Major Developments in German Competition Law in January-June 2016

This newsletter marks the first in a new series of biannual updates on important developments in German competition law.

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Introduction

During the reporting period, the adoption of the Draft Bill for the 9th amendment to the Act against Restraints of Competition (“ARC”) clearly takes the spotlight. The most important suggested changes concern the transposition of the EU Damages Directive; the adaptation of the competition rules to the ever-increasing importance of the digital economy; and the synchronization of the German fining system with the EU approach through the introduction of the concept of an (accessory) liability of the “economic entity”. Other noteworthy developments include the ministerial approval proceedings in the merger case Edeka/Tengelmann, which recently got a surprising twist by a decision of the Higher Regional Court in Düsseldorf; the imposition of further significant fines by the Federal Cartel Office (“FCO”) following from its investigation into resale price maintenance in the retail sector; and new case law on the assessment of certain e-commerce practices.

Merger Control

The Draft Bill contains three suggestions related to the ARC’s merger control regime, which are supposed to enhance the toolset for the proper assessment of transactions in the digital economy.

First, it is envisioned to introduce an additional threshold related to the deal value to determine merger notification requirements. So far a filing obligation in Germany is only triggered if certain turnover-related thresholds are met. In the future, a transaction shall also need to be notified if it has a value of more than EUR 350 million (in addition to certain turnover-related criteria). These considerations stem from the case Facebook/WhatsApp, which was not subject to German (or EU) merger control due to WhatsApp’s insignificant global turnover of around EUR 10 million – even though the purchase price amounted to a whopping EUR 19 billion.¹

Second, the Draft Bill clarifies that a “market” within the meaning of competition law can exist even if services are provided free of charge. This is often the case, e.g., for two-sided platforms. Here the Draft Bill mirrors recent decisions by the FCO – in 2015 the authority had defined relevant markets in two merger cases concerning online real estate platforms and online dating platforms, respectively, even though some of the users did not have to pay for the services at issue (the European Commission took the same approach in Google/Motorola (2012) and in Facebook/WhatsApp (2014)).

¹ In the end, the European Commission did carry out an investigation because the transaction met the merger control thresholds in three EU Member States and Facebook had requested a referral to the Brussels watchdog.
Third, the Draft Bill suggests supplementing the list of factors relevant for determining the existence of a dominant position with a number of criteria, which are particularly relevant for the assessment of digital platforms. The additional aspects include network effects (in particular due to the associated economies of scale), access to data, user behavior (including the use of parallel platforms, so-called multi homing, and switching costs), and innovation-induced competitive pressure. The suggested amendments are also relevant for investigations into potentially abusive behavior, which presuppose the existence of market dominance.

Ministerial approval granted for Edeka/Tengelmann. For significantly more than a year the plans of market leader Edeka to acquire approx. 450 super markets of rival group Kaiser's Tengelmann have been under close scrutiny, and no end to this story is in sight. In March 2015 the FCO prohibited the transaction as it was found further to deteriorate the competitive situation in a number of already highly concentrated regional markets. Moreover, the FCO found that the buyer power of the leading retail chains would have been strengthened further. Remedies offered by the parties were deemed insufficient.

In April 2015 the parties filed a request for ministerial approval, and almost one year later, in March 2016, the Minister for Economy and Energy granted such an approval subject to a number of non-competition-related conditions, which mainly concerned the preservation of jobs and workers' rights.

Headline-grabbing news then occurred on 12 July 2016 when the Higher Regional Court of Düsseldorf granted an expedited motion by two complainants against the ministerial approval. Apart from severe criticism of several lines of argument the judges focused on potential bias of the Minister in light of secret and undocumented meetings with representatives of the merging parties. The Minister already announced his intention to launch an appeal before the German Supreme Court but it seems highly uncertain whether the parties will proceed with their plans in light of the mounting time pressure and the uncertain schedule of further judicial action.

Edeka/Tengelmann marks the 21st request for ministerial approval since the introduction of the instrument in 1973 (out of which nine petitions were successful). The present case triggered, once again, sharp criticism regarding undue political influence on merger control proceedings, and it seems possible that the relevant provision of the ARC may be amended in one way or the other in the context of the 9th amendment (the Draft Bill, which was published prior to the decision of the Düsseldorf court, is silent on this point).

