

Newsletter, 1 March 2013

Annual Review 2012 and Trends 2013

Last year's highlights in German and European competition law and trends for this year

Although the new year is still young, some major fining decisions in Germany and on EU-level have already been handed down¹ or are at least announced or imminent.² Before the year picks up speed, we would like to look back and highlight the most interesting proceedings and key developments in German and European competition law during the last 14 months.

Cartel Enforcement

The detection and prosecution of cartels continues to be at the top of the competition authorities' agendas. In 2012, the German Federal Cartel Office ("FCO") imposed fines in the amount of €248 million on 57 companies and 31 individuals in 14 cartel proceedings.³ The fines concern sectors such as concrete paving stones and pipes, fire engines, chemical wholesalers, automatic door systems, confectionary or power transformers. The highest fine in the amount of €124.5 million was imposed on the members of the rail cartel which primarily harmed the Deutsche Bahn AG.⁴ Due to its dimension, the cartelists' "criminal energy" and the damages actions it provoked, the cartel is subject to exceptionally high press coverage in Germany.

Although 2012 looked like a year of low fines, the European Commission ("Commission") concluded the year by fining a true "textbook cartel" with the largest ever fine on a single cartel: For almost 10 years, several manufacturers of TV and computer monitor cathode ray tubes (amongst them LG, Philips and Sam-

sung) had fixed prices, shared markets, allocated customers and restricted their output on a worldwide basis. They received a fine of €1.47 billion. The other four cartel decisions in 2012 concern window mountings, international airfreight services, water management products and switchgears. In total, the Commission issued cartel fines of nearly €1.9 billion against 37 undertakings. Several major cartel investigations continue into 2013, *inter alia* into the automotive supply sector⁵ and various inter-bank reference rates⁶.

2012 has confirmed the Commission's approach to vigorously pursue obstructions during dawn raids. While the European Court of Justice ("ECJ") confirmed a €38 million fine on E.ON for breaching a seal during a dawn raid⁷, the Commission, for the first time, fined a company for obstructing IT searches: A Czech energy company which failed to block an email account and diverted incoming emails paid €2.5 million for the breach of its obligation to cooperate with the Commission during the dawn raid.⁸

Private Antitrust Enforcement

The trend to more private antitrust enforcement in Germany has been strengthened by a significant, albeit first-instance court ruling. In May 2012, the Regional Court Mannheim granted damages to a customer of a member of the German fire engines cartel who successfully based his claim on a clause of his general terms of contract by which he was entitled to claim 15% of the contract amount in case of damages caused by the contractor's anti-competitive behaviour.⁹ The possibility to contractually set a fixed amount of damages is

¹ E.g. FCO, fines of €60 million on confectionary manufacturers, [Press Release](#) of 31.1.2013; fines of €41 million on flour mills, [Press Release](#) of 19.2.2013; Commission, fines of €79 million on Telefónica and Portugal Telecom, [Press Release](#) of 23.1.2013.

² EU Competition Commissioner Almunia, [Speech](#) on 6.12.2012.

³ FCO, [Press Release](#) of 18.12.2012.

⁴ FCO, [Press Release](#) of 5.7.2012.

⁵ See [Commeo Newsletter](#) of January 2012.

⁶ See [Commeo Newsletter](#) of February 2012.

⁷ ECJ, decision [C-89/11P](#) of 22.11.2012.

⁸ Commission, [Press Release](#) of 28.3.2012.

⁹ Regional Court Mannheim, decision 7 O 436/11 Kart of 4.5.2012.

expected to facilitate the enforcement of civil damages claims in Germany.

In January 2012, the District Court Bonn handed down a landmark decision in the *Pfleiderer* case¹⁰ by rejecting a third party access to file to leniency applications thereby affirming the FCO's position as set out in its 2006 leniency programme. The significance of the judgment extends far beyond the particular case in question as it is the first decision of a national court on the scope of access to file for third parties in cartel cases following the ECJ's judgment in June 2011 (*Pfleiderer*¹¹). The ECJ had decided that it was up to the national courts to balance on a case-by-case basis the interests of the damaged parties and the necessity of effective cartel prosecution, for which leniency programmes are acknowledged to be significant. EU Commissioner Almunia has announced to submit a legislative proposal on antitrust damage actions in the first quarter of 2013. The proposal will especially address the issue of access to evidence related to leniency applications aiming at harmonizing the relevant rules.¹²

Spotlight on E-Commerce

As the economic importance of e-commerce and its competitive pressure on the "bricks and mortar" business grows, competition authorities turn their attention to vertical (and horizontal) agreements in online retail and distribution. The authorities are particularly going after general bans on internet sales, best price guarantees, resale price maintenance and most-favoured-nation clauses.

In late 2012, the Commission closed its proceedings into the sale of e-books after accepting legally binding commitments offered by Apple and four international publishers.¹³ The FCO issued one fining decision regarding a horizontal restriction of online sales¹⁴ and has opened three noteworthy investigations concerning vertical issues:

- In February 2012, the FCO issued a statement of objections to HRS, the leading hotel reservation portal in Germany, concerning its best price clause.¹⁵ HRS's standard

contract terms prohibit hotels from offering better conditions on the internet via their own websites or other providers.

- The FCO is investigating Japanese sneaker maker Asics over its online sales practices and has received complaints against Adidas and Nike which announced to prohibit their authorized dealers to sell on open marketplaces such as Amazon and eBay within their selective distribution systems. While this restriction is permitted in selective distribution systems according to the Commission's Guidelines on Vertical Restraints¹⁶, the FCO has not yet taken stand on that matter.
- In February 2013, the FCO launched a web survey of 2,400 sellers who offer their products on Amazon Marketplace in order to examine the effects of a price parity clause of Amazon's terms and conditions.¹⁷ The clause prohibits sellers from selling their products cheaper on any other internet sales channel than on Amazon.

