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Overview

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The enforcement agency: the Bundeskartellamt

In Germany, the responsibility for the enforcement of competition law lies mainly with the Bundeskartellamt (Federal Cartel Office, FCO), located in Bonn. The FCO is an independent higher federal authority, assigned to the Federal Ministry for Economic Affairs and Energy. It has extensive investigatory powers under section 57–59 of the Act against Restraints of Competition (ARC). Cases are allocated according to the economic sector to one of the FCO's 12 Decision Divisions, which are very autonomous in the way they conduct their investigations. The FCO cooperates closely with the Directorate General for competition of the European Commission, and takes part in the European Competition Network (ECN), the European Competition Authorities' (ECA) forum and the International Competition Network (ICN).

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

Practice and recent developments

Cartel agreements

In cartel cases, the FCO has the power either to impose an order to discontinue the objectionable conduct or to impose fines. In contrast to the European Commission, the FCO can impose fines on undertakings as well as on individuals. Fines imposed on individual persons may amount up to €1 million, with fines imposed on undertakings at up to 10 per cent of their total turnover. Sanctions are imposed frequently, particularly in cases where companies have committed severe competition law infringements, such as violations of hard-core restrictions. According to its leniency programme, the FCO may grant immunity from fines or otherwise a reduction up to 50 per cent if a cartel participant contributes to uncovering a cartel. However, immunity from fines may only be granted to the first applicant. No immunity will be granted to the only ringleader or to cartel participants who coerced others to participate in the cartel. Compared with 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 2011, for example, 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. In 2012, the FCO, inter alia, imposed fines totalling €124.5 million on four rail manufacturers and suppliers for concluding anti-competitive agreements to the detriment of Deutsche Bahn AG. Moreover, the FCO imposed fines totalling approximately €55 million on TV broadcasting groups Pro7Sat1 and RTL, as well as on two individuals involved on account of agreements on the basic encryption of TV programmes. Confectionery manufacturer Haribo was fined €2.4 million for an anti-competitive exchange of information. In early 2013, the FCO concluded the cartel proceedings against several manufacturers of branded confectionery; fines of approximately €60 million were imposed on 11 companies and some of their sales representatives. Finally, in February 2013, the FCO concluded its cartel proceedings against 22 companies in the milling industry, the association of German mills and their representatives on account of their involvement in illegal agreements in the sale of flour. The fines imposed amounted to €41 million; a first fine of approximately €24 million had already been imposed in the same proceeding in 2011.

In April 2013, the Federal Court of Justice confirmed a fine of €380 million against the participants of a German cement cartel, the highest fine ever imposed according to German competition law. In the judgment, the Court set an important precedent, ruling that the fining system according to the ARC is compatible with constitutional requirements. Furthermore, the Court clarified the meaning of the 10 percent threshold. It

took the view that the FCO must take the threshold into consideration as a maximum value, meaning that the FCO must calculate the fine in such a way that it does not exceed the 10 per cent threshold, and the fine is not capped at 10 per cent after the calculation of the fine.

The risk for cartels to be uncovered has risen significantly as a result of an electronic whistleblowing system that has been implemented in June 2012. The new system enables the FCO to receive anonymous tip-offs.

With respect to the FCO's leniency programme, the Higher Regional Court in Düsseldorf adopted, in April 2012, an important precedent which protects leniency applications from disclosure through court orders. And in December 2012, the German Federal Constitutional Court confirmed a provision introduced in the ARC in 2005 whereby interest is chargeable on fines for competition law infringements in case of appeals against the respective order of the FCO.

A case worth mentioning in the field of vertical restraints concerned the manufacturer of high-quality power tools TTS Tooltechnic, which was fined €8.2 million for setting up and enforcing a vertical resale price maintenance system.

In early 2013, the FCO launched a web survey of 2,400 sellers who offer their products through Amazon Marketplace, the purpose being to assess the effects of a certain "price parity clause", which prohibits sellers who offer their products on the Amazon platform from selling the same products cheaper through other internet sales channels. The FCO pointed out that the effect of such clause might result in restraints between the different internet marketplaces, higher sellers' fees and higher prices for consumers. In order to remove the concerns raised by the FCO, Amazon abolished the price parity clause from its general terms of business, which led to the FCO terminating the proceedings against Amazon.

In September 2013, the Kammergericht Berlin held the view that a school bag producer may not prevent his distributors from selling the products on internet platforms such as eBay or Amazon. The Oberlandesgericht Karlsruhe and the Oberlandesgericht München ruled in 2009 and 2011 respectively that such clauses are in conformity with competition law.

Finally, in late 2013, the Landgericht Düsseldorf dismissed a collective action initiated by CDC, a provider of legal services, against the members of the former cement cartel. The Court argued that the transfer of claims to CDC was – pursuant to German law – invalid.

Unilateral anti-competitive practices

According to article 3(2) Regulation (EU) No. 1/2003, the EU member states are not precluded from adopting national rules concerning unilateral conduct that are stricter than the ban on certain anti-competitive practices by market dominant companies within the meaning of article 102 of the Treaty on the Functioning of the European Union (TFEU). This explains why companies that have a certain market strength – for example, because other, smaller companies are dependent on them – are faced with further reaching obligations in Germany than they are in most other jurisdictions. The details are laid down in sections 19 and 20 of the ARC.

Two decisions relating to unilateral conduct were of particular interest in 2012, both concerning the pricing of water. In its decision against Berlin public water utility Berliner Wasserbetriebe, the FCO ordered the utility to lower its drinking water prices by €254 million for the period 2012–2015. Another public utility, Stadtwerke Mainz, gave a commitment to reduce its water prices by approximately 15 per cent for the period 2013–2019.

Merger control

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 with no 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 that 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, 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 are likely to arise as a result of the merger. If so, 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. A clearance with conditions or obligations is possible.

As part of the 8th amendment to the ARC, Germany has revised its merger control rules. At the core of the reform was the introduction of a new substantive test, which prohibits mergers that result in a significant impediment of effective competition (SIEC). The new test is modelled on the example of the EU's Merger Control Regulation (EC) No. 139/2004. However, even after the reform has taken effect, German merger control retains certain peculiarities that prevent a strict alignment of policies between Germany and the EU. In particular, the German practice continues to rely on substantive presumptions, a balancing clause and an exemption for markets defined as de minimis. Given that German merger control has a notoriously expansive extraterritorial reach, these peculiarities continue being of practical relevance for a large number of transactions worldwide.

Public procurement law

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

Procedural and legislative developments

After a long legislative process the 8th amendment of the ARC (8. GWB-Novelle) finally came into effect on the 30 June 2013. The amendment brings a few main changes but falls short of a reform of German competition law. The amendment partially aligns the German merger control system to the European one by introducing the SIEC test (see above). Furthermore, the market share threshold for the legal presumption of market dominance has been increased from one third to 40 per cent. Other notable changes concern the calculation of turnover for companies in the press sector for purposes of merger control and the application of the merger control rules to mergers between statutory health insurers.

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Simon Hirsbrunner is a partner at Heuking Kühn Lüer Wojtek'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 recently co-edited a book on European energy law, and regularly speaks and publishes on competition and state aid law matters.

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Heuking Kühn Lüer Wojtek is a partnership of more than 250 lawyers, tax advisers and notaries 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 well-established contacts with leading law firms in all of the major jurisdictions allows us to account for the increasing international liaison of competition law and worldwide networking of antitrust authorities.