Fine for incorrect information in merger filing. On 7 January 2016, the FCO imposed a fine of EUR 90,000 on Bongrain Europe SAS for the provision of incorrect information in a merger notification submitted back in 2011. Pursuant to the FCO's findings, the sales figures provided for both the acquirer and the target were significantly too low. In addition to the imposition of the fine, the FCO also started demerger proceedings, which were discontinued only upon divestiture of the shares in one of the companies concerned.

This case confirms once again the strict approach of the FCO when it comes to procedural issues in merger control cases. It is the third time the FCO imposed fines for incorrect or incomplete information in merger notifications, and the fine for Bongrain is quite close to the statutory limit of EUR 100,000. In this context, reference is also to be made to various fines imposed by the FCO for implementation of a notifiable transaction prior to clearance (so-called "gun jumping"). The highest such fine amounted to EUR 4.5 million and was levied on Mars, Inc. in 2008.

Prohibition of Cartels

After long political debate, the Draft Bill suggests a major change to the fining system for competition law infringements by proposing the introduction of a group liability and a stricter liability for legal successors. This would move the
approach in Germany much closer to the rules at the EU level. To date, the FCO can impose fines generally only on those legal entities, which were directly involved in the infringement. Some companies have taken advantage of this principle by cunningly restructuring their corporate group in the face of a major fine – much to the ire of the FCO, which openly threatened to pass on cases to the European Commission. This loophole was partially closed by the 8th amendment to the ARC in 2013. Now the draft Bill seeks to establish a general accessory (co-)liability of the "economic unit" encompassing the entity at issue.

On the other hand, the Draft Bill is silent on the criminalization of cartel infringements – an aspect also figuring prominently in the political debate for a long time. Apparently, the possibility of imposing personal fines on individuals involved in the cartel infringement (which does not exist at the EU level) is deemed to have a sufficiently deterring effect.

**FCO imposes further significant fines in the "verticals" case.** Since 2010, the FCO has been investigating multiple suppliers of branded goods and leading retail store chains regarding certain practices perceived as elements of resale price maintenance. This so-called "verticals" case focuses on a number of product areas (beer, coffee, confectionery, hygiene products and pet food) and has led to the imposition of fines totaling approx. EUR 242 million so far.

During the first months of 2016, the FCO made significant progress with the outstanding parts of its investigation. In particular, in April 2016 the FCO imposed additional fines in the beer sector, which by now have reached a total amount of EUR 94 million. The facts established with regard to this product group are exemplary for the entire verticals case. Pursuant to a "basic agreement", the retailers undertook not to undercut a certain minimum price level as long as the suppliers ensured through certain price management measures that the other retailers behaved in the same way. This arrangement aimed at the avoidance of price wars and a corresponding decrease of sales margins, to the detriment of consumers. All companies agreed to a settlement with the FCO.

Throughout its investigation in this case, the FCO heard complaints about a lack of clear criteria for the distinction between legitimate and anti-competitive discussions on prices and conditions among partners at different levels of the supply chain. The FCO is currently working on a guidance paper, which is supposed to clarify the scope of the prohibition against resale price maintenance.

It is noteworthy that over the past years the FCO also imposed fines for horizontal cartels at the supply level with regard to all of the product categories under scrutiny in the verticals case. In the beer industry, these fines added up to EUR 338 million. Sometimes it was only in the course of these investigations into "classic" cartel behavior that the FCO obtained information on the producers' dealings with the retailers, which eventually triggered the proceedings in the verticals case.

**FCO fines sanitary cartel.** In March 2016, the FCO imposed a fine totaling EUR 21.3 million on nine wholesalers and one individual for a cartel in the sanitary, heating and climate business. The FCO found that the cartel members had coordinated on the calculation of gross price lists and sales prices for many years. Back in the 1970s, the FCO had accepted the collaboration regarding certain calculation parameters due to limited technical means of the mostly medium-sized companies. However, pursuant to the FCO this justification fell away over the years. All companies cooperated with the FCO's investigation and agreed to a settlement. An investigation against one more company, which refused a settlement, is still ongoing. Compared to the European Commission, the FCO is much more open to conducting such "hybrid proceedings".

