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RECENT DEVELOPMENTS IN GERMAN COMPETITION LAW[1]

The recent past has seen a flurry of activity in the area of German competition law both at the legislative level and at the enforcement level. This advisory summarizes the main developments with respect to mergers, hardcore cartels, and anti-competitive agreements and also provides an overview of the increasing number of private damage claims for breach of competition law.

NEW PRESIDENT OF THE FEDERAL CARTEL OFFICE (FCO)

In December 2009, Andreas Mundt, the former head of the FCO's general policy division, replaced Bernhard Heitzer as president of the agency (Mr. Heitzer left the FCO to become State Secretary at the Federal Ministry of Economics and Technology). Mr. Mundt's appointment is the first internal appointment to the president's office in the history of the agency and shows the great appreciation for Mr. Mundt, in particular for his economic expertise.

MERGER CONTROL[2]

Second domestic turnover threshold. On 25 March 2009, a second domestic turnover threshold of €5 million became effective in the German merger control regime. Under the revised rules, a concentration requires notification under the German Act against Restraints of Competition (ARC) only if at least one party generated German turnover of more than €25 million and at least one other party achieved local revenues in Germany of more than €5 million. (The requirement that the combined worldwide turnover of all parties together must exceed €500 million remained unchanged.)

Prior to the amendment the number of concentrations requiring notification under German merger control was very high compared to international standards. The introduction of the second domestic turnover threshold is expected to reduce this number by approximately 30% and to limit the scope of the merger regime to transactions where at least two of the parties have appreciable activities in Germany. However, the second domestic turnover threshold stays considerably behind the thresholds of other EU countries. For example, in the Netherlands each of at least two of the parties must have domestic turnover of at least €30 million. In Belgium, the threshold is €40

1 To read this advisory in German, please visit: http://www.arnoldporter.com/public_document.cfm?id=15426&key=17G2.

2 Some of the topics addressed in this chapter were already dealt with in an Arnold & Porter advisory of February 2009, available at: http://www.arnoldporter.com/public_document.cfm?id=14095&key=6F3.

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million, and in France it even amounts to €50 million.

The FCO has taken active steps to redeploy the resources made available by the additional threshold for other activities. Already at the end of 2008, the agency had established a 12th Decision Board dedicated exclusively to enforcement actions against hardcore cartels, alongside with the 11th Decision Board, which had been established for that purpose back in 2005. Moreover, the marked increase in the number of sector inquiries is noteworthy. With four sector inquiries in 2009, the FCO seems to follow the example of the European Commission, which carried out numerous investigations of different sectors in recent years (including credit cards, pharmaceuticals, and energy). In Germany, gas transport (final report published in December 2009), district heating, the dairy industry and the fuel sector were under FCO scrutiny. Sector inquiries pursuant to Section 32e ARC do not target specific companies. However, there must be indications that competition is restricted in the targeted sector, and in many cases the findings in the framework of a sector inquiry constitute the starting point for individual cartel or abuse investigations. The conclusions drawn from a sector inquiry may also influence merger control decisions. For example, the FCO's recent decision to prohibit the proposed acquisition by Total Deutschland GmbH of 59 petrol stations from OMV Deutschland GmbH explicitly refers to the results of the inquiry into the fuel sector. Companies are therefore well advised to devote sufficient resources to sector inquiries and to intervene actively.

Amendment of German external trade and foreign investment laws. In April 2009, an amendment of the German external trade and foreign investment laws (*Aussenwirtschaftsgesetz* and *Aussenwirtschaftsverordnung*) came into force. This created new powers for the German government to review and, if necessary, block or impose conditions for reasons of public policy or public security when voting shares of 25% or more in a German company are acquired by a company that is located outside the EU, Iceland, Liechtenstein, Norway, or Switzerland. The rules also apply to companies that are located within this geographical area but were only set up to circumvent the new rules. An official of the Federal Ministry of Economics and Technology reported that during the three first months after the laws became effective, 20 companies had requested a clearance certificate (*Unbedenklichkeitsbescheinigung*), by which the government confirms that it will not object to the transaction at issue. According to the official, companies have to wait on average less than one month until they receive the certificate. The government also initiated a small number of reviews *ex officio*, but it appears that so far no formal review has been initiated and no acquisition has been blocked or cleared subject to conditions.

