Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Germany

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The following is a selection of some of the most important developments in German competition law and policy in 2021. It has been a busy year for the Federal Cartel Office ("FCO"), inter alia because the new rules for digital companies took effect. The following covers cases under these new rules, abuse of dominance, merger control, antitrust (cartels, horizontal cooperation and vertical cases) and damages litigation.

1. New rules for the digital companies

Section 19a ARC. The FCO has used its new powers under Section 19a ARC – the special rules for digital gatekeepers – to open proceedings against all four GAFA companies in 2021. The new rules provide for a two-step process: (i) designate a company as a digital gatekeeper; (ii) the possibility to prohibit specified conduct/practices listed in the norm.

In some cases, *e.g.*, regarding ***Amazon***, the FCO has so far only engaged in the first step, i.e., the designation proceedings as digital gatekeeper (see press release here). In other case, the FCO has opened proceedings into relevant practices at the same time, namely against ***Google*** (see press release here and here), as well as against ***Facebook*** (see press release here). Regarding Google, the practices under review concern the user conditions for data processing and Google's News Showcase offer. Concerning Facebook, the FCO had started investigating the company's condition for users to have a Facebook account to use the company's virtual reality glasses Oculus under traditional abuse of dominance rules already in 2020, and then switched the case towards the new rules. Regarding ***Apple***, the FCO has followed a hybrid approach and has opened the designation proceedings, while announcing that there were several complaints against certain practices (see press release here).

On December 30, 2021, the FCO issued the first decision under Section 19a(1) ARC and designated ***Google/Alphabet*** as a digital gatekeeper, namely a company with paramount significance for competition across market (see case summary here). The decision focuses on structural elements, assessing the various neighboring and vertically related digital activities. It focuses on market power in general search engine services, search-based advertising, services with high user numbers (like YouTube, Chrome, Android, Google Play Store and online advertising services) and the resulting potential across markets. Google has refrained from challenging the decision, and the FCO continues its proceedings into the relevant practices. (Regarding Google's News Showcase offer, the agency has also started market testing commitment offers in January

2022). The decision is a milestone in antitrust enforcement in the digital economy. At the same time, the FCO is under some pressure to push ahead with the remaining proceedings as well, given that it is currently still the only agency with such far-reaching powers. There is also a possible race among regulators, given that the DMA, with similar powers at EU level, is expected to enter into force in 2022.

Section 20(3a) ARC. This new provision has triggered less publicity than Section 19a ARC when it was introduced last year, but it may be even more "revolutionary". The provision relates to paramount market power and special rules on unilateral conduct, which apply below the threshold of dominance under German law. It aims at preventing the tipping of platform markets, i.e., at intervening before competition in digital markets is lost. It prohibits a company with paramount market power from impeding its competitors, notably from preventing them to achieve network effects in platform markets if this poses a serious risk to significantly restricting competition on the merits. The legislative materials refer to practices such as prohibiting or preventing multi-homing (using more than one platform in parallel) or rendering platform switching difficult. Unlike Section 19a ARC, this rule can be enforced in civil litigation.

That happened in interim relief proceedings in Berlin between ***Immowelt vs. Immoscout***, two real estate platforms (see the decision in German here). The court found on April 8, 2021, that Immoscout, the leading real estate platform, had a paramount market position. This was based on an overall horizontal comparison in the online real estate platform market in Germany, including the number of website views and listings placed. While Immoscout's share of visits and listings was around 40%, it had 85% more listings than Immowelt. Immowelt successfully requested that Immoscout abstain from offering so-called "list-first" rebates. These were granted to commercial customers, if they listed 95% of their online real estate offers in the first seven days on Immoscout's platform or their own websites, but not on any third-party platforms (like Immowelt). The court ruled that these rebates impeded multi-homing, as they acted like de-facto exclusivity and resulted in market foreclosure, given that 56% of all contacts via platforms were made during this initial period (and 30% of ads were no longer available afterwards). The court also ruled that this practice seriously risked significantly impeding competition on the merits, as the rebate had led to a steep increase in Immoscout's listings and a decrease in Immowelt's ones. The court stressed that the new rule does not require to demonstrate any actual negative effects, but only a serious risk of significant impediment of competition. The case shows that in Germany the practices of digital platform players with market power may also be subject to increased private enforcement under the new rules.