The case is a vivid reminder that companies must constantly assess whether previously legitimate behavior (which may even have been approved by the authorities) may now be viewed differently due to changes in the factual or legal
circumstances. Moreover, it is to be recalled that agreements, and even the mere exchange of information, on gross price lists have always been considered illegal by the FCO – even if the parties only agree on calculation parameters and then publish individual gross price lists and even if they grant individual discounts on such gross prices.

**Higher Regional Court of Düsseldorf confirms illegality of “narrow” MFN clauses.** By decision of 4 Mai 2016, the Higher Regional Court of Düsseldorf confirmed the FCO’s opinion that hotel booking platforms such as booking.com are not allowed to impose either “wide” or “narrow” most favored nation (“MFN”) clauses on their partner hotels. “Wide” MFN clauses are meant to ensure that hotels do not offer better prices on their own websites or on other booking platforms while “narrow” MFN clauses only oblige the hotels not to offer better conditions on their own websites. The FCO (and now the judges of the Higher Regional Court) condemn even the latter type of clauses as anti-competitive restrictions, arguing that they prevent the hotels from price differentiation vis-à-vis other platforms in order to protect their own online distribution activities.

A number of other national competition authorities (“NCAs”), e.g. in France, Italy, Norway, Poland or Sweden, have a different perspective. They consider narrow MFN clauses to be legal because they protect the platforms from “freriding”, i.e. hotels benefitting from the platforms’ marketing efforts without having to pay any compensation. This divergent case law across the EU leads to considerable legal uncertainty. Against this background, the European Competition Network (comprising the European Commission and the NCAs of the EU Member States) has initiated an extensive market survey on the economic impact of MFN clauses. Preliminary results are expected for late 2016.

**Higher Regional Court of Frankfurt/Main on platform bans.** The Higher Regional Court of Frankfurt/Main recently had to address the legal conditions for platform bans – a crucial issue for producers, distributors and retailers of branded products – in two cases. With such platform bans, producers prohibit the sale of their products on internet platforms such as Ebay or Amazon. From a producer’s perspective, the brand image may be impaired if its products are available on these platforms, e.g. because appropriate consultation cannot be guaranteed. At the same time, online platforms are a major distribution channel in particular for small retailers because of their multiplier effect.

In its decisions, the Higher Regional Court had to balance these conflicting interests. While the FCO takes a rather restrictive approach and, as a general matter, considers platform bans for the purpose of protecting the brand image to be incompatible with competition law, the judges took a more generous approach. In a decision of December 2015, they validated a contractual clause in the framework of a selective distribution system, which prohibited sales via Amazon. In following the producer’s reasoning, the court held that it was impossible for consumers to obtain appropriate consultation regarding the products at issue (functional backpacks) on Amazon. The court also acknowledged that, in principle, the protection of the brand image can be a valid and sufficient justification for platform bans.

In light of divergent decisions by other German courts, the Higher Regional Court of Frankfurt/Main then seized the opportunity in another case (concerning luxury cosmetics) to file a reference for preliminary ruling with the ECJ in April 2016. *Inter alia*, the Frankfurt judges asked the ECJ to clarify whether, for the sake of protecting a “luxury image”, it is compatible with competition law generally to prohibit the platform sales, irrespective of whether the producer’s legitimate quality standards are contravened in the specific case. The questions submitted to the ECJ concern the interpretation of an ambiguous passage in the ECJ’s ruling in *Pierre Fabre* in 2011. The ECJ’s responses are eagerly anticipated and hopefully will enhance legal certainty in this increasingly important area of law.
Abuse of Dominance

E-commerce-related competition law issues are also more and more in the focus of unilateral conduct and abuse cases. Apart from the proposal to introduce additional market power criteria into the ARC (see above), the initiation of proceedings against Facebook by the FCO also bears testimony to this development. According to a press release of early March 2016, the FCO is investigating the question whether Facebook’s general terms and conditions on the utilization of user data amount to an abuse of Facebook’s potentially dominant position on the market for social networks.

