

Recent Developments in German Competition Law

Since our last advisory on the subject in March 2010, there have been a number of important developments in German competition law. At the legislative level, a new law will broaden the applicability of the competition rules in the health sector. In the merger control field, the Federal Court of Justice (*Bundesgerichtshof*) and the Federal Cartel Office (FCO) adopted decisions in three headline-grabbing joint dominance cases. Moreover, the FCO imposed multi-million EUR fines in two price-fixing cases involving “hybrid” settlements. The FCO also published interesting statistics on hardcore cartels, as well as an informal “guidance letter” on the distinction between unobjectionable price recommendations and illicit resale price maintenance. In the private enforcement area, conflicting court of appeals decisions highlight the complex issues regarding the standing of indirect purchasers.

Legislative Initiatives and Administrative Developments

Pharmaceutical Market Reform Bill. As part of far-reaching reforms of the healthcare sector, the German Parliament approved on November 11, 2010 the Law on the Re-Ordering of the Pharmaceutical Market (*Gesetz zur Neuordnung des Arzneimittelmarktes*), which entered into force on January 1, 2011.

The reform aims at boosting competition in the healthcare sector. From a competition law perspective, the main change will be a much broader competence of the FCO to review the dealings of the statutory health insurers under the Act against Restraints of Competition (ARC). In particular, while so far only the ARC provisions on unilateral abusive behavior have been applicable, the FCO will also be entitled to review the compatibility of, e.g., agreements between statutory health insurers and health service providers or agreements among health insurers regarding joint tenders of discount contracts with the cartel ban in Sections 1 *et seq.* ARC. However, there are important exceptions to this general rule for a number of contract categories, in particular those agreements that the statutory health insurers are legally obliged to enter into.

Another cornerstone of the reform is an effort to curb the power of drug makers to set prices in Germany, the largest pharmaceutical market in Europe. Under the new law, drug makers will have the right freely to determine the prices of their branded drugs only in the first year after market launch. If they do not reach an agreement with the statutory health insurers during this period that the premium pricing is indeed justified, an independent appraisal body will step in and assess the drug's cost effectiveness.

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FCO adopts Best Practice Guidelines for expert economic opinions. On October 20, 2010, the FCO published a notice on binding quality standards for expert economic opinions submitted to the FCO in order to ensure that such opinions satisfy certain minimum requirements concerning the relevance, traceability and completeness of data and arguments; the transparency of critical assumptions; the seamless documentation of empirical analyses; and the indication of relevant sources.¹ With its notice, the FCO reacts to the increasing number of economic opinions submitted by the parties in complex cases.

Merger Control

In the last six months, the FCO and the German Federal Court of Justice had to decide on three prominent cases raising concerns about joint dominance. The ARC provides for statutory presumptions of joint dominance where three or fewer undertakings have a combined market share of at least 50 percent or where four or fewer undertakings achieve a combined share of at least 75 percent. However, the undertakings can rebut these presumptions by demonstrating that the members of the oligopoly do not have a leading market position vis-à-vis the remaining competitors or that competition between them can be expected post-merger.

The Federal Court of Justice confirms the prohibition of Axel Springer's takeover of the ProSieben/SAT.1 group.

On June 8, 2010, the Federal Court of Justice confirmed that the FCO was right in 2006 in prohibiting the merger between the publishing company Axel Springer, a leading German media company that owns newspapers like *Bild* and *Die Welt*, and the television company ProSieben/SAT.1.²

Even though the parties abandoned the merger after the prohibition by the FCO, Axel Springer filed an appeal with the Düsseldorf Court of Appeals and then also with the Federal Court of Justice in order to obtain legal certainty for possible future mergers.

The Court of Appeals dismissed the appeal as unfounded, and the Federal Court of Justice concurred. More specifically, the

court confirmed that the German television advertising market has a duopolistic market structure with the channels of the ProSieben/SAT.1 group and its main rivals, namely RTL and a number of other channels belonging to the Bertelsmann group, achieving a combined market share of more than 80 percent, and that the envisioned transaction would strengthen the joint dominance of the two groups. In this context, the Federal Court of Justice held that the Axel Springer newspapers would have the means to advertise the ProSieben/SAT.1 channels and that the mere possibility (and economic reasonableness) of such cross-promotion was sufficient to block the deal in light of the particular market structure at hand.