Gun-jumping. In December 2008 and February 2009, the FCO imposed record fines in two cases for violation of the filing and stand-still obligation (gun-jumping). Mars Inc. was fined €4.5 million for closing the acquisition of Nutro Products Inc., a manufacturer of pet food, immediately upon obtaining clearance from the US antitrust authorities but prior to the FCO's approval. The FCO came to the conclusion that the concentration would have strengthened Mars Inc.'s dominant position in the market for dry dog food, and Mars eventually agreed to divest the trademark rights for Nutro for Germany and Austria. According to the FCO, Mars' active cooperation was taken into account for the calculation of the fine.

In February 2009, the FCO fined Druck- und Verlagshaus Frankfurt (DuV), a German publishing house, €4.13 million for not having notified the acquisition of another publisher in 2001 even though the relevant turnover thresholds were met. The FCO found out about this acquisition in the context of the assessment of another transaction, which had been notified in 2008. When calculating the fine, the FCO took account of DuV's financial strength, the fact that DuV had disregarded its filing obligation deliberately and in full knowledge of the law, and the high likelihood that the transaction at issue probably would have been prohibited (a criterion explicitly mentioned in the FCO's 2006 Fine Guidelines).

Both fines are at an unprecedented level in the context of gun-jumping. A main reason for this is that the FCO for the first time applied its 2006 Fine Guidelines. The fine imposed on DuV also calls to mind the fact that the prescription period of five years is triggered only as of the moment when the violation of the filing and stand-still obligation has come to the FCO's knowledge.

Merger control decisions 2009. In 2009, the FCO prohibited three proposed concentrations in the areas of newspapers, petrol stations and hospitals. Moreover, the agency cleared several transactions subject to conditions (including the EnBW/EWE and EnBW/VNG deals in the energy sector).[3] Some notifications were withdrawn following objections of the FCO. In the winter 2008/2009, the FCO also reviewed three proposed concentrations in the banking sector involving six of Germany's largest banks, namely the acquisition of sole control over Postbank by Deutsche Bank; the acquisition of all assets of Dresdner Bank by Commerzbank; and the merger between DZ Bank and WGZ Bank. The FCO acknowledged that the three concentrations led to a far-reaching (and, some say, overdue) re-structuring of the German banking sector and that they needed to be evaluated in an overall context. Ultimately all three deals obtained unconditional clearance in the first phase. The FCO concluded that the combined market shares of the parties involved on all relevant product and services markets were significantly below the statutory 33.3% threshold that triggers the rebuttable presumption of single firm dominance. The FCO also excluded the creation or strengthening of joint market dominance in light of the highly competitive market environment.

HARDCORE CARTELS AND PRIVATE DAMAGE CLAIMS

Significant fines for coffee roasters. In December 2009, the FCO imposed fines of approximately €159.5 million on three coffee roasters (Tchibo, Melitta, and Dallmayr) and six of their employees (the latter would not be possible under the EU rules) for hardcore price fixing. In the course of its investigation, which was triggered by a successful immunity application of Kraft Foods, the FCO found evidence of a general agreement to coordinate on retail prices and special offer prices for the most important roast coffee products, which formed the basis of at least 20 meetings between early 2000 and June 2008. Moreover, the FCO could prove in at least five instances individual agreements about the amount and timing of specific price increases, all but one of which the companies managed to push through in the market. The fines would have been even higher if the companies had not been granted reductions for their cooperation with the FCO under the leniency program. There are further proceedings pending in the coffee sector, which focus on potential price-fixing for cappuccino and the away-from-home coffee market (catering, wholesalers, etc.).

