Recent Developments in German Competition Law

German competition law has seen a number of noteworthy developments in the first half of 2011. In merger control, the Federal Cartel Office (FCO) made headlines with the prohibition of an online video platform and continued with its tough line on gun-jumping while the Düsseldorf Court of Appeals once again showed its determination to scrutinize the merits of prohibition decisions by the FCO. On the cartel front, the FCO confirmed its readiness to enter into settlements even in "hybrid" cases, and the Federal Court of Justice clarified hotly debated questions on the standing of indirect purchasers and the applicability of the passing-on defence in private damage actions. Finally, the Düsseldorf Court of Appeals made important statements regarding the scope of the compulsory license defence in patent infringement proceedings, which explicitly contradicts recent EU case law in this area.

Merger Control

FCO prohibits online video platform of RTL and ProSieben/SAT.1. On March 17, 2011, the FCO blocked plans by the TV channel operators RTL and ProSieben/SAT.1 to form a joint venture for the operation of an online video platform reminiscent of the US TV streaming site HULU. The two parties had planned to create an internet platform financed by advertisements and targeted at German and Austrian consumers for reruns of TV content free of charge within seven days after the program's original airing. The platform was intended to be open to content from other private and public channels, which would have remained responsible for the editorial control and marketing of their offerings on the platform, but would have had to pay a fee to the joint venture for the use of its technical infrastructure.

The FCO found that the joint venture would further strengthen the existing duopoly of RTL and ProSieben/Sat.1 in the market for TV advertising in Germany and would likely also result in collaboration between the companies outside of the joint venture. The FCO took the potential pro-competitive effects of the proposed deal into account—the platform would have been the first "one-stop shop" for free content in Germany—but was not convinced that these effects would outweigh the anti-competitive effects of the cooperation.

The FCO's decision underscores the general skepticism of the authority and the German courts regarding efficiency arguments in merger control. In 2006, the FCO had prohibited the merger between the publishing company Axel Springer and ProSieben/SAT.1

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(confirmed by the Federal Court of Justice in 2010)[1] on the basis that this transaction would strengthen the existing duopoly between RTL and ProSieben/SAT.1 on the TV advertising market. Neither the FCO nor the Federal Court of Justice followed the efficiency arguments put forward by the parties in this deal. Also, the 2006 decision was widely seen as a clear hint that the FCO would be very critical of any kind of cooperation between RTL and ProSieben/SAT.1, so it did not come as a surprise to many observers that the online venture was ultimately derailed.

Court clarifies criteria for the assessment of potential competition. In April 2009, the FCO had prohibited a merger between two local newspaper publishers active in neighboring geographic markets. The FCO had considered both parties dominant in the newspaper and advertising markets in their respective local areas and found that the merger would further strengthen this dominance through the elimination of potential competition.

The parties successfully appealed the prohibition. On December 22, 2010, the Düsseldorf Court of Appeals found that there was no potential competition between the parties because they had already engaged in a comprehensive cooperation on content supply and the marketing of advertisements. For the duration of the cooperation, there was thus no incentive to enter each other's territory. The court further rejected the FCO's argument that absent the merger, a different buyer might acquire the target and quit the current cooperation, which in turn would re-introduce potential competition. The court stated that future developments can only be taken into account if concrete evidence indicates that their occurrence is highly probable whereas the merely theoretical possibility is not sufficient.

This case underscores once again the importance of effective judicial review for the development of merger control doctrine. The Düsseldorf Court of Appeals usually deals with several prohibition decisions every year. This is in stark contrast to the situation at the EU level where the merging parties have shown a clear tendency in recent years to withdraw their notifications in view of strong opposition by the European Commission rather than to accept a prohibition decision, which they could then appeal to the EU's General Court. One reason for the different approaches may be the fact that the court proceedings in Germany are comparatively short—it usually takes the Düsseldorf Court of Appeals only six to nine months to decide on an appeal.

The FCO continues to impose fines for gun-jumping. In the first half of 2011, the FCO adopted two further fining decisions for the premature implementation of concentrations. On January 28, 2011, the FCO imposed a fine of €414,000 on the agricultural cooperative ZG Raiffeisen based on the finding that its acquisition of a storage site for crop protection products in May 2009 had amounted to a notifiable concentration. The FCO stressed that storage capacity is a key parameter for successful business operations in this area and that turnover can be attributed to a storage site.

On May 10, 2011, the FCO fined Interseroh in the amount of €206,000 for gun-jumping. This seems to be the first case, in which "voluntary" information about implementation of a transaction without prior approval triggered a fine. The concentration at issue took place in 2008 and concerned the increase of the stake held by HHR Stahlschrott und Metallrecycling (HHR) in fm Beteiligungsgesellschaft (fm) from 40 percent to 49 percent through the exercise of an option. At the same time, HHR was granted a veto right regarding certain strategic decisions at fm, which conferred (joint) control on HHR. The parties failed to notify this transaction to the FCO even though the FCO had indicated beforehand that the exercise of the option would trigger a new filing obligation. In 2010, HHR, itself a joint venture between Alba/Interseroh and Scholz AG, was dissolved, and only then Interseroh informed the FCO of the events described above.