The case is of high significance for the further development of German merger control, particularly as regards the media sector, since it highlights the fact that even merely conglomerate effects can be grounds for a prohibition decision if they are found to strengthen (or create) a dominant position.

The Federal Court of Justice overturns the prohibition of the Phonak/GN ReSound merger.

On April 20, 2010, the Federal Court of Justice overturned an FCO decision, which had prohibited Phonak (since August 1, 2007, operating under the name Sonova) from acquiring the hearing aids business (GN ReSound) of the Danish company GN Store Nord in 2007.³ The FCO had objected to the intended deal based on the argument that it would have strengthened the joint dominance of a narrow oligopoly consisting of Siemens Audiologische Technik (part of the Siemens group), Oticon and Phonak. These three suppliers accounted for a combined market share of 80 percent, and GN ReSound was their largest competitor with a market share of 5-10 percent.

While the Düsseldorf Court of Appeals had concurred with the FCO's findings, the Federal Court of Justice did not share these concerns and held instead that the applicants had managed to rebut the statutory presumption of joint dominance. The Federal Court of Justice criticized the FCO and the Court of Appeals for putting too much emphasis on the alignment of the oligopolists' market shares brought about by the notified transaction, and stressed that a "catch-up merger" can boost competition even when it equalizes the market positions. It also pointed out that a high degree of transparency is an important factor in assessing the

¹ The English version of the FCO notice on the best practices for expert economic opinions is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bekanntmachung_Standards_Englisch_final.pdf.

² Federal Court of Justice, Order of June 8, 2010, ref. KVR 4/09.

³ Federal Court of Justice, Order of April 20, 2010, ref. KVR 1/09.

competitive environment post-transaction but that such transparency in and of itself is not sufficient to conclude that there will be no appreciable competition between the oligopolists in the future.

The parties had abandoned their merger plans in light of the FCO's prohibition decision. On December 22, 2010, GN Store Nord filed an action with the District Court of Bonn against the FCO, claiming damages of €1.1 billion.

The FCO prohibits car parts merger. On May 21, 2010, the FCO prohibited the planned acquisition by Magna, an automotive parts supplier, of the convertible roof systems business of Karmann.

In December 2009, the FCO had cleared the merger between Edscha and Webasto, which had reduced the number of competitors on the German market for convertible car roof systems from four to three. As a result of this merger, Webasto-Edscha had become the largest supplier with a market share of 50-55 percent, with Magna (22-27 percent) and Karmann (18-23 percent) accounting for essentially the rest of the market. Thus, Magna's acquisition of Karmann's business would have resulted in a symmetric duopoly. The FCO prohibited the deal after an in-depth market investigation had shown that the two remaining players would have had little incentive to compete actively.

The FCO raises concerns over the BHP Billiton/Rio Tinto joint venture. On October 18, 2010, BHP Billiton and Rio Tinto abandoned their plans to set up a joint venture in light of serious issues raised by the European Commission, the FCO, and various other competition authorities around the world. Even though the parties had withdrawn their merger notification in Germany, the FCO published a case summary on its website describing the FCO's analysis and misgivings in detail. It remains to be seen whether the FCO will adopt this novel approach in other cases—which would be bad news for the companies involved as the publication of competition concerns, even if they are only of a preliminary nature, may lead to unwanted press coverage and impair their position in subsequent proceedings in other jurisdictions.

Cartels

Statistics. On September 6, 2010, the FCO published a report entitled "Efficient cartel enforcement-benefits for the economy and the consumer," which contains interesting

statistics on cartel enforcement in Germany.⁴ For example:

The number of cartel decisions imposing fines almost tripled from five decisions between 1994 and 1997 to 14 decisions between 2006 and 2009.

Fines also increased significantly—whereas total fines between 1994 and 1997 amounted to approximately €165 million, the fines between 2006 and 2009 added up to approximately €1 billion. Similarly, the average fine of individual companies increased tenfold from €1.2 million to €12 million.

