NEWSLETTER
ANTITRUST

SZA
SCHILLING, ZUTT & ANSCHÜTZ

JULY 2020

MAJOR DEVELOPMENTS IN GERMAN COMPETITION LAW IN THE FIRST HALF OF 2020

Even though the first half of 2020 was in many aspects dominated by the COVID-19 pandemic, there were many interesting developments in German competition law. For example, the Federal Supreme Court took a surprisingly clear stand in favor of the Federal Cartel Office in the Facebook case. We will report on this and other important decisions below.

I. Merger Control

1. Court Decisions

Following the admittance of the appeal in the *CTS Eventim* case, the path is clear for the Federal Supreme Court to clarify in how far the **strengthening of a dominant position** needs to be **significant** in order to justify a prohibition decision. The issue has been the subject of controversy ever since the SIEC test was introduced into the Act against Restraints of Competition ("ARC") in 2013. In particular, the Higher Regional Court of Düsseldorf and the Federal Cartel Office ("FCO") assume that the creation or strengthening of a dominant position as such amounts to a significant impediment to effective competition within the meaning of Section 36 (1) ARC. They refer in particular to the legislative documents according to which the courts' previous case law concerning the criterion of the creation or strengthening of a dominant position shall continue to apply. This case law does not require any significance. On the other hand, legal scholars argue that a prohibition according to the current version of Section 36 (1) ARC always requires significance. Since the prohibition threshold requires a significant impediment to effective competition, there must also be a significant strengthening of a dominant position. Now, the Federal Supreme Court will have the chance to rule on this important question.

2. FCO Proceedings

In the first half of 2020, the FCO largely succeeded in dealing with ongoing merger control proceedings as usual. The Act on Mitigation of the Consequences of the COVID-

19 Pandemic in Competition Law of 25 May 2020 extended the review periods for mergers notified between 1 March and 31 May 2020 by one month for the first phase and by two months for the second phase. However, the FCO only made sporadic use of the extended deadlines; the vast majority of projects were cleared in the first phase after (significantly) less than one month.

In the first half of 2020, the FCO closed three **in-depth investigations**. It approved one concentration without and one with ancillary provisions; one application was withdrawn by the notifying parties:

- In April 2020, the FCO unconditionally cleared the acquisition of **Vossloh's shunting locomotive division** by the **Chinese CRRC Zhuzhou Locomotives**, which had already been notified in September 2019. In order to be able to reflect the expected fluctuation of market shares over a forecast period of five to ten years, the FCO had examined a set of several conceivable scenarios of market developments. In the end, the FCO did not find evidence that the deal would significantly impede effective competition. The main reasons for this were the declining competitiveness of Vossloh locomotives, the low presence of CRRC in the European market for shunting locomotives, and the market entry of established rail technology manufacturers such as Alstom, Stadler and Toshiba with innovative drive technologies.

  In the course of its review, the FCO also paid close attention to possible effects of a major European supplier being taken over by a state-owned Chinese company (CRRC is a subsidiary of the state-owned China Railway Rolling Stock Corporation). Considerations regarding potential Chinese subsidies, the technological and financial resources of the parent company, and the strategic advantages resulting from other state-owned shareholdings played a role in the competitive assessment. Other market participants had particularly expressed concerns about possible low-price and dumping strategies. However, the review revealed the limits of assessing the specific concerns regarding take-overs by state-subsidized or state-owned companies under merger control rules. The EU Commission is now trying to close this regulatory gap with its White Paper on competition-distorting subsidies from third countries published in June 2020.

- In March 2020, the FCO approved the acquisition of the 53 German **Cinestar cinemas** by the **Vue Group** subject to conditions. The Vue Group previously operated 31 cinemas in Germany, most of them under the CinemaxX brand. With regard to some of the regionally defined cinema markets, the FCO had doubts as to whether cinemagoers would still have sufficient alternative options post-transaction. The parties to the merger therefore undertook to sell a total of six cinemas. On the demand side, i.e. in relation to the film distributors, the FCO did not have serious competitive concerns. Even though the merger created the leading cinema operator in Germany, the FCO considered the high degree of concentration on the supply side sufficient to counterbalance the combined entity's buyer power.

