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# Disclosure of Trade and Business Secrets in German Antitrust Investigations – Federal Court of Justice rules on the Role of Interested Parties as a new Friend to the Federal Cartel Office

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**Executive Summary**

On 20 February 2024, the German Federal Court of Justice ("**FCJ**") ruled on the disclosure of trade secrets in antitrust proceedings. The underlying case (File No. KVB 69/23) concerns the German Federal Cartel Office's ("**FCO**") antitrust investigation into Google's business practices and the FCO's intention to disclose information to a third party TomTom, one of Google's competitors, who have been summoned to participate in the proceedings ("**Interested Party**").

**Essential Take Aways**

In its decision, the FCJ emphasized the importance of broad and effective antitrust enforcement. The protection of trade secrets in antitrust administrative proceedings may be restricted by written and unwritten disclosure obligations if the (predominantly private) interest in confidentiality is outweighed by other more significant (not necessarily public) interests.

The FCO's right to disclose trade or business secrets to third parties in antitrust proceedings thus depends on whether the disclosure is proportionate in view of the above interests.[1] The FCJ considered the following aspects in balancing the private interest in confidentiality against the public interest and the third party's interest in disclosure[2]:

- The public interest prevails especially in cases where the Interested Party's knowledge of the respective information is necessary for the clarification and assessment of the facts of the case.
- The Interested Party plays a pivotal role as a direct competitor in the proceedings, especially due to its specialized knowledge of market conditions and its assessment of the competitive effects of certain business strategies and contractual clauses of the company concerned.
- A balancing in favor of disclosure of trade secrets is more likely, the more essential the disclosure is to further the proceedings and the closer the alleged practices are to a core principle of antitrust law.

## Facts of the case

In February 2022, the FCO informed Google[3] about the initiation of antitrust administrative proceedings against Google pursuant to Section 19a (2) Act Against Restraints of Competition ("**ARC**"), Sections 19, 20 ARC and Article 102 Treaty on the Functioning of the European Union ("**TFEU**"). The subject of the investigation was, inter alia, the bundled offer of Google Automotive Services ("**GAS**") to vehicle manufacturers, consisting of the mapping service Google Maps, a version of the app store Google Play and the voice assistant Google Assistant (together referred to as "**GAS Services**"). TomTom, one of the two third-party companies that had been summoned to the proceedings as Interested Party is a direct competitor to Google offering similar content, software and navigation services to the automotive industry.[4]

In the FCO's view, the following practices of GAS potentially amounted to an infringement pursuant to Section 19a (2) ARC:

- Bundling of the relevant GAS Services;
- Restricting vehicle manufacturers from advertising services on the condition that they do not pre-install any other voice assistant other than Google Assistant;
- Requiring vehicle manufacturers, as GAS licensees, to set Google services as default services and to give them preferential on-screen placement; and
- Impeding the interoperability of GAS Services with third-party services.

To better understand the facts of the case, the FCO informed Google about disclosing the Statement of Objections ("**SO**") to the Interested Party for assessment. On July 25, 2023, Google filed a complaint with the FCO against the disclosure of the SO to the Interested Party. Google challenged the disclosure of 28[5] passages in the SO *inter alia* relating to Google's revenue expectations in the in-car infotainment business, as well as to various (potential) agreements and business strategies in connection with GAS licensing agreements.[6] Google alleged, the disclosure of the SO would give the Interested Party a significant competitive advantage and thus severely impair Google's competitive position.

The FCO did not remedy the complaint, but instead referred the challenge to the FCJ. According to the FCO, the trade and business secrets were disclosed only to the extent necessary for an understanding of the facts and their full legal assessment. This would prevail over Google's interest in confidentiality, as no concrete negative effects on Google's competitive position were to be expected from the disclosure.

## The Judgement

Regarding the vast majority of the remaining 9 passages at issue, the FCJ ruled in favour of disclosure to the Interested Party.

Google's complaint was only deemed justified with respect to one verbatim quotation from its internal documents. In this regard, the FCJ held that the additional disclosure of this specific wording was neither necessary to further the proceedings nor would it contribute to the clarification of the facts.