Between 2000 and 2009, the FCO received 234 leniency applications, with 112 of these applications being submitted after a revised leniency program entered into force in March 2006.

The increasing importance of cartel enforcement is also evidenced by the fact that the Düsseldorf Court of Appeals (the competent court to hear appeals against FCO decisions) created an additional cartel senate in July 2010.

Ophthalmic lenses cartel. On May 28, 2010, the FCO imposed fines totaling €115 million on five manufacturers of ophthalmic lenses, the trade association of optometrists, and seven individuals for agreeing, *inter alia*, on recommended retail prices, price surcharges, bonuses, and discounts. Three manufacturers received a reduction under the FCO's leniency program. The investigation ended with a "hybrid" settlement in the sense that some of the companies and individuals involved agreed to settle with the FCO while others did not.

Coffee roasters cartel (part 2). Following the imposition of fines in December 2009 totaling €159.5 million for a cartel relating to the supply of roasted coffee to the food retail sector, the FCO recently found another hardcore cartel among coffee roasters. On June 8, 2010, the FCO imposed fines of approximately €30 million on eight coffee roasters, 10 individuals, and the German Coffee Association (DKV), for price-fixing in the "out-of-house" market (coffee supplies to restaurants, hotels, and other bulk customers).

The FCO found that directors and employees of the coffee roasters had formed a working group within the DKV from

⁴ The report can be found at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Infobroschuere/1009_Infobroschuere_deutsch.pdf.

at least 1997 until mid-2008, which coordinated on upward (and also occasionally downward) price moves. The FCO also concluded that the DKV had directly participated in the cartel by publicly announcing and supporting at least one price increase.

The proceedings were triggered by an immunity application; two other companies received a fine reduction under the FCO's leniency program. Six of the eight companies and their employees entered into a settlement agreement with the FCO.

In its press release and a case summary, the FCO explicitly referred to the amount of the cartel overcharge, as it had also done in the other coffee roaster cartel. It is unclear whether this is an exceptional, industry-specific approach or whether it reflects a conscious effort by the FCO to encourage and facilitate private damage claims.

The FCO's ophthalmic lenses and coffee roasters decisions illustrate two recent developments in German cartel enforcement: (i) settlements seem to have become the norm rather than the exception, with the FCO apparently being more willing than, e.g., the European Commission to accept "hybrid" settlements; and (ii) the FCO increasingly imposes fines on associations for facilitating, or participating in, cartel infringements. Moreover, the FCO again made use of its powers to impose fines on individuals.

Private Cartel Enforcement

Karlsruhe Court of Appeals disallows passing-on defense and limits standing to direct purchasers. On June 11, 2010, the Karlsruhe Court of Appeals awarded €100,000 in damages and interest in a cartel follow-on damage claim against a manufacturer of carbonless paper.⁵ The claim was lodged in the aftermath of the European Commission's decision in December 2001 that found a hardcore price-fixing cartel among 10 producers in that industry.

The Court of Appeals disallowed the application of the passing-on defense. The court acknowledged the general principle that defendants facing an action for damages are entitled to prove that the plaintiff was able to decrease the amount of damages *ex post*. However, according to the court, this principle does not apply in cartel damage cases

⁵ Karlsruhe Court of Appeals, Judgment of June 11, 2010, ref. 6 U 118/05 (Kart.).

since it would decrease the level of deterrence, thereby impeding the efficient enforcement of competition law. This approach is in line with the introduction of a new provision that explicitly excludes the passing-on defense as part of the latest ARC reform in 2005.

Importantly, the Court of Appeals also held that the standing of potential cartel victims is generally limited to direct purchasers based on the argument that this group is generally best placed to prove damages. In this context, the court explicitly rejected the view taken by another court of appeals in October 2009 that stated that direct and indirect purchasers are entitled to cartel damages as joint and several creditors.⁶ In light of these conflicting decisions, it is to be hoped that the Federal Court of Justice will take the next opportunity to provide much-needed guidance on the standing issue, which is of crucial importance for private cartel enforcement in Germany.