- **Edgewell Personal Care Company** and **Harry's Inc**. abandoned their transaction in February 2020. Following a detailed investigation the FCO had come to the preliminary conclusion that the conditions for a prohibition were met on the German market. Due to "significantly" different market characteristics (such as distribution channels, availability and prices), the FCO had assumed a separate product market for wet razors sold under private labels. Interestingly, the FCO came to the preliminary conclusion that the merger would significantly impede effective

competition not only based on unilateral effects but also through coordinated effects.

In addition, the reporting period saw a series of noteworthy **approvals in the first phase**:

- With regard to market definition, the FCO continued its practice of leaving open, whenever possible, the question of whether **brick and mortar and online outlets** belong to one and the same product market. In the case of the takeover of *Mayersche Buchhandlungen* by *Thalia*, the FCO at least expressly stated that, although there were some indications that the markets were not fully interchangeable, there was strong substitution between online and mail-order business on the one hand and stationary bookstores on the other. In the *Signa/SportScheck* proceedings, the FCO also diagnosed substantial competitive pressure from online retailers in the retail trade with sports and outdoor articles.
- Unlike in the case of wet razors, the FCO left open, whether **private labels and branded products** belong to the same product market when it comes to nut-nougat-spreads. The merger of the *Krüger Group* with the *Peeters Group* to form by far the largest German contract manufacturer for nut-nougat-spreads did not raise any serious concerns. The main reasons were the overarching importance of the "Nutella" brand, which also limits the ability to set prices for private labels, and the supply-side flexibility of other manufacturers.
- In a case report on the acquisition of *Honey Science Corp.* by *Paypal* in 2019, which was published in 2020, the FCO took a closer look at the **transaction value threshold** of Section 35 (1a) ARC. According to the FCO, this was a textbook example where the competitive and economic potential of the target company was not (yet) reflected by domestic sales. At the same time, a considerable number of domestic consumers used the target's free internet-based services. In this context, the FCO pointed out, *inter alia*, that although Honey Science Corp. had hardly actively developed its German business so far, it had the necessary financial resources to quickly roll out its transaction platform in Germany, especially since the business model was influenced to a considerable extent by indirect network effects on both sides of the two-sided market.
- Finally, the FCO approved a number of **hospital mergers** during the review period. Among them the acquisition of *Rhön-Klinikum AG* by *Asklepios* and a further acquisition by the Fresenius Group's *Helios*, the largest private hospital operator in Germany. Despite the ongoing consolidation, the FCO prohibited just very few hospital mergers in recent years. More precisely, only seven out of 323 hospital mergers examined since 2003 were blocked. It remains to be seen what degree of concentration the hospital landscape will reach before this practice changes. At least health care experts seemed to agree that the high number of intensive care beds - possibly called into question by a continuing consolidation - is an important factor in the so far successful German response to the COVID-19 pandemic.

II. Abuse of Dominance

1. Facebook

In February 2019, the FCO prohibited Facebook under the general clause of Section 19 (1) ARC to use conditions which made the use of its social network dependent on the extensive collection and processing of user data by Facebook (see our Newsletter 1/2019). With regard to the abusiveness of the **terms and conditions** used by Facebook, the FCO had primarily taken into account a violation of the principles of the GDPR based on market power.

In August 2019, in a much-discussed decision the Higher Regional Court of Düsseldorf ordered the **suspensive effect** of the complaint filed by Facebook against the FCO's decision. The court had serious doubts as to the existence of an exploitative or exclusionary abuse (see our Newsletter 2/2019).

In an equally spectacular decision of 23 June 2020, the Federal Supreme Court overturned the decision of the Higher Regional Court of Düsseldorf and rejected Facebooks' request to order the suspensive effect. In the Federal Supreme Court's view, there is no serious doubt that the terms and conditions contested by the FCO are abusive. Contrary to the Higher Regional Court of Düsseldorf, the Federal Supreme Court found that terms and conditions are abusive if they do not allow the private Facebook user to choose between a limited personalization - confined to the data disclosed on facebook.com itself - and a comprehensive personalization - using also "off-facebook" data. The Federal Supreme Court held that - in light of the high barriers for switching to other social networks - the **lack of choice** constitutes a competitively relevant exploitation of the consumer. Access to a broader data base strengthened existing lock-in effects on the market for social networks. In addition, the Federal Supreme Court could not rule out negative effects also on the market for online advertising.

With extraordinary straightforwardness, the Federal Supreme Court thus already addressed the legal issues relevant for the main proceedings. It remains to be seen how the Higher Regional Court of Düsseldorf will implement these findings.

