Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Germany

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The following is a selection of some important developments in German competition law and policy in 2022. It covers cases under the new rules for digital companies, abuse of dominance, merger control, antitrust (cartels, horizontal cooperation and vertical cases) and damages litigation.

Special rules for the digital companies – Section 19a ARC

The Federal Cartel Office ("FCO") has used its new powers under Section 19a ARC, both in designating gatekeepers as well as in substantive proceedings. Possible overlaps with the upcoming DMA obligations have surfaced in several cases, and the FCO coordinates with the Commission, even though neither gatekeepers nor central platform services under the DMA have been designated yet.

Gatekeepers designations

The FCO has continued to designate gatekeepers that are subject to the special rules for digital gatekeepers under Section 19a ARC. The test is whether a company active on multi-sided markets has so-called paramount significance for competition across markets. The FCO had first designated Alphabet/Google in December 2021. In 2022, Meta/Facebook and Amazon followed.

Meta. The FCO issued the decision on May 2, 2022 (case summary here). The decision finds that Meta operates a strong, data-driven ecosystem in the entire sector of ad-financed social media, which is characterized by strong lock-in effects on private and business users, with competition mostly existing only on the fringes. The FCO confirmed that Meta's core service Facebook is dominant in the platform and network market for social networks for private users in Germany (which the FCO had already found in previous abuse of dominance proceedings). The decision refers to considerable economies of scope, resulting from other strong Meta services (such as Instagram, Facebook Messenger and WhatsApp). These services cover the entire range of offers for private users in the social media sector and are financed through offering closed vertically integrated online advertising to advertisers across all services. The FCO also stresses Meta's superior access to user data and that it combines private user data from various sources, which are highly relevant across markets for user retention, product and monetizing the company's overall

product range.

Amazon. Amazon was designated as a gatekeeper on July 7, 2022 (see here). The decision is based on Amazon's key position in the e-commerce sector through its hybrid country-specific sales platforms, i.e., with Amazon acting both as a retailer and online marketplace operator for third-party sellers. The FCO found that Amazon has a dominant position in the German market for the provision of online marketplace services for commercial sellers, having further secured its position through providing logistical services for sellers. (This finding in principle also has an impact for the application of classic abuse of dominance rules.) The decision also refers to expansion of the ecosystem through offering business IT services, as well as other consumer services e.g., video and music streaming or regarding the Internet of Things. Given its wide product portfolio, including bundled consumer offers via its Prime program, the FCO concludes that Amazon has a unique position to retain its various customer groups. The FCO notes that the ecosystem provides Amazon vast access to data, including excellent insights into user conduct and preferences, opening up potentials for improved personalized services, filling gaps in its product portfolio and improving the basis for business decisions.

In contrast to Alphabet and Meta, Amazon has appealed the designation decision, thereby testing the special judicial review path that is limited to an appeal with the Federal State Court. The appeal does not have suspensive effect.

Proceedings into specific practices

Meta/Quest. The FCO declared on November 23, 2022, that it did not object to Meta offering VR glasses in Germany. The FCO had opened proceedings under Section 19a regarding the new terms for user access to Meta's virtual reality glasses platform Oculus (now Meta Quest), (see case summary here). Meta changed its conditions and allowed users to sign on to a separate Meta account instead of having to use a Facebook account for being able to use Meta's new VR glasses. Meta also committed to hold user data collected on the separate Meta account separate from its other services (unless users give further consent). The commitments amount to some sort of internal unbundling of platform services that Meta sought to initially integrate. The FCO continues proceedings, reviewing if users are given sufficient choice whether to use the new Meta account and whether their data are processed across services.

Google News Showcase. The FCO terminated proceedings into Google's News Showcase online service offer in Germany without a decision on December 21, 2022 (see press release here), after Google changed its conduct in practice. Google refrained from integrating the News Showcase program into its general search engine services. It also promised not to make the participation in the program a relevant factor for a publisher's ranking in the general search results. (Here is a possible overlap with the DMA, which would arguably prohibit such a practice.) In addition, Google changed its contractual terms for German publishers allowing the possibility to license their ancillary copyright regarding crawled press content separately from participating in the News Showcase program. The FCO did not pursue further complaints relating to the amount of the remuneration with respect to ancillary copyrights.