With respect to the calculation of damages, the Karlsruhe Court of Appeals treated the European Commission's findings on price-fixing arrangements as *prima facie* evidence for a cartel overcharge and estimated the resulting damages at €100,000. In favor of the defendant, the court took into account that the plaintiff had managed to mitigate the effect of the price increase by obtaining higher quantity rebates. At the same time, the court agreed with the plaintiff that it was not plausible that the cartel-inflated price decreased to the competitive level immediately after the end of the cartel. Instead, the court assumed that prices were affected by the cartel until five months after the infringement had ended.

Vertical Agreements

FCO adopts commitment decision concerning "take-or-pay" clauses imposed by electricity and gas suppliers.

On July 7, 2010, the FCO accepted commitments offered by the twelve largest suppliers of electricity and gas in Germany concerning their supply contracts with industrial clients. The FCO had taken issue with the suppliers' contractual practice to oblige their industrial customers to purchase minimum quantities of electricity and gas, and to prevent them at the same time from reselling any excess quantities. The FCO did not object to the minimum purchase obligation,

⁶ Berlin Court of Appeals, Judgment of October 1, 2009, ref. 2 U 17/03 Kart.

however, it raised serious concerns about the cumulative resale ban. When the suppliers formally committed to abolish this contractual provision, the FCO closed the file without imposing a fine.

FCO imposes fine of €2.5 million on Garmin for resale price maintenance. On June 28, 2010, the FCO imposed fines totaling €2.5 million on Garmin, a leading manufacturer of mobile navigation devices, and one of its employees for engaging in resale price maintenance with its distributors. The FCO concluded that Garmin had used a dual-pricing system for Internet sales, pursuant to which Garmin charged higher prices if a distributor made Internet sales below a certain minimum price established by Garmin. Moreover, if the distributor in question subsequently raised its Internet price, Garmin retroactively rewarded this with a bonus.

FCO provides informal guidance on resale price maintenance in the retail sector. Following criticism of inconsistencies in its CIBA Vision and Phonak decisions in 2009, the FCO issued a “Guidance Letter” on the distinction between unobjectionable recommended retail prices (RRP) and illicit resale price maintenance (RPM). While the Guidance Letter was addressed to a number of companies in the retail sector, which the FCO had searched in January 2010 on suspicion of illegal resale pricing practices, it is also instructive for other industries. It is the first time that the FCO provided guidance in this way.

The Guidance Letter makes clear that unilateral action, which removes the non-binding character of RRP, is generally prohibited. Such unilateral action can consist of the exertion of pressure (in particular through threats of commercial disadvantages) or the granting of incentives (such as rebates, marketing support, and refunds). Moreover, the Guidance Letter takes issue with coordination on fixed retailer margins and also objects to the binding recommendation of (minimum) resale prices through pre-printed orders.

The FCO further stated that a number of other practices are in a “grey area” in the sense that they are not illegal *per se* but may be deemed anti-competitive depending on the specific factual circumstances. The FCO listed the following examples: ongoing discussions of RRP initiated by the supplier; the supplier’s compilation of price comparison lists with a view to dissipate them at the downstream level; and the provision of calculation/pricing manuals or guidelines to distributors/retailers.

The Guidance Letter also raises serious concerns about indirect horizontal effects in the form of a “hub-and-spoke” coordination between distributors/retailers. According to the FCO, particularly problematic practices in this context are the disclosure by the supplier of conditions agreed with, or sensible pricing information obtained from, competing distributors or retailers as well as the most-favored customer clauses aiming at a coordinated retail price level.

Sector Investigations

FCO raises concerns about Automated Teller Machine (ATM) bank charges. In March, 2010, following numerous consumer complaints, the FCO started an investigation into bank charges that are levied at cash machines in transactions where the card-issuing bank is different from the bank operating the ATM. The average bank charge levied is almost €6, while experts have calculated that the actual cost for an ATM transaction involving a card issued by another bank is only €0.63. Since the banks committed to provide more transparency by displaying their charges at the bank terminal, the FCO closed its investigation in August 2010. However, the authority made clear that it will carefully monitor the banks’ adherence to their transparency commitments.

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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