*Elaborated Balancing Criteria*

The FCJ assessed the general aspects for balancing interests of the parties in administrative antitrust proceedings under Section 56 (4) ARC. In doing so, the FCJ largely confirmed the FCO's position, prioritising disclosure over the need for confidentiality based on a balancing of the two focal points of interest:

- The disclosure of a trade or business secret must be suitable and necessary[7] to further the FCO's investigations, and
- The public interest in furthering the proceedings through disclosure and the (procedural) interests of the Interested Party – which, in this respect, are both of equal importance – must outweigh the confidentiality interests of the company concerned.[8]

In order to determine whether disclosure is appropriate, the private confidentiality interests on the one hand must be weighed against the public interest and the interest of the Interested Party in disclosure and in furthering the proceedings on the other hand. In doing so, both spheres of interest must be reconciled as far as possible.[9]

**Relevance of underlying antitrust rules (Section 19a ARC).** The FCJ's decision was influenced by the legal framework underlying the FCO proceedings. Specifically, Section 19a ARC enables the FCO to intervene proactively in the case of the paramount cross-market significance of a company.[10] The effects of strategies, business expectations and intended behaviour in a certain competitive situation, which often constitute trade or business secrets, thus are a focal point for proceedings under Section 19a (2) ARC. The FCJ held that in this context, there was an overriding interest to clarify the facts and enable the Interested Party to comment on Google's business expectations and the potential resulting consequences for the market.[11]

**The more likely an infringement, the higher the interest in disclosure.** If the Interested Party depends on the disclosure of the information to take a meaningful position, and the information presumably leads to a core allegation under antitrust law[12], the interest in disclosure is more likely to prevail.

**Procedural interest and utility of the Interested Party must not be undermined.** The procedural purposes associated with the parties' opportunity to state their case in a hearing, as stated in Section 56 (1) ARC, must be considered when balancing the interests at issue. In addition to the interest in determining the facts of the case pursuant to Section 57 ARC as a basis for enforcement of the provisions of the ARC, it further is in the interest of any party to an antitrust administrative proceeding to be informed of the status of the proceedings and to be able to effectively exercise its right to be heard.

**Contribution of a competitor is of particular importance for the FCO to assess the facts.** The opportunity to have the Interested Party – that is also a direct competitor of the company concerned – comment on the case may be particular importance to the FCO. The Interested Party's specific knowledge of the market conditions and its assessment of the effects of strategies and contractual clauses implemented by Google may be relevant for the FCO in establishing the facts of the case.[13]

According to Section 57 (1) ARC, the FCO has a broad discretion to investigate and collect any evidence required by using appropriate investigative instruments at its disposal. [14] The investigative measures may include obtaining information and an opinion on the allegations from

an Interested Party and associations of people whose interests are significantly affected by the decision to be taken provided that there is significant economic interest.[15] The primary purpose of obtaining information from an Interested Party is therefore to collect and clarify facts in the proceedings before the antitrust authority. With the Interested Party becoming part of the proceedings, it must be given the opportunity to comment in accordance with Section 56 (1) ARC. The FCO is therefore obliged to inform parties to the proceedings of the facts relevant to the decision and to inform them of the preliminary economic and legal assessment of the facts at its discretion.[16]

According to the FCJ, a disclosure of facts to an Interested Party with special knowledge of the market concerned is appropriate in principle as the Interested Party aides the FCO in its understanding and assessment of the conduct under investigation. The more detail the Interested Party received on the company concerned (in this case Google) in the antitrust proceeding and the latter's business activities, the better the Interested Party can comment on the subject matter of the proceeding and support the proceeding. Notwithstanding, the FCJ also accepted that a disclosure of information to the Interested Party is not appropriate if knowledge of the trade and business secrets in question is unlikely to improve the investigative value of the Interested Party's opinion.

The only question is whether there is any other equally effective way to keep the Interested Party informed in regard to its statement or if the proceedings can be supported in another way, without disclosure. Disclosure to the Interested Party is also necessary in principle, as questioning business partners of the company concerned or obtaining an expert opinion are frequently not equally effective.

It is to be expected that the FCJ's decision will not be its last word, and the criteria developed by the FCJ will play an essential role in assessing future disclosure decisions of the FCO.

