards the prohibition of an abusive refusal to grant access (Section 19 (2) no. 4 ARC) it is clarified that the scope of this provision also covers the **refusal of access to data, platforms or interfaces**, as well as the refusal to license intellectual property rights. The focus of this proposed amendment lies on cases where such access or licensing is objectively necessary in order to operate on an upstream or downstream market. The proposal, which finds its doctrinal basis in the *Oscar Bronner* judgement of the European Court of Justice of 1998, clearly aims at the peculiarities of the digital economy.

Finally, the draft legislation provides for a new legal ground in Section 19a of the ARC, which is intended to enable the FCO to exercise more effective control over digital groups with an ***"outstanding cross-market significance for competition"*** in an effort to protect competition in markets not yet dominated. In this respect, the draft provides for far-reaching and broadly defined powers of the FCO, which may prohibit discriminatory and obstructive behavior as well as the use of data to raise barriers to market entry. While it shall be possible to provide an objective justification for such restrictions, the burden of proof in this respect shall lie squarely on the addressees of the provision.

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.
+32 2 8935 120
silvio.cappellari@sza.de

Hans-Joachim Hellmann, LL.M.
+49 621 4257 212
hans-joachim.hellmann@sza.de

Dr. Stephanie Birmanns
+32 2 8935 121
stephanie.birmanns@sza.de

Dr. Christina Malz, LL.M.
+49 621 4257 212
christina.malz@sza.de