2. Abuse of dominance

Abusive rebates. The FCO terminated abuse of dominance proceedings against Deutsche Post AG (DPAG) without a fine on March 2, 2021, after DPAG abandoned its rebate schemes for mail services for newspapers and magazines (see press release here). The proceedings under Section 19 ARC and Article 102 TFEU had started in 2016. Given DPAG's cooperation the FCO left the market definition and the question of dominance open.

The FCO qualified the rebates that DPAG offered to customers as exclusivity and/or fidelity rebates, which could foreclose competitors. In the original rebate scheme, the rebates were partly explicitly conditional upon the customer's entire circulation of the press products being dispatched by DPAG. The FCO only briefly stated that this is tantamount to an exclusivity clause, which is per se abusive for a dominant company. The FCO found that other rebates had the same effect, because they were very high if the customer dispatched a large proportion of the circulation with DPAG, and if certain steps were met, the additional rebate was granted for the entire volume, not just the increment. In addition, if customers dispatched a part of the circulation with DPAG's competitors, they might lose DPAG's rebate for the future. The FCO found that this eliminated the customers' incentive to sourcing competing mail services.

The FCO also took issue with DPAG's subsequent rebate scheme, despite the lack of exclusivity clauses. It found that even though the rebate reference period was limited to three months and the contracts had short termination periods, it could not be excluded that the scheme might foreclose competitors, because the rebates were still based on the entire circulation and granted retro-actively. In addition, the FCO took into account DPAG's superior position compared to its competitors, including the national footprint of its mail delivery network. Finally, the FCO found that the rebates may have been granted in a discriminatory fashion among customers. Ultimately, DPAG abandoned its rebate scheme and started offering fixed unit prices to customers.

It is interesting that the case summary does not mention the AEC test anywhere. While it may be possible that no competitor would be as efficient as DPAG, the test that the FCO applied seems to follow the traditional rebate test like in *Post Danmark II*. The first two European *Intel* judgments (from 2014 and 2017) do not seem to play any role here – and the latest *Intel* decision of the European Court was still pending. It remains to be seen whether the FCO will be more willing to engage in an AEC-test analysis in the future.

Facebook/Meta. The FCO's decision from February 6, 2019, prohibiting dominant social network player Facebook to process and combine users' personal data collected from various services, because the practice infringes the GDPR and thus also constitutes an abuse of dominance, is still not final yet. After back and forth between the Düsseldorf Court of Appeals and the Federal State Court in interim proceedings concerning the immediate enforcement of the decision in 2020, the Düsseldorf Court of Appeals finally held a first hearing in the main proceedings on March 24, 2021 – after which it referred the case to the Court of Justice in Luxembourg for a preliminary ruling (see referral decision in German here). The referral questions mainly relate to the interpretation of the GDPR, including whether Facebook's practices may be justified under the regulation, whether users can validly consent to these practices if Facebook is dominant, and whether the FCO – as a competition and not data protection agency – is competent to find that certain practices may infringe the regulation. The case illustrates that proceedings under traditional abuse of dominance rules, including judicial review, can be complex and lengthy, which was one of the reasons to introduce new rules for the digital economy.

3. Merger control

The increased merger threshold under the new law has not significantly diminished the FCO's merger case load. Overall, it dealt with 1,000 filings (compared to 1,200 in 2020). The FCO investigated 14 transactions in second phase proceedings. There was one prohibition, and three clearances without, and one clearance with conditions, while other filings in second phase were withdrawn.