Cartels

In the first half of 2011, the FCO once again confirmed its readiness to close cartel investigations with a settlement even if one or several cartel participants decide not to go down that route. Such "hybrid" settlements are still quite rare at other national authorities and the European Commission.

Fire-fighting vehicles cartel. On February 10, 2011, the FCO entered into a settlement with three manufacturers of fire-fighting vehicles and an accountant in Switzerland and

1 Arnold & Porter LLP, "Advisory: Recent Developments in German Competition Law," (January 2011) *available at:* http://www.arnoldporter.com/public_document.cfm?id=17115&key=1F3.

imposed fines totaling €20.5 million for a price fixing and quota allocation cartel. Proceedings against a fourth manufacturer not willing to settle are still ongoing. Pursuant to the FCO's findings, the cartel participants had carved up the German market for fire-fighting vehicles among themselves since at least 2001. The companies agreed on their respective shares of sales and notified their order intake to the Swiss accountant who then compiled lists used to monitor adherence to the agreed quotas. The companies also orchestrated price increases and divided tenders among themselves. Apparently the FCO did not fine any of the individuals involved but transferred the case files to the public prosecutor who will look into criminal liability for bid rigging.

Illicit information exchange regarding consumer goods. On March 17, 2011, the FCO announced the settlement of a cartel investigation against three manufacturers of consumer goods, which included the imposition of fines totaling €38 million for the illegal exchange of competitively sensitive information. Another cartel participant decided against a settlement and will therefore receive a separate decision from the FCO. Triggered by an immunity application, the FCO had found out that the companies had regularly informed each other on the state of negotiations with major retailers and that some of the participants also had exchanged information on planned price increases.

District court issues questionable decision on joint and several liability. On March 16, 2011, the Munich District Court handed down a noteworthy ruling on the principles of joint and several liability.

In July 2009, the European Commission had imposed total fines of approximately €61 million on nine companies including Stahl-Metallurgie (SKW) for their involvement in the calcium carbide cartel between April 2004 and January 2007. SKW was a 100 percent subsidiary of Degussa AG (now Evonik Degussa, Evonik) until August 2004 when it was acquired by Arques. The European Commission held Degussa and SKW jointly and severally liable for a fine of €1.04 million covering the time between April and August 2004 (and also imposed a fine of €13.3 million jointly and severally on Arques and SKW for the period after August 2004).

After payment of €1.04 million, Evonik sued SKW for reimbursement of that amount before the Munich District Court. However, the court dismissed Evonik's claim in its entirety, arguing that an obligation imposed on SKW to reimburse Evonik would mean that from an economic point of view the fine would be passed on to SKW's current parent also for the first period of the cartel. In the court's view, this outcome would impair the objectives which the European Commission had sought to attain with its fine.

The court's decision does not seem to be in line with the principles of joint and several liability as established by EU case law. In recent decisions, the EU's General Court held that joint and several liability of two companies for a cartel infringement is to be split equally between them unless the European Commission has explicitly determined a different allocation. Moreover, the court disregarded the fact that the European Commission explicitly found the subsidiary liable for the entire duration of the cartel—if the court's approach was correct, this finding would be meaningless for the time until the change of ownership. It is to be hoped that Evonik will launch an appeal so that the Munich Court of Appeals can look into these fundamental issues. Moreover, the European Commission should take cases like this as a signal that it needs to spell out the precise apportionment of fines whenever it imposes joint and several liability for a cartel infringement.

Private Cartel Enforcement

Federal Court of Justice affirms the standing of indirect purchasers and the admissibility of the passing-on defence. On June 28, 2011,[2] the Federal Court of Justice decided on the appeal against a judgment of the Karlsruhe Court of Appeals. The case concerned damage claims based on the European Commission's decision of December 20, 2001 regarding a cartel in the carbonless paper industry. The Karlsruhe Court of Appeals had rejected the standing of indirect purchasers as cartel victims and the applicability of the passing-on defence.[3] The Federal Court of Justice now took a different stance on these two crucial and hotly debated aspects of private cartel enforcement in Germany. According to a press release, the court held that indirect purchasers are entitled to seek damages from cartel members. At the same time, it allowed cartel members to use the passing-on defence if and to the extent they can prove that their customers have passed on the damage suffered

2 Ref.: KZR 75/10.

3 Advisory of January 2011, available at: http://www.arnoldporter.com/public_document.cfm?id=17115&key=1F3.

from the cartel to the next market level. The publication of the full decision is eagerly expected as it will reveal the court's reasoning underlying these important principles.