2. Confirmation of Case Law regarding Special Discounts

In a case against the **furniture chain XXXLutz**, the FCO pushed for the abolishment of special discounts requested by XXXLutz with regard to its 75th anniversary. In doing so, the FCO relied on the principles laid out by the Federal Supreme Court in its "*wedding discounts*" ruling of 2018 (see our Newsletter 1/2018). XXXLutz had demanded a "jubilee discount" of 7.5% from its suppliers, which was to apply to all deliveries for six months during 2020. In the opinion of the FCO, already the amount of the discount, which was obviously based on the number 75, lacked an objectively comprehensible compensation as required by case law. The FCO held that a lump-sum discount requested by a company with market dominance or relative market power on the basis of turnover without reference to specific suppliers, goods or articles triggers the assumption that an objective justification is missing. After XXXLutz had entered into negotiations with the suppliers and determined individual compensations for the requested discounts, the FCO was able to close the proceedings in February 2020 without imposing a fine.

3. Exclusivity Agreements

In June 2020, the Federal Supreme Court further clarified its jurisprudence on exclusivity agreements. The case at hand concerned the obligation of numerous organizers of live events to sell their tickets exclusively or to a considerable extent via the market leader **Eventim**. The FCO and the Higher Regional Court of Düsseldorf had regarded these contracts as abusive. In its decision, the Federal Supreme Court concurred and emphasized that the assessment of such exclusivity obligations could not be based on the "as efficient competitor" test as applied in the *Intel* ruling of the ECJ with regard to a discount system. In contrast to a discount, the exclusionary effect of an exclusivity clause resulted already from the scope and duration of the contractual obligation and the market strength of the company demanding exclusivity. The risk of market foreclosure is, thus, significantly higher in exclusivity scenarios. Pursuant to the Federal Supreme Court it is therefore not necessary to prove the concrete suitability of these agreements to restrict competition.

III. Cartels

Developments regarding the prohibition of cartels (Section 1 ARC) during the reporting period were dominated by the COVID-19 pandemic. In addition, the FCO has issued two fining decisions under circumstances worth mentioning.

1. COVID-19 Measures

During the last months, the FCO was in many ways exposed to the consequences of the pandemic. In particular, it received far more requests than usual for a **"certificate of non-objection"** under Section 32c ARC concerning cooperation among competitors. According to the FCO's President Mundt, there were about 20 such requests by the end of April alone. In most cases, the aim was to remedy or prevent bottlenecks in complex supply chains. The FCO showed a flexible approach - in coordination with other competition authorities within the ECN and ICN - by temporarily allowing cooperation (usually by means of so-called "chairmen's letters") as long as the cooperation was non-discriminatory and proportionate.

A particularly prominent example of this business-friendly approach was a restructuring procedure proposed by the German Automobile Association for **distressed suppliers**. In this respect, the FCO declared in June 2020 that it was prepared to tolerate an exchange of information between the various stakeholders (owners, employees, customers, lenders and government bodies) on liquidity, loans, aid measures and also operational problems, as well as the joint development of solutions provided certain framework conditions were met. However, data may only be exchanged in aggregated form and only to an extent that is indispensable for restructuring; negotiations may not last longer than until the end of 2021; and each stakeholder must be free to reject the outcome of the negotiations.

In April 2020, the FCO discontinued proceedings against **Sky and DAZN** for possible competition law violations with regard to the award of the broadcasting rights for the UEFA Champions League seasons 2018/19 to 2020/21. Among other things, the FCO pointed out that due to the COVID-19 pandemic it was hardly foreseeable how the market would develop in the future and that the effects of an intervention were therefore subject to particular uncertainties.

Worth mentioning is also the FCO's request for information addressed to **Amazon**, which dealt with possible concerns about supply shortages at the beginning of the pandemic and the company's decision to give priority to certain supplies. However, FCO President Mundt emphasized that the authority has not (yet) opened a formal investigation.

The legislator did not remain inactive either. The already mentioned law to mitigate the consequences of the COVID-19 pandemic provides that for such fines, for which payment facilitations (e.g. deferrals) were granted due to difficult economic conditions, the usual **interest** to be paid will also be waived until the end of June 2021. This provision is based on discussions involving SZA in the context of the settlement of the proceedings in the plant protection products cartel (see 2. below).