Google Maps. The FCO has opened proceedings into Google's map services on June 21, 2022 (see press release here). The FCO reviews the restrictions of the possibility to combine Google's map

services with third-party maps, which could impede competition in the area of map services. The agency also investigates Google's licensing conditions for its services in vehicle infotainment systems.

Google user data processing. The FCO has sent a statement of objections regarding Google's user data processing terms on December 23, 2022 (see press release here). The case concerns user data collected and processed across various services (Google Search, YouTube, Google Play, Google Maps and Google Assistant), but also through third-party websites and apps and from Google's so-called background services, which partly collect data from Android devices on a regular basis. In the FCO's view, users do not have sufficient choice whether to agree to this far-reaching processing of their data, or to what extent. The FCO also takes issue with a lack of transparency. The agency notes that there may be overlaps with the DMA, which is only applicable, however, to so-called and yet to be designated central platform services. The FCO coordinates with the European Commission in this regard.

Amazon cases. The FCO has extended two ongoing abuse of dominance proceedings into Amazon's conduct vis-à-vis competing third-party sellers on the marketplace platform to also cover Section 19a ARC on November 14, 2022 (see press release here). One case concerns algorithmic price-setting control for third-party sellers, which may hamper the visibility of these offers. The other one concerns so-called brand gating through agreements with branded manufacturers that limit or prevent third-party sellers from offering these branded products on Amazon's platform.

Apple's tracking rules for third-party apps. On June 21, 2022, the FCO has opened proceedings into Apple's app tracking policy – even prior to designating Apple as a gatekeeper under Section 19a(1) ARC (see press release here). The FCO investigates the so-called App Tracking Transparency Framework, introduced in the context of the iOS 14.5 update, imposing certain conditions for third-party apps regarding user tracking. User tracking is particularly important for apps that are financed through advertising. The FCO reviews suspicions of self-preferencing and of impeding app developers. In addition to existing legal requirements for apps to obtain user consent for data tracking, under Apple's new rules additional separate user consent requirements for tracking appear when users for the first time open a third-party app – whereas this is not the case for Apple's own apps.

Abuse of dominance

Access to feeder flights. The FCO prohibited Lufthansa to terminate an agreement on the provision of feeder flight services in Europe to Condor, another German airline with which Lufthansa competes in the separate market for long-haul flights, on September 1, 2022, based on (Section 19, 20 ARC and Art. 102 TFEU) (see press release here). The FCO found that Lufthansa is dominant in the provision of feeder flights within Europe and from the major German hubs (Frankfurt, Munich and Düsseldorf), where it is the only airline offering feeder flights to European destinations. No other airline has such a dense network of feeder flights, including within Germany. The FCO established that Condor had no realistic alternative option to offer passengers a seamless journey. Nor was it possible for Condor to create its own feeder flight network, as there were no slots available (and most were held by Lufthansa). The FCO concluded that access to the feeder flights was objectively necessary to offer seamless long-haul flight services. The FCO thus

ultimately applied an essential facilities doctrine, without using that term.

The decision finds that without access to Lufthansa's feeder flights, Condor would not have been able or only to a very limited extent to offer passengers seamless long-haul flights from the departure airport to the destination. The FCO concluded that by terminating feeder flight services to Condor, Lufthansa abused its dominance in feeder flights and unfairly impeded Condor in the downstream market for long-haul passenger flights, in which both compete. Lufthansa had in effect expanded its own long-haul flights activities and did not want to support a rival through offering feeder flight services. The FCO acknowledged the principle that even a dominant company is not per se required to support competitors. However, this would not apply in cases of essential facilities. In the overall balancing of interests, which is always done under German abuse of dominance rules, and considering the ARC's goal of free competition, the FCO decided that Condor's interests and keeping long-haul flights competitive prevailed. The FCO explained that the termination would also have had negative effects on downstream travel agents. The FCO ordered Lufthansa to continue to offer feeder flight services for an indefinite duration (until competitive circumstances change), and even imposed further non-discriminatory access obligations.