Edeka/Real. The step-by-step divestiture of the Real grocery stores, previously held by Metro and then sold on to SCP Retail for further divestiture, continued in 2021. The FCO granted partial clearance for Edeka's acquisition of 72 Real stores on March 17, 2021 (see press release here). Edeka is the leading grocery retailer in Germany, and the FCO's analysis focused on noncoordinated effects, including dominance. It scrutinized those areas in which the combined shares were at least between 35-40%. Edeka was ultimately only allowed to acquire 45 stores without conditions, and six stores subject to commitments. Edeka was not allowed to acquire the remaining 21 stores. Regarding the commitments, Edeka undertook to either lease parts of the acquired retail space to competitors for at least 10 years, or has announced to close other Edeka stores in the same area. This marks a more flexible approach in the FCO's practice compared to a full divestiture, which has usually been the remedy of choice in this type of cases. This may well serve as a blueprint for other mergers and commitments in the retail sector.

The FCO cleared two conglomerate mergers in phase I: Salesforce/Slack and SAP/Signavio. It cleared ***Salesforce/Slack*** on February 25, 2021 (see case summary here). Salesforce is a leading provider of customer relationship management software (CRM), while Slack offers complementary enterprise collaboration software. The FCO reviewed whether the merger could strengthen Salesforce's position in some CRM segments through offering a product bundle. However, the FCO found that the companies' products were not closely linked, so that customer groups did not really overlap. The purchase decision is usually taken by individual business units at a given customer, which makes sourcing of a bundle less likely.

SAP/Signavio. The FCO cleared the case on February 26, 2021 (see case summary here). SAP supplies enterprise application software (EAS), and has a strong position in the segment of enterprise resource planning software (ERPS). Signavio offers complementary B2B solutions for process management software. The case mainly concerned process management software, in particular process mining, which uses data from an ERPS system. The FCO investigated whether tying or bundling SAP's ERPS with Signavio's products would significantly impede competition. The FCO contemplated that foreclosure would be possible through pre-installing Signavio's solutions into SAP's EAS, through product bundles or restricting access to SAP's system for competing process management software providers. The market investigation showed a lack of demand for product bundles, so the FCO investigated the possibility of SAP to hamper interoperability of third-party process management software with SAP's ERPS post-merger. Ultimately, the FCO found this to be unlikely, given that Signavio's process mining software is not yet considered to meet all customer requirements.

On December 9, 2021, the FCO found that the acquisition of the US cloud-based CRM platform services company ***Kustomer*** by ***Meta*** (former Facebook) was notifiable under the transaction value threshold (see press release here). The threshold was introduced in 2017 to allow the review of large incumbents acquiring young, companies with a high economic value and competitive potential, even if they do not (yet) have a large turnover, in particular in the digital industry. Kustomer did not reach the second domestic turnover threshold of € 17.5 million, but the consideration exceeded the statutory transaction-value threshold of € 400 million, and the FCO found that the company had significant activities in Germany through offering its services to customers located in Germany. That Kustomers offers its software as a service, i.e., that customers get access to a cloud (located outside of Germany) did not change that. The case gained prominence because the Commission reviewed the transaction in parallel after Austria had referred it to the EU level under Article 22 EUMCR. Germany did not join the request. The FCO rejected that this approach undermined the one-stop-shop principle of EU merger control, reasoning that it is within the Member State's discretion whether to refer a case under this provision to the Commission.

4. Antitrust

Cartel enforcement

In 2021, the FCO imposed fines of overall € 105 million on 11 companies and eight individuals across several industries. This is a significant decline from 2020, in which the fines totaled € 358 million. The FCO's president conceded that the pandemic did not facilitate cartel enforcement, in particular regarding dawn raids. The FCO only carried out inspections twice in 2021. The FCO's president explained that the declining number of leniency applications (9 vs. 13 in 2020) was connected to increased follow-on civil damages litigation. He therefore suggested that leniency recipients should obtain favored treatment in civil damages litigation.