Pursuant to the FCO, the abuse in this case might consist of (suspected) breaches of data privacy rules. This is a novelty in German and European competition law enforcement. More precisely, the FCO examines whether it is only because of its market position that Facebook can impose its general terms and conditions on the collection and utilization of user data. If so, the FCO is likely to qualify Facebook’s conduct as an abusive imposition of unfair conditions on users.

The Facebook investigation shows yet again that the FCO is ready to take on a pioneer role when it comes to tackling innovative competition law questions in the field of e-commerce. Assuming that its investigation will confirm the FCO’s allegations against Facebook, we consider it quite likely – due to the novelty of the relevant issues – that the case will end with a decision to terminate the infringement(s) rather than the imposition of a fine.

Private Enforcement

Implementation of the EU Damages Directive. The Draft Bill transposes the EU Damages Directive into German law and thus contains important amendments concerning the ARC’s rules on private enforcement. The Directive aims at facilitating the enforcement of competition rules by increasing legal certainty and reducing the differences between the EU Member States as to the national rules governing cartel-related damage actions. The transposition of the Directive is due by December 2016. The Draft Bill introduces, in particular, the following crucial provisions:

- A rebuttable presumption that cartel infringements result in (pecuniary) harm. However, the amount of harm caused is not covered by the presumption – the burden of proof for this important element rests with the injured party.

- An explicit recognition of the passing-on defence, which essentially mirrors the findings of the judgment of the German Supreme Court in its landmark ORWI ruling of 2011.

- Under certain conditions, a rebuttable presumption that an overcharge was passed on to an indirect purchaser. The scope of this presumption was subject to much debate during the legislative process. The Draft Bill foresees that it only applies in favor of the indirect purchaser while the infringing party shall not be allowed to invoke the presumption. It is worth noting that the presumption does not cover the amount of the passed-on overcharge.

- A limitation of joint and several liability for both small and medium-sized enterprises and successful immunity applicants. In addition, the Draft Bill clarifies that the joint and several liability among co-infringers shall be governed by their relative responsibility for the harm caused by the infringement.

- A provision concerning the consequences of consensual dispute resolution both for the settling injured party and the joint and several liability among the infringing parties.

- The introduction of a stand-alone right to claim disclosure of information and evidence. This right aims at reducing information asymmetries and is afforded to both the injured party and the cartelists. Disclosure can also be requested from third par-
ties, which may be able to provide relevant information. However, leniency statements and settlement submissions are not subject to disclosure under the proposed rules. Unfortunately, the Draft Bill did not use the opportunity to extend this explicit protection to a specific rule of the German code of criminal procedure, which is increasingly used as a “backdoor” for introducing evidence from the competition authority’s files into civil litigation.

- The adjustment of limitation periods. In particular, the limitation period for bringing actions for damages will be increased from three to five years.

A large number of damage claims are pending in Germany. Germany continues to be one of the most important fora for cartel-related damage litigation in the EU. Often, claims for damages exceed the administrative fines. However, the body of case law is still at an early stage of development, not least because disputes are often settled out of court.

The largest cartel damage action ever brought in Germany is currently pending before the Regional Court of Cologne where members of the air cargo cartel are sued for damages in excess of EUR 3 billion (including interest). One of the interesting details of this case is that direct and indirect purchasers bundled their claims via a special purpose vehicle, which could, inter alia, make it more difficult for the infringing parties to rely on the passing-on defense.

Passing-on was also the decisive issue in another case dismissed after five years of first-instance litigation by the Regional Court of Düsseldorf. In that case, the insurer HUK-Coburg had claimed damages as an indirect purchaser against members of the car glass cartel. However, the insurer failed to show that the overcharge for the cartelized car glass paid by carmakers was passed on to repair shops and insurers. Other lawsuits against car glass producers are still pending.

In addition, German civil courts currently deal with damage litigation in areas as diverse as rails, lotteries, cement and sugar. In the sugar proceedings alone, the top three German producers are facing over 40 claims totaling more than EUR 400 million.

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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