*Analysis of Individual Disclosed Passages*

Without intending to draw final categorical conclusions in this section, it makes sense to analyze the disclosures granted in individual cases in terms of their practical relevance. After all, it may be of interest to courts as well as to interested parties requesting disclosure, to know in which cases the interest in disclosure has prevailed:

- The FCJ doubts whether Google's earnings opportunities**[17]** qualify as a secret at all. Irrespective of this, the protection of a non-specific indication of a possible yield does not outweigh the interest in information, as the text passage is suitable and necessary for the clarification of the facts.[18] The knowledge of the competitor's possible earnings expectations enables the Interested Party to present the economic significance of the proceedings in more detail and thus to promote the proceedings.[19]
- Similarly, conclusions drawn by the FCO from publicized events – regardless of whether they are correct or not – do not constitute a business secret of the company.
- The disclosure of the GAS license agreements in relation to default settings of the GAS Services and their placement, in particular the verbatim reproductions of contractual agreements between Google and vehicle manufacturers that are not publicly known, is legitimate. The FCJ does not see any possible competitive disadvantage or increased risk of this information becoming known to other vehicle manufacturers, as the FCO has placed the Interested Party under a criminal

confidentiality obligation and there is no reason to believe that this will be breached.[20]

- The exact wording of the provisions on default settings and placements of Google's applications is important for the progress of the proceedings, as it enables the Interested Party to comment specifically on the competitive effects of those provisions. Any paraphrasing of the contractual provisions is not equivalent to a reproduction of the wording and increases the risk of misunderstanding and thus potentially reduces the quality of the comments.[21] The FCJ again flags the importance of the public interest in promoting the process. The specification of default settings and placements is one of the core allegations of the proceedings and the assessment of the Interested Party as a competitor of these effects is of particular importance due to their market knowledge.
- With the same argument as before, that the information is particularly relevant for proceedings according to the objective of Section 19a ARC – namely to counteract the threat of market dominance at an early stage – the FCJ also authorizes the disclosure of Google's internal considerations to change the remuneration model for the licensing of its services.[22] The argument for this is that even without the disclosure of Google's internal considerations, it can be assumed that the Interested Party will examine whether corresponding models for the remuneration of its services can also be considered. Hence, the FCJ does not see a critical knowledge advantage for the Interested Party or competitive disadvantage for Google. Nevertheless, the hearing of the Interested Party on Google's monetization considerations and a possible connection with Google's own bidding power is of considerable importance for the clarification of Google's possible (future) market and power position.[23]

*Analysis of Rejected Arguments*

The FCJ did not follow Google's argument that the disclosure of sensitive information to a competitor constitutes a violation of Article 101 TFEU, nor did it address the threat of a competitive disadvantage for the disclosing company.

Even if a disclosure by Google itself to one of its competitors would constitute a violation of Section 1 ARC, Article 101 TFEU, this does not rule a disclosure request unlawful from the outset. In the specific case of disclosure to competitors summoned to participate in the antitrust proceedings, the secrets in question are not disclosed by the company but by the antitrust authority, which is per se not an addressee of Article 101 TFEU.

On the one hand, the company concerned argued that if sensitive information is being disclosed to competitors, there is a high likelihood of imitation and adaptation.[24] However, even if competitors were to analyse the wording of the contract and adapt their own offer in such a way to make the most of the leeway left by Google, the FCJ considered this to be a minor disadvantage.

## Practical outlook

The FCJ's decision focuses on the highly sensitive topic of the disclosure of business and trade secrets and their protection. It may serve as a blueprint for future cases in Germany in which competition authorities disclose internal information of a targeted company to interested parties for investigative purposes. The FCJ encourages interested parties to intervene on behalf of the FCO. In this respect, the rights of interested parties in antitrust administrative proceedings are strengthened

and the involvement of third parties will become more important in practice going forward.

While the decision ultimately appears to be in favour of a disclosure to advance antitrust proceedings, especially in the context of Section 19a ARC, disclosure obligations are by no means unlimited and require a careful balancing of affected interests. Each trade secret and disclosure thus must be assessed on a case-by-case basis. It thus is possible (if not to be expected) that the FCJ may be flooded with respective applications for the protection of trade secrets. Hence, as in the case discussed here, it is important to find amicable solutions before going to court.