The economic consequences of the Corona crisis also played a prominent role in the hearing on the participation of the Kölsch breweries in the **beer cartel** before the Higher Regional Court of Düsseldorf in June 2020. Pursuant to Section 81 (4a) sentence 1 ARC, the court (like the FCO before) must consider the economic circumstances of the companies concerned when setting fines. In view of the breweries' significant decline in sales over the last months, the presiding judge suggested that a pandemic-related reduction of up to 25% for a brewery presented by SZA and other parties might be appropriate.

2. Plant Protection Products Cartel

During the reporting period, the FCO imposed fines totaling almost EUR 157 million on eight wholesalers of plant protection products and a number of their employees. The authority concluded that the companies had coordinated their gross price lists for sales to retailers and end customers between 1998 and 2015. In some cases, there had also been agreements on discounts and so-called "net-net prices" (sales prices to retailers without further discounts). All addressees of the fining decision had filed leniency applications with the FCO and agreed to a settlement.

The proceedings in this case were overshadowed by disputes about the FCO's **procedural errors and violations of fundamental rights**. An employee of the FCO had called three of the affected wholesalers on the basis of an anonymous tip-off and suggested that they should consider the submission of leniency applications. Two of the companies then indeed filed such applications within 24 hours and were granted immunity from fines and a substantial reduction in fines, respectively.

Against this background, one of the affected wholesalers, BayWa AG, filed a much-noticed **state liability lawsuit** against the FCO with the Regional Court of Cologne. The company claims the fine paid (almost EUR 69 million) as well as the attorney's fees incurred in the course of the FCO proceedings. This lawsuit is particularly delicate for the FCO since only two years ago the Higher Regional Court of Düsseldorf had found that the FCO had committed manifest procedural errors regarding the file management in the sausage cartel.

3. Technical Building Services Cartel

In December 2019, the FCO concluded proceedings in the field of technical building services by fining eleven companies a total of approx. EUR 110 million. Between 2005 and 2014, the companies had rigged bids for 37 major contracts. Loosing companies were "compensated" with subcontracts, compensation payments, or the submission of corresponding sham bids in other tenders. Some of the companies concerned cooperated with the FCO and finally agreed to settle the case. However, three parties did not settle and challenged the fining decision before the Higher Regional Court of Düsseldorf.

The FCO was not able to publish the press release and the case report on these proceedings until the end of March 2020, as some of the companies concerned had filed an appeal against the intended content of these publications with the Higher Regional Court of Düsseldorf. The court pointed out that the mentioning of violations of competition law by a company in such publications (regardless of whether or not they were ultimately found guilty) was only permissible after a **fair hearing** had been granted. However, this requirement could also be satisfied by the hearing in the FCO's cartel proceedings.

4. Working and Bidding Consortia

Already in December 2019 (the reasons for the ruling were not published until 2020), the Higher Administrative Court of North Rhine-Westphalia issued an interesting ruling on working and bidding consortia between potential competitors. According to this ruling, such cooperations are in line with Section 1 ARC if (1) the companies involved are individually unable to submit a competitive bid; (2) each company is capable but lacks the necessary capacities; or (3) only the cooperation enables the submission of a promising bid. With this **categorization**, the Higher Administrative Court summarized the principles developed by various Higher Regional Courts in recent years on this topic.

IV. Private Enforcement

In the area of private enforcement, the landmark *Rail Cartel II* ruling of the Federal Supreme Court will lead to an adjustment of the decisional

practice, which is already partially reflected in recent rulings of the courts of first instance. In addition, the numerous claims against members of the truck cartel continue to bring about interesting legal developments, which will also have an impact on cases in other sectors. This applies in particular to the bundled assertion of damage claims.

1. Rail Cartel II Ruling by Federal Supreme Court

In its *Rail Cartel II* judgment of January 2020, the Federal Supreme Court recalibrated the rules on eligibility and attribution of damages for cartel infringements, taking into account the requirements of EU law, and (at least apparently) lowered the requirements of proof for plaintiffs. The judges also commented on the requirements for the issuance of so-called ground judgments (*Grundurteile*).