Other raids in the food sector. In 2009, the FCO conducted several other investigations in the food sector on suspicion of anti-competitive agreements. In March 2009, the agency searched the offices of various sugar producers on suspicion of having agreed on prices, production levels and the allocation of sales areas. The FCO reported that the investigation was triggered by findings in the context of the review of Nordzucker's acquisition of the sugar business of Danisco (cleared in February 2009). In July 2009, the FCO searched the offices of 19 sausage producers that are also suspected of price-fixing, and in December 2009, two durum wheat mills were inspected on suspicion of production quota fixing, customer allocation and price fixing. The series of investigations continued in January 2010 when the FCO searched 15 food retailers, drugstores and pet food suppliers, as well as several manufacturers of branded goods for evidence of retail price fixing or at least agreements of minimum prices for confectionery, coffee, and pet food. A number of other companies received detailed questionnaires and may well also face a fine.

The FCO is not the only European competition authority that has taken a particular interest in the food sector. Recently, the Belgian competition authority reported suspicious parallel increases of prices for chocolate and confectionery. The Portuguese competition authority is currently investigating the food distribution chain for dairy products, coffee, and canned food. In September 2009, the Romanian competition authority initiated investigations into the food retail and supply market. Meanwhile, regulators in Denmark and in the Netherlands conducted sector inquiries in this sector. The manifest focus on the food sector may at least in part be explained by the exchange of information between the European competition authorities within the European

3 In early 2008, the FCO had published detailed model texts for commitments and trustee mandates.

Competition Network, and in particular within the subgroup dealing on food.

Settlements. In 2009, the FCO had the opportunity to further develop the principles for settlement procedures (unlike the European Commission, the FCO has not yet published guidelines on this topic). As soon as a company (or an individual) involved in an antitrust investigation expresses the wish to settle, the competent Decision Board presents the charges, determines the maximum amount of the fine it intends to impose, and sets a time limit within which the company/individual can accept the proposal. The settlement candidate can access the documents in the FCO's file as far as this does not jeopardize the ongoing investigation and then makes a "settlement statement", in which it acknowledges the charges (confession), accepts the maximum fine, and waives its right to inspect the entire file. The settling company/individual does not give up the right to appeal the FCO's decision, but the chances to succeed on appeal are significantly reduced due to the explicit acknowledgement of the facts as established by the FCO. In reward of the settlement statement, the FCO can, at its discretion, reduce the fine by up to 10% (in addition to a potential leniency bonus). At the end of the settlement procedure, the FCO only issues a short decision, which does not contain a detailed description of the relevant facts.

The future will show whether a reduction of up to 10% is a sufficient incentive for companies to settle (even the mandatory reduction by 10% provided for in the European Commission's Settlement Notice is being criticized as inadequate). Another interesting question concerns the FCO's willingness to negotiate with the settlement candidate the determination of the facts influencing the amount of the fine, such as the duration of the infringement. Although FCO officials have repeatedly pointed out that settlement procedures are not a "bazaar", there have been informal hints at a rather flexible approach in this context. For companies, this point appears to be the most promising area for future settlement negotiations.

Private actions for cartel damages. For cartel participants, heavy fines imposed by the competition authorities are not (anymore) the only risk. In addition, they are increasingly exposed to the threat of private damage claims filed by customers or suppliers.

In Germany this is a relatively new trend. In the past, potential victims of cartels were rather reluctant to bring damage claims, in particular because the group of potential claimants was small and the risk of a defeat in court was substantial. However, a revision of the ARC in 2005 considerably facilitated private damage actions. In particular, the amendment brought a significant limitation of the passing-on defense, in which the defendant (e.g., a manufacturer member of a cartel) argues that the overcharge on the products purchased by a direct purchaser (e.g., a distributor) did not cause any damages to the direct purchaser because he raised his own price to pass the higher (cartel) price on to his own customers on the downstream market (e.g., end consumers).