Digital mobility services. The FCO has sent a statement of objections to Deutsche Bahn ("DB") in abuse of dominance proceedings it had already started in 2019 (see press release here). The FCO preliminarily concludes that DB abuses its dominant position as a provider of rail transport services in Germany in relations to digital mobility platforms. These offer online solutions for integrated route planning (combining e.g., train tickets with flights, carsharing, long-distance coach services or rental bikes), for which rail transport plays an important role. The FCO explains that all mobility platforms should have access to DB's train traffic data (delays, cancellations), whereas DB currently only grants access to selected mobility service provides (e.g., Google). The FCO moreover considers DB to impede mobility platforms through contractual restrictions, including bans on advertising, price specifications for passenger tickets, far-reaching bans on discounts and possible discrimination against some mobility platforms regarding commission rates for ticket sales.

Merger control

Overall, the FCO dealt with 800 filings in 2022 (compared to 1,000 in 2021). The FCO assumes that the continuous reduction may not only be due to increased merger control thresholds in place since 2021, but also due to the pandemic and the war in Ukraine. The FCO expects that the number of cases may increase again if inflation continues. The agency investigated 8 transactions in second phase proceedings. There was one prohibition, and two clearances with conditions, while two filings in second phase were withdrawn (and three were still ongoing in 2023).

BIRCO/ACO. The FCO prohibited the acquisition of BIRCO by ACO on January 14, 2022 (see press release here). The parties are active in drainage systems, in particular line drainage (i.e., surface draining of roads, squares and properties, where drainage channels collect surface water and conduct it to the sewage system). The FCO concluded that based on special demand side patterns, line drainage constitutes a separate product market: for technical reasons, customers decide very early on in a construction project that they want line drainage, and they then specifically only search for line drainage systems without considering other surface draining

systems. Based on this narrow product market definition, the number one and three players would have merged, with combined shares of 45-50%, clearly exceeding the statutory presumption of single dominance. They would have almost been three times as big as the next largest competitor, and the FCO found that post-merger the combined entity would have had superior access to building material traders and procuring entities, with foreclosure effects on competitors at both levels.

Avast/NortonLife Lock. On February 7, 2022, the FCO cleared the acquisition of cyber security software provider Avast by competitor NortonLife Lock in phase I (see case summary here). The FCO focused on software for private users. The FCO found that the product market may well include freemium offers (i.e., a basic software set offered for free, sometimes with advertising, which can be upgraded) but left that question open. The FCO reviewed worldwide and EEA-wide areas, which is its usual approach in software cases, but in addition national markets, given that the products here are for private users. Under a potential narrow market definition, the parties' shares would have been considerably higher than 40% – the statutory single dominance threshold – in Germany. However, the FCO stated that there was strong competition from substitutes, in particular by the operating systems mainly used by private users (Windows, MacOS, iOS, Android) and the antivirus software either already integrated in these systems or pre-installed by the manufacturer, alleviating concerns even in the narrow market definition scenario.

OMV petrol stations/EG Group (Esso). On February 11, 2022, the FCO cleared the acquisition of OMV'S petrol stations network in Germany by EG Group in second phase, under the condition that both the target and the acquirer first sell 23 and 25 petrol stations, respectively (see press release here). EG Group operates service stations under the "Esso" brand and is one of the leading petrol station operators in Germany, together with BP, Shell and Total. While the increment brought about by OMV was below 5% in some areas, and the merging parties' combined shares often ranged between 15-20%, the FCO found that the merger would lead to coordinated effects and create or strengthen collective dominance among BP, Shell and EG Group in various local markets in Southern Germany. The collective dominance presumption under German law was met, and the FCO reviewed the markets overall, finding inter alia that the Airtours criteria were met. One important factor was the high degree of pricing transparency. It also considered other aspects, including whether shares would get more symmetric and actual competitive dynamics. The case was originally notified to the European Commission in May 2021, which referred it to Germany under Art. 9 ECMCR. The commitments are designed as up-front-buyer solutions, as is normal under German merger control rules. And the divestitures must be fully implemented; contractual sales agreements alone are not sufficient.