Horizontal cartels. The FCO finally ended proceedings in the ***stainless steel cartel***, which had started with dawn raids in 2015, with fines against the last two companies, Lech Stahlwerke and BGH Edelstahlwerke, in January and July 2021, respectively. These were the only participants that did not settle, but in fact appealed the decisions. (The first fines in the case had been issued in July 2018.) In the ***steel forging cartel***, the FCO fined three companies as well as two individuals in a total amount of € 35 million for the exchange of sensitive information with competitors from other EU countries in the context of association meetings, including on their cost situation, pricing strategies and actual negotiations with suppliers (see press release here).

The appeal against the FCO's fines imposed on local breweries in the Cologne area in 2014 for participation in the ***beer cartel*** was successful. The Düsseldorf Court of Appeals lifted the fines on September 8, 2021, and found that there was no evidence for a cartel infringement (see press release in German here). The court found that during the appeal proceedings, in which the court heard witnesses and reviewed all evidence anew, only two witnesses out of 14 could remember the alleged price fixing, and even those not with sufficient clarity. (The court proceedings took place more than 10 years after the alleged events.) It is quite rare that cartel fines are lifted. The FCO has filed further appeal against the ruling.

Vertical price fixing.This has been a focus in the FCO's practice in 2021. The FCO fined German ***school bags*** supplier Fond of in total € 2 million on August 17, 2021, for agreeing with distributors that the recommended resale prices should be actual sales prices, and for sanctioning deviation from that understanding. The FCO became aware of case because the Austrian competition agency requested help in carrying out inspections in Germany (see press release here). The FCO also fined ***consumer electronics*** supplier Bose (audio products) € 7 million for similar conduct within its selective distribution system on December 2, 2021 (see press release here) .

In the ***musical instruments*** case, the FCO fined three suppliers (Yamaha, Roland and Fender), as well as two retailers and three individuals in the total amount of € 21 million for vertical price fixing, as well as horizontal price fixing among the retailers in several cases (see press release here). Each supplier agreed with the retailers that in practice retail prices should adhere to certain minimum prices that the suppliers set in different ways: at a particular retail price between the recommended resale prices and the retailers' previous purchase prices, by applying a multiplier to their purchase prices, via a set "web advertised" or "minimum advertising prices" for online sales, or set at a certain percentage below the recommended resale prices. Non-compliance was sanctioned in several instances. Minimum advertising prices are now deemed exempted under the draft Commission guidelines on vertical restraints, but the case is a good example that, just like recommended resale prices, they must not be enforced as minimum or actual resale prices in practice – otherwise they constitute resale price maintenance.

Horizontal cooperation

In January 2021, the FCO gave green light to a cooperation between the three mobile telephone operators with their own ***network infrastructure*** in Germany: Deutsche Telekom, Vodafone and Telefonica aim to close dead spots in their nation-wide mobile communication networks (see press release here). They will grant mutual access to their 4G networks in areas with low mobile phone traffic and in this way close smaller gaps (dead spots) there. It is often unprofitable for the incumbent operator to expand its own network in these areas. Originally, the two leading players Deutsche Telekom and Vodafone wanted to enter into an exclusive cooperation, which the FCO rejected because of possible foreclosure effects.

The FCO also issued comfort letters in November 2021 regarding two ***sustainability initiatives***: the banana living wages initiatives and the extension of the animal welfare initiative to cattle (see press release here). The ***living wages*** project aims at supporting compliance with minimum wages laws in the banana sector inter alia in Ecuador through a voluntary agreement among large retailers in Germany on common standards on wages and sustainable procurement strategies across the supply chain, and on gradually increasing the sourcing of these bananas. The initiative only concerns private label bananas and does not cover any parameters like purchase prices, other costs, production volumes or margins, or surcharges or minimum sales prices. The FCO found that while this agreement included horizontal and vertical cooperation aspects and falls within the scope of the cartel prohibition, it ultimately aims at setting a voluntary qualitative production standard, i.e., to support the implementation of the local minimum wages law in practice. The impact on competition in respect of purchasing prices was found to be minimal, and it did not involve any vertical resale price maintenance.