Another important development is the emergence of companies specialized in actions for cartel damages. These companies bundle the claims of a great number of potential claimants and then file a single action comprising all claims. A €114 million "bundled claim" against six members of a cement cartel has been pending since 2006 before the Regional Court of Düsseldorf. In April 2009, the German Federal Court of Justice (*Bundesgerichtshof*), indirectly confirmed the admissibility of such bundled claims by declining to hear an appeal on that issue. In its ruling, the court also made clear that such actions are not inadmissible just because the amount of work tends to be much higher than in the case of individual lawsuits.[4]

The proceedings in this case will now re-focus on substantive issues, with the required standard of proof and the damage calculation presumably constituting the key issues. German procedural law enables the court to estimate the amount of the damage caused (Section 287 of the Code of Civil Procedure) but the plaintiff arguably will have to provide the factual basis of this estimate, and concrete evidence of the damages suffered.

Particularly in cartel-related cases, the settlement of private damage claims can bring significant benefits to all parties involved. For the cartel member, the outcome of the case is better foreseeable, and a non-disclosure agreement can prevent publication of the damage amount agreed upon. For the claimants, a settlement

4 German Federal Court of Justice, Order of 7 April 2009, ref. KZR 42/08.

helps to avoid complex proceedings often involving protracted evidentiary issues. Against this background, it did not come as a surprise that Degussa, one of several companies sued for damages due to its participation in a bleaching agents cartel before the Regional Court of Dortmund settled in October 2009 for an undisclosed amount. In this case, 32 companies from the paper industry reportedly have claimed more than €600 million in damages.

More actions for cartel damages are to be expected in the next few years; private lawsuits against the members of a paper cartel and of a décor paper cartel are currently being prepared. As regards the décor paper cartel, claimants may face particular difficulties to provide evidence of the anti-competitive behavior at issue—since the cartel participants entered into a settlement agreement with the FCO, there is no decision laying out the FCO's factual findings in detail. This is likely the reason why one of the potential claimants is currently litigating the scope of its right to access the FCO's file before the District Court of Bonn. In September 2009, the court asked the Court of Justice of the European Union (ECJ) for a preliminary ruling on questions specifically relating to the right to inspect leniency applications.[5]

VERTICAL AGREEMENTS — UNDUE INFLUENCE ON RETAIL PRICES

In the recent past, the FCO repeatedly fined manufacturers for exerting undue influence on their customers' pricing strategy. In four cases since May 2008, the FCO imposed fines between €4.2 and €11.5 million.

In May 2008, the FCO fined Bayer Vital €10.34 million. The investigation had revealed that Bayer Vital had influenced the retail prices for certain non-prescription medicines. Bayer Vital offered pharmacies a price reduction through a "partner bonus" if they committed to largely complying with Bayer Vital's recommended retail prices (RRPs, which are as such not prohibited by German competition law). In the FCO's view, the pharmacies that had entered into such an agreement with Bayer Vital (11,000 out of 21,000 German pharmacies!) had also violated the ARC, but the FCO did not fine them due to the insignificance of the individual infringements.

5 Referral for a preliminary ruling of 9 September 2009, C-360/09, Pfleiderer AG/Bundeskartellamt.

In April 2009, the FCO imposed a fine of €9 million on Microsoft for agreeing with one of the major German electronics retail chains in at least two instances on the retail price of Microsoft's new software package.

