

The Handbook of Competition Enforcement Agencies

2012

**A Global Competition Review special report
published in association with:**

Bell Gully

Berwin Leighton Paisner

D&B David si Baias SCA

Edwards Wildman Palmer LLP

Edwards Wildman Palmer UK LLP

ELÍG, Attorneys-at-Law

Fraser Milner Casgrain LLP

Freehills

Gärde Wesslau Advokatbyrå

Heuking Kühn Lüer Wojtek

J.Sagar Associates

Lapidot, Melchior, Abramovich & Co

Magalhães Nery e Dias – Advocacia

Marques Mendes & Associados

Prager Dreifuss Ltd

Ružička Csekcs in association with members of CMS

Salans

Skrine

Vasil Kisil & Partners



GCR

GLOBAL COMPETITION REVIEW

Overview

Simon Hirsbrunner and Reinhard Siegert

Heuking Kühn Lüer Wojtek

The enforcement agency: the Bundeskartellamt

In Germany, responsibility for enforcing competition law lies with the Bundeskartellamt (Federal Cartel Office (FCO)), located in Bonn. The FCO is an independent higher federal authority which is assigned to the Federal Ministry of Economics and Technology. The FCO has extensive investigatory powers under sections 57 to 59 of the Act against Restraints of Competition (ARC). The FCO takes its decisions through twelve Decision Divisions, which are mainly organised according to economic sectors and which decide independently. The FCO takes part in the European Competition Network (ECN), the European Competition Authorities' (ECA) forum and the International Competition Network (ICN). Most intensively, the FCO cooperates with the Directorate General for Competition (DG Comp) in Brussels.

Apart from the FCO there are also competition authorities on the level of the different *Bundesländer* (federal states), residing at the respective *Bundesland's* Ministry for the Economy. The respective *Bundesland* prosecutes infringements, the effects of which are limited to the specific *Bundesland* in question. In addition the Bundesnetzagentur (Federal Network Agency) – an independent regulatory authority – is responsible for preventing any practice amounting to an abuse of a dominant position in the telecommunications, post, electricity, gas and railway sectors.

Practice and recent developments

Cartel agreements

In cartel cases the FCO is entitled either to impose an order to discontinue the objectionable conduct or to impose fines. In contrast to the European Commission, the FCO can not only impose fines on undertakings but also on individuals. Fines imposed on individual persons may amount up to €1 million, fines imposed on undertakings up to 10 per cent of their total turnover. Fines are imposed frequently, particularly in cases where companies have committed severe distortions of competition such as violations of hard-core restrictions. According to its leniency programme,

the FCO may grant an immunity from or a reduction of fines, if cartel participants contribute to uncovering a cartel. However, immunity from fines may only be granted to the first leniency applicant. No immunity will be granted to the only ringleader or to cartel participants who coerced others to participate in the cartel. Compared to other European competition agencies, the FCO probably has the most experience with cartel settlements, whereby parties acknowledge the facts and the agency reduces the fine by up to 10 per cent. Contrary to the EU model, settlements are also possible in the case of vertical restraints. It is not a precondition to a settlement that all parties involved agree; hybrid settlements are quite common.

In 2010 for example the FCO imposed a fine of €91 million against manufacturers of utility steam generators. Eight coffee roasters and the German Coffee Association were punished by fines totalling approximately €30 million. In 2011 the FCO imposed a fine of €17.5 million against a producer of aerial ladders. Another producer of aerial ladders was granted immunity under the leniency programme.

Regarding restrictive agreements, the 12th Decision Division of the FCO released a *Vorsitzendenschreiben* (chairman's letter) on 13 April 2010, in which it comments in great detail on resale price maintenance. Moreover, the risks of being involved in a 'hub and spoke' cartel by participating in an information exchange via dealers or suppliers respectively are discussed in detail.

The FCO's sector inquiries into fuel retail markets in electricity generation and wholesale markets released in 2011 and, in particular, the sector inquiry into the milk markets, released in its final version in 2012, gained significant attention from the respective market participants.

Unilateral anticompetitive practices

With respect to unilateral practices, the German legislator in section 19, 20 ARC has used its freedom granted by article 3(2) EU Regulation 1/2003 to go beyond the application scope

of article 102 TFEU. Even where no market dominant position is achieved, undertakings with a certain market strength must observe the same restrictions as a market dominant undertaking. This is the case in particular if small or medium sized companies are dependent on this company. Irrespective of whether the company is dominant or (only) has market strength in relation to a small or medium sized company, the FCO may order the company to discontinue the infringement or impose fines on persons and companies. In 2011, for instance, the FCO ordered a producer of laboratory chemicals to redraft its purchasing terms in a non-discriminatory manner.

Mergers

The German merger control regime under the ARC is characterised by significantly low turnover criteria (a worldwide turnover threshold of €500 million as well as two domestic turnover thresholds of €25 million and €5 million respectively). Notifications must be filed ex-ante with the FCO. Concentrations without any material effects on Germany are exempt from notification. However, the FCO takes the view that this exception requires a strict interpretation.

Germany is one of the few jurisdictions where the acquisition of a non-controlling minority shareholding may give rise to a reportable concentration. This is the case where either the shareholding amounts to 25 per cent or more of the capital or voting rights or where a shareholding below 25 per cent confers an influence which is competitively significant.