The initiative ***animal welfare*** has existed since 2014 for poultry and pigs. It provides for a purchase price surcharge by kg of sold meat, which is set by the initiative and payable by participating abattoirs to producers that raise the animals according to certain animal welfare standards. The participating retailers also pay a surcharge to the abattoirs, which is bilaterally negotiated and on which the initiative has no influence. The retailers remain free how to handle the resulting cost increases and whether and how to pass these on to consumers. The FCO originally tolerated the initiative to support a pilot project in establishing a trusted animal welfare standard in the German grocery retail sector, but also imposed improvements in recent years, such as the requirement to transparently label the meat concerned. The extension of the initiative to cattle has received green light for the next three years, but the FCO has clarified that the agreement on the surcharge payable to farmers would normally constitute a hardcore restriction regarding procurement activities. The FCO has signaled that the initiative should provide a different, more market-based financing model for the future, and ensure that the participating retailers do not only remain free in theory how to handle the cost increase, but also in practice.

Vertical agreements

The Federal State Court ruled in the ***booking.com*** case on May 18, 2021 (see decision in German here). The case concerned booking.com’s narrow best price clauses, preventing the participating hotels from offering better prices and conditions on their own websites than on the platform. The FCO had prohibited these clauses in 2016 because of infringement of Article 101(1) TFEU – in deviation from most other NCAs that reviewed these agreements in parallel and found that the clauses were exempted under Article 101(3) TFEU. Booking.com ceased its practice but appealed the prohibition with the Düsseldorf Court of Appeals, that quashed the prohibition, reasoning that the best price clauses were justified – not due to an exemption but as ancillary restraints to the platform service agreements between booking.com and the participating hotels, meaning they would not even fall within Article 101(1) TFEU.

The Federal State Court lifted the previous judgment and rejected booking.com's appeal. The court stressed that the best price clauses restrict competition, and found that the effect of the clause is comparable to that of a minimum price agreement, which is generally qualified as hardcore restriction under the VBER. The Federal State Court clarified that the narrow best price clauses do not constitute ancillary restraints, as they are not objectively necessary to carry out the agreement. The relevant question is whether the agreement generates efficiencies that outweigh the restrictions, which can only be assessed in the context of an exemption. In the current case, the narrow best price clauses were not exempted due to the VBER, because booking.com's market share exceeded 30%. The Federal State Court also rejected an individual exemption under Article 101(3) TFEU. It found no causal link between the efficiencies generated by operating the platform, like one-stop shop, transparency for consumers, etc., and the best price clause. The practice after 2016 would show that operating the platform was still possible without best price clauses. The court rejected the solution of a free-riding problem as a sufficient efficiency, and found that at least it would not outweigh the restrictions of price competition for the hotels. The court referred to the FCO's findings that the free-riding problem only existed to a limited degree. The court concluded that the loss of price transparency and security for consumers to get the best price on booking.com's platform was outweighed by the possibility to obtain better prices at the hotels' own websites.