The adaption of the competition rules to the evolving e-market will remain a major challenge for competition authorities as well as for online retailers who may also face different approaches taken by the various national competition authorities in the EU.

Merger Control

In 2012, the FCO received about 1,200 merger notifications. 21 transactions were examined in detail out of which four were prohibited. The FCO continued to introduce a more economic, i.e. effects based approach, in reviewing transactions. In March 2012, it published its "Guidance on Substantive Merger Control"¹⁸ which is noticeably based on the Commission's Merger Guidelines¹⁹. The 8th amendment of the German Act Against Restraints of Competition ("ARC")²⁰ will further align the German merger control rules with the EU's regime. In particular, the traditional German "dominance test" will be replaced by the "Significant Impediment to Effective Competition" ("SIEC") test. The new substantive test will close the enforcement gap for mergers that will not lead to market dominance but nevertheless may impede effective competition, e.g. on oligopolistic mar-

¹⁰ District Court Bonn, decision 51 Gs 53/09 of 18.1.2012. See [Commeo Newsletter](#) of March 2012.

¹¹ ECJ, decision [C-360/09](#) of 14.06.2011.

¹² EU Competition Commissioner Almunia, [Speech](#) on 6.12.2012.

¹³ Commission, [Press Release](#) of 31.12.2012.

¹⁴ FCO, [Case Summary](#) of 3.12.2012 (in German only).

¹⁵ FCO, [Press Release](#) of 10.2.2012. The FCO is still investigating the case as well as the competition authorities in the UK, Switzerland, Austria, the Netherlands and the US in comparable matters.

¹⁶ OJ 2010, [C 130/01](#), para 54, last sentence.

¹⁷ FCO, [Press Release](#) of 20.2.2013.

¹⁸ Available at the FCO's website under [Merger Control / Information leaflets](#).

¹⁹ Horizontal Merger Guidelines, OJ 2004, [C 31/5](#); Non-horizontal Merger Guidelines, OJ 2008, [C 265/6](#).

²⁰ The reform is expected to come into force in the months to come. We will report about the changes in detail in a separate Newsletter.

kets. Dominance will still continue to be relevant under the SIEC test as a rule example covered by this test.

The number of transactions notified to the Commission in 2012 (283) was lower than in 2011 (309). The Commission initiated 10 Phase II proceedings (compared to eight in 2011 or four in 2010) out of which one transaction - Deutsche Börse/NYSE Euronext²¹ - was prohibited. Commissioner Almunia has announced to streamline the merger control proceedings for non-problematic transactions and to close the enforcement gap as regards the acquisition of non-controlling minority shareholdings.²² As regards the latter the EU's General Court upheld a fine of €20 million by the Commission against Electrabel for implementing a transaction without having received the Commission's prior approval. Electrabel considered that its minority shareholding was insufficient to confer "control" within the meaning of the EU Merger Regulation.²³ The case highlights the importance of determining the correct trigger for a notification and confirms that the acquisition of a minority shareholding will be considered as an acquisition of *de facto* control of a company where it is virtually certain of obtaining a majority at future shareholder meetings due to the remaining shareholders being widely dispersed. The fact that the acquisition of control was ultimately found not to raise any competition concerns was irrelevant for determining the gravity of the infringement.

Abuse of Dominance

The FCO's activities as regards abusive practices of dominant companies primarily focused on the drinking water and energy sectors in 2012.²⁴ It initiated proceedings against Deutsche Post AG on account of a possible hindrance of letter service providers by using a cut price strategy to squeeze competitors out of the market or to prevent potential new entrants.²⁵

While the Commission has adopted very few decisions on abuse of dominance in the last years (and none in 2012), it has initiated numerous investigations into suspected breaches of Art. 102 AEUV in the energy, pharmaceutical, telecoms and IT sectors. The Commission's activities in 2012 showed an increasing willingness to tackle highly political cases - the Commission's decision to open formal pro-

ceedings against Gazprom for alleged restriction of gas supplies across member states in Eastern and Central Europe has caused a considerable political turmoil²⁶ - and if necessary to take a tougher approach than other competition authorities in parallel cases. While the U.S.'s Federal Trade Commission dropped its long-running probe into alleged manipulation of search and advertising services by Google, the Commission is currently analyzing remedies the search giant was finally willing to offer in order to avoid formal proceedings and financial penalties.²⁷

Compliance

Compliance remains key. During the last year France and the UK have established reward systems for companies having in place competition compliance programmes. While the Commission continues to refuse to consider such programmes as either an aggravating or mitigating factor in calculating its fines²⁸, the FCO is said to have already awarded compliance programmes in exceptional cases. However, it is explicitly stressed in the draft bill of the 8th amendment of the ARC that such reductions will only be granted on a case-by-case basis.

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²¹ Commission, [Press Release](#) of 1.2.2012.

²² EU Competition Commissioner Almunia, [Speech](#) on 6.12.2012.

²³ General Court, decision [T-332/09](#) of 12.12.2012.

²⁴ E.g. FCO, [Press Release](#) of 5.6.2012.

²⁵ FCO, [Press Release](#) of 5.11.2012.

²⁶ Commission, [Press Release](#) of 4.9.2012.

²⁷ EU Competition Commissioner Almunia, [Speech](#) on 21.5.2012.

²⁸ See Commission's Brochure "[Compliance Matters](#)" of 2012, p. 21.