Kustomer/Meta. The FCO cleared the acquisition of Kustomer by Meta in phase I on February 11, 2022 (see case summary here). The case was originally only notified to the Austrian agency, which referred the case to the European Commission under Article 22(1) ECMR. The FCO did not agree to a referral under that rule. It found that it had jurisdiction and then reviewed the merger under national rules in parallel to the Commission proceedings (which were terminated in Phase II with commitments on January 27, 2022).

Kustomer offers cloud-based customer relationship management (CRM) services worldwide. Kustomer bundles communication channels for companies to communicate with their end customers, including Meta's Facebook, Facebook Messenger, Instagram and WhatsApp, which are made available to Kustomer via APIs. (The Commission decision's commitments provide non-discriminatory access for third parties to these APIs for 10 years.) The FCO concluded that the

merger only had minor effects in the CRM market viewed in isolation (also due to the Commission decision's commitments). It then reviewed whether the deal would protect or strengthen Meta's social media ecosystem in a relevant way under the SIEC test. The FCO found it conceivable that the additional services could strengthen the ecosystem, which might indirectly strengthen Meta's market position in individual markets, e.g., in the social media online advertising area. However, the FCO could not establish possible risks for competition with the necessary probability for opening an in-depth investigation. The FCO's president expressed reluctance that the FCO had to clear the transaction, which was rather extraordinary. Overall, the case further fueled the discussion about special merger control rules for digital gatekeepers.

XXXLutz/Tessner Group. On March 9, 2022, the Düsseldorf Court of Appeals issued a declaratory judgment that the FCO's clearance subject to commitments of the joint venture XXXLutz/Tessner Group was unlawful (case Kart 2/21 (V), see decision in German here). The merger combined the number two and four in the furniture retail industry in Germany. The FCO had defined the product market as overall retail sales of a basic furniture portfolio, including full-portfolio retailers' stationary and online sales, as well as specialized stationary trade with a limited portfolio (like kitchen, upholstery, etc.). Nevertheless, the FCO reviewed the stationary segment separately from online and further distinguished the segment by discounter vs. department store. The FCO found a significant impediment of competition due to unilateral effects in the discounter segment, below the strengthening of dominance, so this was a so-called gap case. The merger was cleared subject to the divestiture of 23 retail outlets. The parties had already implemented the commitments, but the Court found they had a continuous legal interest in a ruling because they prepare civil damages actions against the FCO.

The merging parties challenged the commitments, arguing that the deal should have been cleared without commitments. The Court sided with the parties. It took a broader view of market definition/segments than the FCO, i.e., that online furniture retailers, specialized furniture and non-furniture retailers with only a limited furniture portfolio should all be included in the discount segment, if applicable. The Court also found that the merger did not meet the SIEC test. It explicitly left open whether the thresholds that the FCO had created to be indicative of finding a situation prone to unilateral effects were generally suitable. (They consisted of alternative thresholds by segment, based on a mixture of combined market shares and increments, see blog on developments in 2020 here). The ruling found that these thresholds could at least not demonstrate a significant impediment of competition in the case at hand. The Court explained that the FCO's theory of harm, i.e., unilateral effects of the merger through the elimination of competition between the merging parties, required an oligopolistic market structure, referring to the relevant passages in the Commission guidelines on horizontal mergers. However, based on the Court's the revised market definition/segments, none of the markets identified by the FCO as raising concerns could be qualified as oligopolistic.

Antitrust

Cartel enforcement

In 2022, the FCO imposed fines of an overall € 24 million on 20 companies and seven individuals across several industries. This is a significant decline from 2021, in which the fines totalled € 100 million (and from 2020, with total fines > € 300 million). The FCO received 13 leniency

applications in 2022 and has also opened cartel proceedings based on two hints received via the anonymous whistleblower tool (which is a rather minimal ratio in light of > 1,000 hints received via the tool overall). The FCO's president sees the fight against cartels being back on track to normal again following the years of the pandemic, pointing to the highest number of dawn raids (18 in total in 2022) in recent years.