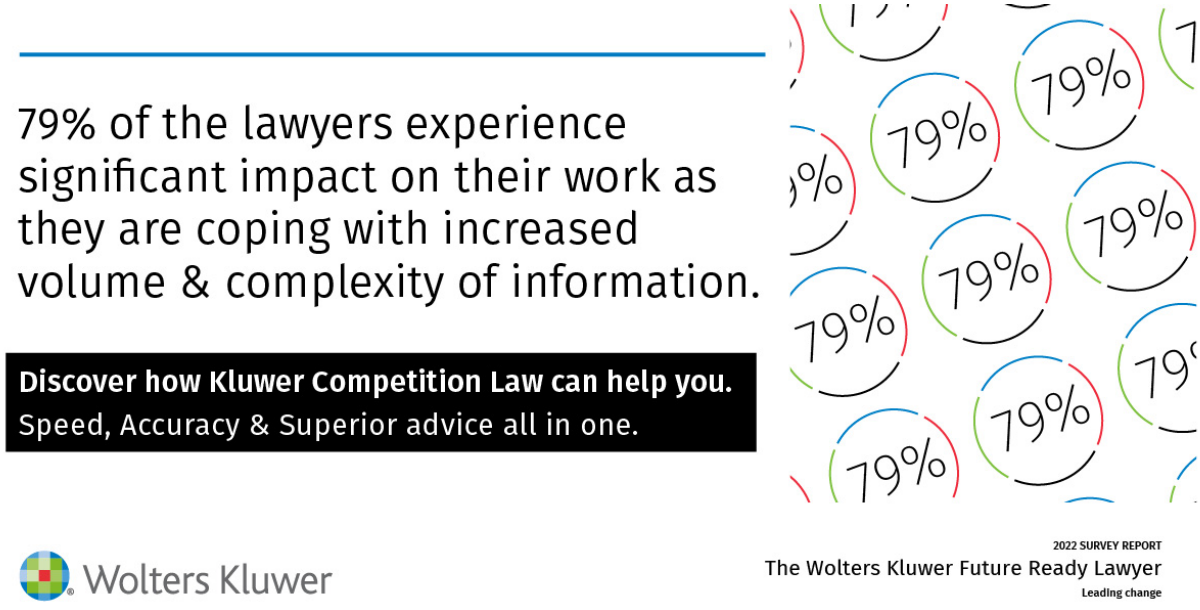
The ruling came prior to the publication of the Commission's draft guidelines on vertical restraints, which provide that narrow best price clauses will be covered by the VBER, i.e., exempted if the market share thresholds are met. For an individual exemption, the draft guidelines accept that preventing undercutting (free-riding) can be a legitimate goal, but acknowledge that if competition at platform level is limited, the clauses may allow a platform to maintain higher prices for its services, which may lead to higher consumer retail prices. The draft guidelines mention the platform's market power, whether the share of sales via direct channels are significant and whether there are any cumulative effects as relevant criteria for the analysis. This seems to slightly differ from the court's analysis in *booking.com*. It remains to be seen how the FCO will handle these clauses in the future.

5. Damages litigation

The Federal State Court issued two additional judgments regarding the tracks cartel, *Schienenkartell V* (September 23, 2020, published only in 2021, available in German here) and *VI* (February 10, 2021, available in German here). In ***Schienenkartell V*** the court confirmed that in case of a partial judgment that the claimant suffered damages, without clarifying the amount, courts must carry out an overall assessment of all circumstances of the case brought forward by the parties. If this exercise involves the same questions that are relevant for determining the damages amount in subsequent proceedings, a partial judgment may lack permissibility, if there is no substantial procedural efficiency gain. The court also found that the passing-on-defense is limited for normative reasons in cases where the direct customer (in that case a public transport provider) may have passed on the higher costs to consumers, but where consumers have no incentives to claim damages (scattered damages). A passing-on defense would then unduly exonerate the cartelists from providing compensation.

In ***Schienenkartell VI*** the court found that clauses on liquidated damages used in tenders, stipulating a percentage of the bid value as damage if the winner has engaged in illicit cartel restrictions, are permissible. The conditions: they must not exceed the amount of typical damages, and the defendant must have the possibility to demonstrate that only lower or no damages occurred. The amount in the clauses may be based on general economic principles, including those set out in various meta-studies on the average overcharge in cartels to reflect typical damages. The clause in the relevant case provided an amount of 5%, and the court upheld it. The court indicated that liquidated damages clauses may refer to an amount of up to 15% based on the latest relevant studies.

In a case regarding damages in the trucks cartel, ***LKW-Kartell II*** (April 13, 2021, available in German here), the Federal State Court ruled that the factual presumption that a cartel typically leads to an overcharge also applies if the cartel conduct related to the coordination of gross list prices, because these form the starting point for subsequent price negotiations with customers, even if net or actual prices ultimately differ.



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