Going forward, it appears likely that the FCO may resort to a disclosure of confidential information in similar cases and Section 19a ARC proceedings. Hence, companies subject to disclosure will have to be prepared. From a practical view, tactical redactions and blackening with a paint roller will no longer be an option, as the core message of the FCJ is clear: if disclosure will help the FCO, and if infringement is likely, the interest in disclosure will always prevail. From the perspective of the company concerned, which is obliged to disclose, these criteria should be properly scrutinized, as the company concerned usually knows best whether the infringement is likely or not. If the FCO does not uphold a complaint against disclosure, an appeal to the FCJ will have to be carefully considered in the future. In the event of an unsuccessful appeal to the FCJ, further significant costs will be incurred, which could be avoided – for example, through an amicable settlement and a sensitive redaction. Notwithstanding, whether a disclosure is warranted (or not) in view of the interests at stake must be carefully assessed on a case-by-case basis. Moreover, there is a variety of confidentiality measures that may still ensure and preserve confidentiality interests in an effective manner even if disclosure is ordered for. In its judgment, the FCJ did not address these other available protection measures, e.g in the form of in camera proceedings in various forms. For similar cases in the future, a confidential in camera disclosure may be considered on a case-by-case basis.

After all, it remains to be seen, how this judgement will change the landscape of disclosure and dealing with trade and business secrets in the broader antitrust environment, as it might also influence other antitrust enforcement areas.

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[1] BGH, Judgment of 20 February 2024 – KVB 69/23, para. 41. – *Google-Offenlegung (in English: Google Disclosure).*

[2] Ibid., para. 39.

[3] For the sake of simplicity, the two complainants to this matter, namely Alphabet, the parent company of the Google Group, and the German company belonging to the group (affiliated companies within the meaning of Section 36 (2) ARC), will be referred to collectively as "Google".

[4] BGH, Judgment of 20 February 2024 – KVB 69/23, para. 2 – *Google-Offenlegung*.

[5] The parties have reached an out-of-court settlement with regard to 11 passages prior to the start of the court proceedings and agreed to settle the dispute with respect to further 8 passages in question during the proceedings.

[6] Concretely, the link to Google's cloud offering, default settings to be made for GAS Services and their placement in vehicle systems, remuneration models, as well as data access rights.

[7] Suitability and necessity are the first two elements of the so called "principle of proportionality" (*Verhältnismäßigkeitsprinzip*), the third one being appropriateness.

[8] BGH, Judgment of 20 February 2024 – KVB 69/23, para. 32 – *Google-Offenlegung*.

[9] Ibid., para. 39.

[10] Section 19a ARC intends to ensure more effective control of companies that have resources and strategic positioning that enable them to exert considerable influence on the business activities of third parties or to expand their own business activities into ever new markets and sectors.

[11] BGH, Judgment of 20 February 2024 – KVB 69/23, para. 51 – *Google-Offenlegung*.

[12] Ibid., para. 38.

[13] Ibid., para. 38.

[14] Ibid., para. 26.

[15] Ibid., para. 25.

[16] Ibid., para. 26.

[17] Ibid., para. 45.

[18] Ibid., para. 49.

[19] Ibid., para. 50.

[20] Ibid., para. 56.

[21] Ibid., para. 57.

[22] Ibid., para. 60.

[23] Ibid., para. 62.

[24] Ibid., para. 37.

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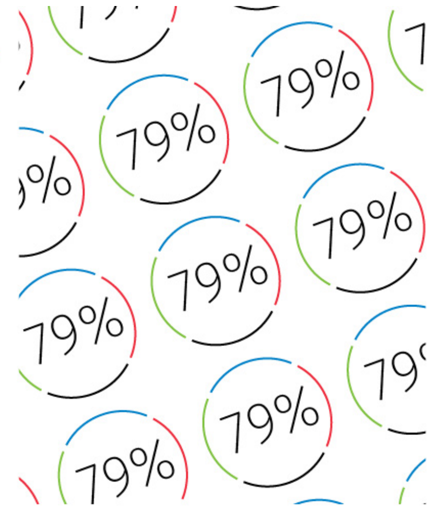

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