Horizontal cartels

The FCO imposed fines on various cartels inter alia in the broader construction sector: it fined two manufacturers of modular expansion joints (***expansion joint systems for road bridges***) totalling € 7,3 million on February 2, 2022 (see press release here). They had agreed to preserve their market shares, respectively, through a fixed quota system. The companies also applied a uniform price calculation formula they had developed. On June 9, 2022, the FCO fined two companies for bid rigging in ***industrial construction*** in total of € 12.5 million (see press release here). The case concerned horizontal and vertical bid rigging, i.e., including the company sourcing construction works through bids and bidders. The FCO also fined four ***road builders*** in Dortmund for local bid rigging in several decisions from September through December 2022, in a total amount of ca. € 1 million (see press release here).

Vertical price fixing

The FCO terminated proceedings against a supplier of ordering and billing systems for the hospitality sector concerning suspected resale price maintenance on May 30, 2022, without issuing a decision (see case summary here). The case concerned so-called ***minimum advertising prices*** (MAPs) and the handling of recommended resale prices (RRPs) vis-à-vis retailers in practice. The supplier insisted that a retailer observe the RRPs when offering the products online, in particular on public online platforms, and supply was conditional upon compliance. The supplier claimed that this only constituted MAPs but not the final selling price for retailers, and would thus be permissible. The FCO did not issue a decision, given that the supplier quickly carried out an internal investigation and installed compliance measures, including communications to retailers that they remain free in setting their advertised and actual prices, regardless of the distribution channel. However, the FCO clarified that MAPs as such are not permitted under antitrust law, but that these constitute resale price maintenance and thus hardcore restrictions under Art. 4 lit. b VBER. The case occurred during the discussion at the EU level on whether MAPs should be covered by the VBER, which was finally not the case.

Horizontal cooperation

In January 2022, following a request for assessment by the ***branch initiative*** Agricultural Dialogue Milk, the FCO considered the planned financing concept for a "fair distribution of the risks and burdens associated with the agricultural transformation processes for ***milk producers***" would infringe Art. 101 TFEU and Section 1 ARC (see case summary here). The initiative aimed at better-covering costs for milk producers along the supply chain in Germany. The FCO took issue with the means, i.e., jointly agreed mandatory and index-based price surcharge or price

stabilization mechanism apply to raw milk supply contracts across the value chain for milk and milk products sold in the grocery retail sector. The concept was based on a framework agreement between farmers, dairies and retailers and should apply to renewable, three-year term contracts. The index surcharges to be applied by participants along the supply chain was based on average costs incurred in milk production. FCO considered this as a hub-and-spoke agreement between milk producers and dairies regarding the pricing of the products concerned and as an infringement by object. The FCO rejected an individual exemption, finding no link of the initiative to better product quality or any other efficiencies that would also benefit consumers, but merely the aim to obtain better margins for the milk producers – which did not count as a legitimate benefit in the analysis. The FCO also clarified that the initiative did not aim for any higher sustainability standards than required under EU or national law in the agricultural sector, in which case an exception from antitrust law might apply (see Art. 210 CMO). These elements distinguish this fairness initiative from previous fair trade in bananas or animal welfare initiatives (see on these initiatives the blog on German developments in 2021 here).

On July 4, 2022, the FCO reported that it would not open proceedings into the planned ***R&D cooperation*** between VW and automotive supplier Bosch regarding ***automated driving*** (see press release here). The cooperation aims at developing a software solution in semi-automated driving, i.e., a so-called 360° video perception software, which centrally combines signals and data from cameras, radars and sensors, and processes these by using AI. The FCO reviewed the cooperation under the R&D block exemption regulation and took into account that the software should mainly be used in VW's own vehicles (while also being available to other OEMs). In addition, there are several other competing R&D poles in the form of development projects for automotive as well as global IT companies, both regarding entire driving systems and individual software components for automated driving systems. Accordingly, the FCO decided against opening proceedings at this stage but mentioned that it would continue to observe the development of VW's and Bosch's cooperation.