In September 2009, the FCO imposed a €11.5 million fine on Ciba Vision, the market leader in Germany for contact lenses. Apart from arrangements aimed at the exclusion of the sale of certain types of contact lenses via the Internet, the FCO also took issue with measures referred to as "price cultivation" (*Preispflege*). According to the FCO, Ciba Vision had implemented an internal surveillance and intervention system in which several employees were dedicated to monitoring the traders' Internet retail prices. As soon as the retail prices dropped below Ciba Vision's RRPs, these employees approached the traders and tried—often successfully—to persuade them to increase their prices. The decision clarifies the FCO's position according to which an RRP is illegal if (i) as a consequence of pressure or incentives, it has the same effect as a fixed price or a minimum price; and (ii) the behavior corresponds to an agreement or concerted practice within the meaning of Article 101 TFEU[6] or Section 1 ARC. In the view of the FCO, "*any contact beyond the mere communication of an RRP, which emphasizes it by subsequently and repeatedly addressing the subject … calls the RRP's non-binding character into question and is to be regarded as an exertion of pressure*". In addition to this broad interpretation, the FCO pointed out that it will regard the exertion of pressure in connection with RRPs as an indication for the existence of an inadmissible agreement or concerted practice. Moreover, the FCO stated that it would consider compliance with RRPs, and even a price increase falling short of full compliance subsequent to an active approach by the manufacturer, as sufficient evidence for the existence of such an agreement/concerted practice. In this context, the FCO distinguished the case at hand from the *Adalat* matter recently adjudicated by the European courts. In that case, according to the FCO, the question was only whether the mere fact that a trader did not react to a manufacturer's unilateral introduction of a new policy was sufficient to establish a concerted practice or even

6 Treaty on the functioning of the European Union, OJ 2008 C 115/47.

an agreement (the courts answered this question in the negative). By contrast, compliance with an RRP requires the trader to act, in particular if the sales price initially set by the trader is subsequently to be increased to(wards) the level of the RRP. The FCO deliberately left open whether it would also assume the existence of a concerted practice in a case where only a contact but not a subsequent price increase can be proven.

Finally, in October 2009, the FCO imposed a fine of €4.2 million on Phonak, a manufacturer of hearing aids. A hearing aid retailer had published his prices for Phonak hearing aids on the Internet. In some cases, these prices were substantially below the price level generally prevailing on this market. When other retailers complained about the price cutter, Phonak stopped all deliveries to this retailer in order to induce him—eventually with success—to increase his prices. In its decision, the FCO emphasized that competition for hearing aids is already restricted due, in particular, to insufficient price and product transparency for the final customers. Therefore, any further restriction of competition, including the discontinuation of supplies to a retailer with an aggressive pricing strategy, would have particularly serious consequences.

The fines imposed by the FCO in the above-referenced cases generally corresponded to approximately 15% of the turnover achieved by the manufacturers involved with the affected products in Germany. This is noteworthy as even the fines for hardcore cartels tend to be not significantly higher. (The FCO's 2006 Fine Guidelines provide for an upper limit of 30% but the cartel fines imposed by the FCO so far generally have fallen well short of this maximum.) While the decisions in the Bayer Vital, Microsoft, and Phonak cases appear to be in line with the FCO's prior case law, the Ciba Vision decision goes a step further and has caused a great stir. This is not due to the fact that the FCO found a competition law violation (apparently Ciba Vision's employees had exerted a lot of pressure on price-aggressive retailers), but rather due to the agency's broad interpretation of the concept of "pressure" and the reasoning that the existence of an agreement/concerted practice could be deduced from the fact that pressure was exerted. In the case at hand, there was no need for that kind of approach. It is therefore to be assumed that the FCO intentionally conveyed the message that it intends to apply significantly stricter criteria in the assessment of RRPs and related contacts between a manufacturer and its customers. According to the FCO's press release, Ciba Vision has declined to appeal the decision, so it may take some time until the FCO's new approach will be subject to judicial review.