The Federal Supreme Court's comments focused on the element of "**being affected by a cartel**" (*Kartellbetroffenheit*), which is set out in Section 33 (3) ARC and is subject to a strict standard of proof. The Federal Supreme Court stated that a plaintiff may always be assumed to be affected by a cartel if the infringement in question is **suitable in the abstract** to directly or indirectly cause the damage claimed by the plaintiff. Pursuant to the Court, it is not necessary to prove that the cartel agreement had an actual effect on the transaction(s) in question. As the Federal Supreme Court freely admits, this is a significant correction of the view that it had put forward in in its *Rail Cartel I* ruling of December 2018 (see our Newsletter 2/2018). This readjustment must be seen against the background of the **Otis judgment** of 12 December 2019, in which the **European Court of Justice** extended the attribution of damages beyond upstream and downstream product markets. As a result, the focus of the examination will shift (even) more to the causal link between the cartel infringement and the damages claimed.

In affirming the line taken in *Rail Cartel I*, the Federal Supreme Court rejected *prima facie* evidence of the price-increasing effect of a cartel. Rather, the courts have to carry out a comprehensive assessment of all relevant circumstances. In doing so, however, they may rely on a **factual presumption** to the effect that cartels generally lead to price increases. Moreover, the Federal Supreme Court held that the judges may affirm the occurrence of damages without obtaining a court expert opinion even if the parties had submitted divergent expert opinions.

The Federal Supreme Court also stated that the requirements of procedural economy could conflict with the common practice of issuing ground judgments. Ground judgments decide only on the merits of the claim without determining the amount of the damage. If largely the same facts are decisive for the cause and the amount of the damage, a mere decision on the merits of the claim is, in the words of the Federal Supreme Court, "*inexpedient and confusing*" and therefore inadmissible.

In the aftermath of the *Rail Cartel II* decision, it became apparent that the guidelines issued by the Federal Supreme Court may not - as presumed by some commentators - result in the affirmation of the plaintiffs' damages without further ado. For example, in May 2020 the Higher Regional Court of Frankfurt a.M. rejected damage claims brought by the Schlecker insolvency administrator against members of the **drugstore cartel**. Without commissioning an expert opinion itself, the court, after a detailed examination of the various expert opinions submitted by the parties, came to the conclusion that the plaintiff had not proven the alleged damages to the requisite legal standard because the plaintiff's expert opinion was based on false facts and contradictory in itself. This clearly shows that the chances of success of cartel damage actions after the *Rail Cartel II* judgment depend more than ever on a well-founded presentation

of the damage claim (not lastly) with the help of economic expert opinions.

2. Bundled Assertion of Claims by financialright

With a remarkable ruling of February 2020, the Munich I Regional Court dismissed an action brought by financialright claims GmbH, to which 3,266 alleged claim holders had assigned their approx. 85,000 claims against members of the **truck cartel**. The assignment model, which involved a litigation financier, was found to be void due to various violations of the German Legal Services Act. As a consequence, financialrights had no standing. Although the plaintiff was registered as a collection service provider, its activities had been directed from the outset exclusively towards the judicial enforcement of the individual claims, which did not meet the requirements of the German Legal Services Act. Moreover, the court held that the effective enforcement of the bundled claims was jeopardized by the fact that, with some 85,000 heterogeneous individual claims, the claims with better chances of success were more difficult to enforce in a bundle than individually without the assignment model.

3. Different Assessment of the Cartel Infringement in Truck Cartel

The damage actions against the members of the trucks cartel resulted in numerous other judgments in the first half of 2020. It was particularly interesting to observe how differently the courts assessed the underlying cartel infringement established by the European Commission. For example, the Regional Courts in Leipzig and Nuremberg-Fürth classified the cartel infringement fined by the Commission as a mere **exchange of information** and held that such an infringement did not give rise to any factual presumption within the meaning of the *Rail Cartel I* case law that the transactions forming the basis of the damage claims were affected by the cartel. A diametrically opposed assessment was, however, made by the Higher Regional Court of Schleswig, which stated that the Commission had found a "**hardcore price cartel**", which gave rise to a "strong factual presumption" that the underlying transactions were affected by the cartel. While the two Regional Courts dismissed the respective actions, the Higher Regional Court of Schleswig came to the conclusion that the claims had a valid basis. It remains to be seen whether the Higher Regional Courts of Dresden and Nuremberg will join the Schleswig Higher Regional Court.

NEWSLETTER
ANTITRUST

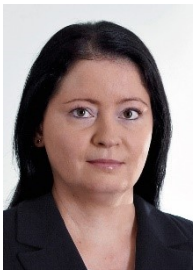
SZA
SCHILLING, ZUTT & ANSCHÜTZ

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 +49 621 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