The FCO has raised no objections against the ***LNG cooperation*** among the major gas importers and wholesalers in Germany, Uniper, RWE and EnBW/VNG, i.e., to build and operate the planned swimming LNG terminals in Wilhelmshaven and Brunsbüttel (see press release here). The agency conceded that the envisaged exclusive use by Uniper, RWE and EnBW/VNG could restrict competition (foreclosure of other gas importers and wholesalers), which might have been viewed more critically in "normal times". However, the cooperation takes place against the energy shortages due to the war in Ukraine and was initiated by the Federal Ministry for Economics and Climate Action. The FCO found that the cooperation would create urgently needed gas import capacities in a relatively short time, thereby reducing energy prices, with positive effects for consumers. These benefits would outweigh the possible negative effects of the restriction. Setting up a more elaborate model with access for more gas importers would have likely required more lead time – which seems to be the analysis of whether the restriction is indispensable to achieving the benefits, an element on which the FCO typically takes a strict stance. Finally, the current model is limited in time to March 31, 2024. Overall, the FCO obviously wanted to demonstrate that antitrust law can be handled in a flexible way in these extraordinary circumstances.

Vertical agreements

The FCO issued a declaratory decision against chainsaw manufacturer Stihl on June 29, 2022,

finding that the ***single branding*** clauses in its selective distribution contracts infringed Art, 101 TFEU and Section 1 ARC (see case summary here). Brand manufacturer Stihl distributes various portable and hand-guided motorized tools for gardening and landscaping via a selective distribution system at the retail level in Germany. The retailers were grouped into two categories, normal Stihl resellers and so-called "Stihl service" resellers. The latter obtained more favourable conditions but were required to agree to single branding/noon-compete clauses, i.e., not to sell competing products regarding quite a wide product range. A competitor's complaint triggered the investigation, and the FCO found that Stihl's market share in Germany exceeded 30% in most product markets (irrespective of the exact definition), at least regarding those products covered by the relevant clauses. The FCO noted that while the use of single branding/non-compete in selective distribution is not per se an infringement of antitrust law and permissible under the VBER, Stihl could not benefit from the VBER due to market share.

The FCO found that the clause in question had a restrictive effect on competition in practice, notably foreclosure effects on competitors to get access to the Stihl resellers, which accounted for most Stihl resellers and often were strong retailers in the relevant product markets with attractive sales locations. The FCO said Stihl could not demonstrate any efficiencies generated by the restrictive agreements, nor that the restrictions were indispensable. The FCO inter alia referred to Stihl abandoning the clauses during (and because of) the FCO proceedings in this context. This seems to be a somewhat circular reasoning that the FCO already applied in the booking.com case regarding the narrow price parity clauses.

Even though Stihl terminated its practice, the FCO nevertheless issued the decision because it wanted to send a signal to the retailers in the product markets concerned, given that the Stihl single branding clauses were widely spread and had impacted the market practice, and also with a view to a few competitors of Stihl who also operate selective distribution systems or may switch to one. At the end of the case summary, the FCO includes an explicit warning that it would continue to monitor the markets and conduct of other manufacturers with significant market shares.

Damages litigation

The Federal Court of Justice ("FCJ") ruled on November 29, 2022, in the civil damages case brought by the insolvency receiver of Schlecker, a former leading drugstore in Germany (case KZR 42/2, see decision in German here). The case concerns follow-on damages based on an FCO decision on illicit information exchange regarding personal hygiene products from 2004-2006. The previous instances had rejected the claim, inter alia because they doubted that there was a general experience-based principle/factual presumption that the exchange of competitively sensitive information would result in higher prices, similar to the one accepted under German law regarding price-fixing cartels (even if it does not amount to prima facie evidence). (All of this relates to "old" claims, i.e., that arose prior to the changes to the law based on the EU's damages directive.). The FCJ clarified that this type of factual presumption does also apply to information exchange, in particular in cases where the information also concerned planned or implemented price increases – and that the courts need to consider such a factual presumption accordingly when carrying out a comprehensive review of whether damages are probable. The FCJ quashed the original ruling and referred the case back.

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