HORIZONTAL RESTRICTIONS OF COMPETITION

Call for boycott. In July 2009, the FCO imposed fines totaling €1.2 million on trade associations of pharmacists for calling on their members to boycott the pharmacy wholesaler Gehe, a subsidiary of Celesio. The call for boycott has to be seen in the context of a long-standing feud between the established pharmacists and DocMorris, a mail-order pharmacy, which is also part of the Celesio group. The conflict was at its peak in 2006 when DocMorris opened an outlet in Saarbrucken as many pharmacists were wary of increased competitive pressure if DocMorris were allowed to establish a pharmacy chain in Germany. However, in 2009 the ECJ ruled that the German laws restricting the ownership of pharmacies to qualified pharmacists and that exclude drug wholesalers from operating pharmacies are compatible with EU law (in particular the freedom of establishment). As a consequence, DocMorris had to give up its plan to operate the pharmacy in Saarbrucken with hired pharmacists. However, prior to that ruling the pharmacists' trade associations were apparently of the view that it was not sufficient to take legal measures against DocMorris. Thus, they had encouraged their members, through publications and speeches, not to purchase products from Gehe in light of its corporate links with DocMorris (via Celesio).

Information exchange. In 2008, the FCO issued two landmark decisions concerning the exchange of information between competitors. It has long been accepted in principle that this kind of information exchange may infringe Section 1 ARC. However, the active enforcement of this principle and the imposition of significant fines in this context are an important development.

In the first case, the FCO imposed fines of approximately

€37 million on four manufacturers of branded drugstore products and some of their sales managers. In addition to coordinated increases of list prices, the FCO found that the regular information exchange at meetings of the Trademark Association (*Markenverband*) about rebate negotiations with retailers constituted a stand-alone infringement of Section 1 ARC as it, in and of itself, significantly restricted price competition.

Shortly afterwards, the FCO imposed fines totaling €9 million on 9 manufacturers of high-quality perfumes and cosmetics products (as well as 13 former and current employees) in a case that became known as the "castle round" (*Schlossrunde*). Since 1995, the members of the circle had exchanged a wide range of confidential business data (including information on advertising budgets, planned product launches and price rises) and also kept each other informed about the commercial strategy *vis-à-vis* selected customers by means of an elaborate market information system based on company-specific information. The individual fines ranged between €250,000 and €2.1 million. In some cases, the fines would have been much higher, had there not been a maximum limit of €500,000 for the period before an amendment of the ARC in 2005. At a recent conference, an FCO official pointed out with regard to the "castle round" case that it was not necessary to provide evidence for an actual anti-competitive effect of the information exchange in order to find an infringement of Section 1 ARC; rather, it was sufficient to show that the behavior at issue had the *potential* to restrict competition.

Further proceedings concerning information exchange among competitors can be expected. In particular, the FCO is said to have the intention to examine potential anti-competitive effects of benchmarking. The increased activities of the FCO in this area are in line with a general tendency among national competition authorities. For example, the French Conseil de la Concurrence (now Autorité de la Concurrence) recently imposed fines for inadmissible exchange of information in several cases. The ECJ judgment from June 2009 in *T-Mobile Netherlands* is also noteworthy in this context. The court ruled that a single meeting between five mobile telephone operators, at which they exchanged their views on reducing standard dealer remunerations for postpaid subscriptions by a given date, may constitute a concerted practice in breach of Community competition law. Importantly, the ECJ pointed out that it is not necessary to provide evidence for a negative impact on competition but that it is sufficient, in accordance with the wording of Article 101 TFEU, that the companies pursue an anti-competitive objective.

OUTLOOK

It can be assumed that, under its new President, the FCO will continue its strict enforcement policy regarding hardcore cartels and other restrictions of competition. A clear hint in this direction can be seen in the recent searches in the food retail business, which were already conducted under the leadership of Mr. Mundt. As regards legislative developments, it will be interesting to see whether the German Parliament will approve draft legislation, pursuant to which the FCO would be given the power to break up companies with a dominant market position. Finally, a recently published judgment of the High Regional Court of Düsseldorf in the cement cartel case is expected to have repercussions on the FCO's fining practice. The court not only reduced the fines imposed by the FCO in that case from approximately €600 million to €328.5 million but also criticized the FCO in general terms for an incorrect interpretation of the abstract fine range laid out in the ARC. The FCO has lodged an appeal with the German Federal Court of Justice. The coming months will be anything but boring!

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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