Until the merger has been cleared by the FCO, it cannot be completed. In recent years, the FCO has toughened its policy against gun jumping. Should the FCO discover that a concentration has been closed without its prior approval, then it initiates a proceeding that may enable it to order the dissolution of the transaction if necessary. Apart from that, significant fines can be imposed even where there is no dissolution order. The usual statutory time limits do not apply in such a case.

Similar to the situation at the EU level, German merger control proceedings are characterised by a division into two phases. In the first phase, lasting one month, the FCO undertakes a preliminary examination to determine if competitive problems might be caused. If that is the case, it initiates formal proceedings (second phase), which must normally be completed within four months from

the date of notification. The second phase ends with a formal decision by the FCO to clear or prohibit the merger. Clearance may also be linked with obligations or conditions imposed on the parties.

Up to now, the FCO's merger control test has been a market dominance test. With the proposed 8th Amendment of the ARC (cf below), German merger control is expected to adopt the EU's SIEC-Test (Significant Impediment of Effective Competition).

German merger control practice is marked by an increased reliance on economic theory and tools, not only in proceedings before the FCO. On 6 December 2011, the Supreme Court set a potentially far-reaching precedent in the case *Total/OMV*. It took the view that a finding of a collective (oligopolistic) dominance was not a matter of checking a set list of criteria (no 'checklist approach'), but was dependent on the circumstances of the specific case and the industry. Thus, the mere fact that one could observe price fluctuations on regional markets was not in itself sufficient to remove concerns against a proposed acquisition of a chain of petrol stations.

Public procurement law

Based on the ARC, the FCO also reviews public procurements if the contract volume exceeds certain thresholds and is awarded by the Federation. Three federal public procurement tribunals are currently embedded with the FCO. Similar to courts, the tribunals are independent bodies. The 16 *Bundesländer* have public procurement tribunals of their own, which deal with contracts awarded by authorities within the respective *Bundesland*.

Procedural and legislative developments

Currently, the legislative process for the 8th amendment of the ARC (8. *GWB-Novelle*) is ongoing. On 28 March 2012, the German Federal Cabinet adopted the draft amendment which will now be discussed in the Bundestag, the German Federal Parliament.

Currently (April 2012), some of the notable changes are:

- Following the *Pfleiderer* decision of the European Court of Justice, third party access to the FCO's file with respect to the leniency and immunity applications and the respective evidence is no longer possible according to the current draft.

- With respect to merger control, the calculation of turnover for companies in the press sector will be reviewed, which will in effect increase the thresholds in said sector for the world-wide combined turnover from €25 million to €62.5 million and the domestic turnover threshold to €3.125 million and €625,000 respectively.
- The German legislator is concerned that companies may try to circumvent the jurisdiction of the FCO by splitting up one

transaction into several smaller ones. In order to close this loophole, the ARC will in all likelihood be aligned with the EU Merger Control Regulation in this respect. This means that several smaller transactions happening in a narrow time frame and economically interlinked may be deemed to constitute one single concentration for the purposes of turnover calculation.

HEUKING KÜHN LÜER WOJTEK

Prinzregentenstraße 48
80538 Munich
Germany
Tel: +49 89 540 31-236
Fax: +49 89 540 31-536

Avenue Louise 326
B-1050 Brussels
Belgium
Tel: +32 2 646 2000
Fax: +32 2 646 2040

Simon Hirsbrunner
s.hirsbrunner@heuking.de

Reinhard Siegert
r.siegert@heuking.de

www.heuking.de

Heuking Kühn Lüer Wojtek is a partnership of about 250 lawyers, tax advisers and attorneys-at-law providing counsel across seven offices in Germany as well as offices in Brussels and Zurich, making it one of the leading German commercial law firms.

In the competition law practice group, we provide comprehensive advice in German and European antitrust law to companies, associations and public authorities. We lead and coordinate the necessary merger control procedures on German, European and multinational levels and support our clients in avoiding antitrust law violations, in particular by means of our compliance counselling.

We represent our clients before the German Federal Cartel Office, the European Commission and before German and European courts. Our international focus and our well-established contacts with leading law firms in all major jurisdictions allows us to account for the increasing international liaison of competition law and worldwide networking of antitrust authorities.



Simon Hirsbrunner

Heuking Kühn Lüer Wojtek

Simon Hirsbrunner LL.M. is a partner in HKLW's Brussels office. He regularly represents companies in antitrust and merger control proceedings before the European Commission and the German Federal Cartel Office. He also advises regularly on EU state aid and trade law matters. Due to his experience as a former case-handler of the European Commission's Merger Task Force he has particular expertise in the merger control field. He has also been involved as a non-governmental expert in several projects of the Merger Working Group of the International Competition Network (ICN). Simon has recently co-edited a book on European energy law and he regularly speaks and publishes on competition and state aid law matters.



Reinhard Siegert

Heuking Kühn Lüer Wojtek

Dr Reinhard Siegert is a partner in HKLW's Munich and Brussels offices. He advises German and international clients from diverse industries on the full range of German and European antitrust law. He represents well-known manufacturers and service companies before the antitrust authorities, German and European courts as well as arbitral tribunals. His main areas of expertise are vertical agreements and cooperations, merger control, joint ventures, litigation and compliance programmes. Reinhard is particularly experienced in issues related to the automotive sector, the chemical and the insurance industry. He frequently speaks and publishes on distribution and competition law issues.



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association

Law
Business
Research

ISSN: 1468-7054