Abuse of A Dominant Position

Court of Appeals does not follow the *Microsoft* case law on compulsory licenses. On December 20, 2010, the Düsseldorf Court of Appeals clarified the scope of the "compulsory license defence" in patent infringement proceedings.

The court stated that this defence can prevail only under exceptional circumstances in order not to deprive the patentee of the substance of his exclusive right. For the assessment of such exceptional circumstances, the court applied the standard developed in the judgments of the European Court of Justice (ECJ) in *Magill*, *Bronner* and *IMS/Health*, which requires, *inter alia*, that the defendant's access to the patented technology etc. must be "indispensable" for carrying out its business. According to the ECJ, the indispensability criterion is not fulfilled if there are alternative solutions, even if they are less advantageous. In the absence of such solutions, it needs to be examined whether there are technical, legal, or economic obstacles, which render it impossible or at least unreasonably difficult to create alternative products.

In the case at hand, the Court of Appeals held that these stringent requirements were not met and that the compulsory license defence was therefore not applicable. In this context, the court explicitly rejected the softer indispensability criteria developed by the EU's General Court in its *Microsoft* decision of 2007, according to which the existence of economic obstacles is sufficient to meet the indispensability test. Furthermore, the Court of Appeals also followed the ECJ's argument in *Magill*, *Bronner*, and *IMS/Health* that the refusal of access to the patented technology must be capable of excluding "any" competition as opposed to "effective" competition (the test used in *Microsoft*). The court justified its approach by stating that the case law of the General Court—unlike that of the ECJ—is not binding for national courts and that, in its view, the criteria set out in the *Microsoft* judgment did not strike a proper balance between the protection of intellectual property rights and competition law.

Court of Appeals applies a plaintiff-friendly approach to calculation of damages. On December 21, 2010, the Frankfurt Court of Appeals rendered an interesting judgment on excessive pricing. In the case at issue, the plaintiff had a long-term toll manufacturing arrangement with the defendant for several drugs. For one of the products, the defendant had adopted moderate price increases during a period of more than ten years but then suddenly raised the price by more than 400 percent.

According to the court, this price increase constituted an abuse of a dominant position. In particular, the court concluded that a price increase by more than 400 percent can only be justified under exceptional circumstances and that the defendant had not met its burden of proof in that respect. Thus, the plaintiff was entitled to damages, which the court calculated in three steps. First, it explicitly stated that an increase by 10 percent would have been unobjectionable; second, it added a further surcharge of 20 percent as a kind of "safety net"; and third, the remaining difference of 370 percent was awarded as damage.

Sector Investigations

FCO examines procurement markets in the food retail sector. On February 14, 2011, the FCO launched a sector inquiry into the food retail sector. The examination focuses on the competitive conditions in the markets for the procurement of food products by food retailers. The background of the inquiry is the increasing consolidation in the food retail sector, which has led to a high concentration level not only in the downstream retail markets but also at the upstream procurement level. The four leading retail companies currently control approximately 85 percent of the relevant markets in Germany. The aim of the inquiry is (i) to determine whether and, if so, to what extent the leading food retailers enjoy purchasing advantages over their competitors and (ii) to examine the effects of such advantages on competition in the downstream markets. Already in the past, mergers in this sector have come under close scrutiny by the FCO and often could be cleared only subject to far-reaching commitments.[4]

4 *See* most recently the takeover of Tengelmann's discount activities (Plus) by EDEKA, which the FCO cleared only after EDEKA had agreed to divest 357 Plus outlets located in regions where EDEKA had a strong market presence.

FCO issues critical report about competition deficiencies in the fuel sector. On May 26, 2011, the FCO presented the results of its inquiry into the fuel sector, which it found to be characterized by a dominant oligopoly between BP, ConocoPhilipps, ExxonMobil, Shell, and Total. According to the FCO's report, these companies do not effectively compete with each other. In particular, an elaborate monitoring and reporting system makes it easy for them to detect, and react promptly to, any price changes, which has resulted in parallel price movements. However, as on earlier occasions, the FCO conceded that it did not find sufficient evidence for the existence of illicit "price signaling" as opposed to an independent—and thus perfectly legal—adaptation to the market conduct of competitors. Rather than taking enforcement action itself, the FCO therefore urged the legislator to look into ways for regulatory intervention in order to protect consumer against supra-competitive prices.

Furthermore, the FCO announced that it will prevent any further concentration among petrol stations and that it will follow up on a number of potential competition law infringements, such as illicit resale price maintenance vis-à-vis independent fuel stations and anti-competitive provisions imposed on the fuel stations by the oil companies with foreclosure effect.

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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