

Newsletter, 14 July 2016

German Federal Cartel Office – Annual Report 2015

Most notable cases and activities of the “European Competition Agency of the Year”

“*Referee of the economy*” (German Federal Minister of Economics), “*guardian of competition*” (President of the German Federal Cartel Office, “FCO”), “*agency for the digital economy*” (Vice-President of the FCO), “*European Agency of the Year*” (GCR-Awards 2016) – the recently published Annual Report 2015 of the FCO contains several noble titles for Germany’s competition authority.¹ And indeed, the FCO can look back on a successful year during which the authority has closed and initiated several cases many of which have been well noted beyond the German borders. This newsletter provides an overview of the key facts and figures as regards the FCO’s activities in the year 2015.

Cartel Enforcement I – Horizontal Agreements

Cartel prosecution remains the “*key area of focus*”² of the FCO. The number of cases and the amount of fines remain high. During 2015 the FCO imposed a total of approx. **€208 million in fines in 11 cartel cases**. The fines were imposed on 45 companies and 24 individuals.³ The proceedings concerned various sectors, such as automotive parts, mattresses, container transport services or prefabricated garages. The FCO received 76 leniency applications in 29 cases, the vast majority was filed by undertakings with only 2 applications being made by an individual.

In its Annual Report 2015 the FCO for the first time published selected examples of the **highest individual fines** imposed on undertakings.⁴ The numbers are impressive: one cartel-ist of the sugar cartel case received a fine of €195.5 million in 2014, a cement producer a fine of €175.9 million in 2003 and one of the beer cartelists a fine of €160 million in 2014.⁵

Cartel Enforcement II - Vertical Agreements

During 2015 the FCO conducted a series of proceedings regarding vertical restrictions of competition, with particular focus on (potential) restrictions of online sales:

- The FCO closed its investigations of anti-competitive clauses in the distribution system of **ASICS** Deutschland, the market leader for running shoes in Germany.⁶ The FCO held that in its former selective distribution system ASICS applied hardcore restraints of competition by prohibiting authorized dealers from using price comparison engines for their online presence and from using ASICS brand names on the websites of third parties to guide customers to their own online shops. In its decision the FCO furthermore criticized that the distributors were prohibited without exception from using online marketplaces such as eBay or Amazon. However, the FCO did not take a decision on this point which is currently discussed at European level.⁷ ASICS appealed against the FCO’s decision to the Düsseldorf Higher Regional Court.
- In January 2015, the Düsseldorf Higher Regional Court confirmed the FCO’s decision that the best price clauses of hotel booking platform HRS were illegal.⁸ Nevertheless, HRS’s competitor **Booking** initially maintained an amended form of its best price clauses under which Booking allowed the hotels to offer their rooms cheaper on other hotel booking portals, but still requested that the prices on the hotels’ own websites may not be lower than on Booking’s hotel portal. In December 2015, the FCO prohibited Booking from continuing to apply its “narrow” best price clauses and ordered the hotel booking portal to com-

¹ FCO, [Annual Report 2015](#), published on 22.6.2016 (in German only), citations: preface of the German Federal Minister of Economics, p. 2; preface of the President of the FCO, p. 3; p. 6 and 7.

² FCO, [Press Release](#) of 22.6.2016 (in English).

³ FCO, *ibid.*, p. 3.

⁴ FCO, *ibid.*, p. 39.

⁵ FCO, *ibid.*, p. 39.

⁶ FCO, *ibid.*, p. 19 as well as [Press Release](#) of 27.8.2015 (in English).

⁷ For more information see Commeo Newsletter “[Controversy over marketplace bans for distributors of branded products in Germany](#)” of 28.1.2016.

⁸ For the full story see Commeo Newsletter “[Most favored nation clauses under scrutiny \(ii\) - Hotel online booking platforms - a never ending story?](#)” of 1.3.2016.

pletely delete them from its contracts and general terms and conditions.⁹ The FCO thereby rejected commitments by Booking that were previously accepted by the French, Italian and Swedish authorities with the backup of the European Commission. While the FCO has received praise for its approach by some¹⁰, others look at it critically. The French competition authority announced on 12 July 2016 that the European Commission and 10 national competition authorities (including the FCO) have launched a **joint survey** to evaluate the effects of Booking's commitments in Europe in the hotel booking platforms sector.¹¹

Following the FCO's approach to best price clauses, Verivox, a comparison website for the supply of electricity and gas sales, agreed to abandon its best price clauses to bring the FCO's investigations to an end.¹² The FCO's investigation against hotel booking platform **Expedia** is still ongoing.

- In 2015, the FCO imposed fines on retailers in the amount of € 103 million, *inter alia* against Lidl.¹³ In May 2016 the FCO closed further proceedings in the "**vertical food retail case**" and imposed fines on a brewery and its retailers totaling € 90.5 million.¹⁴ The series of proceedings, which began with dawn raids in January 2010 and which is one of the FCO's most time-consuming fine proceedings, has thus almost reached its end. So far, the FCO imposed fines amounting to € 242 million for illegal agreements between manufacturers and retailers on retail prices for confectionery, coffee, pet food, beer and body care products. Although the FCO could not prove a hub and spoke cartel, the case has certain horizontal aspects. This is reflected in the high level of fines which were mainly imposed on the retailers. The FCO currently prepares a practical guide to explain companies in the sector the scope of the prohibition of resale price maintenance.
- Due to vertical resale price maintenance the FCO further imposed fines on two manufacturers of mattresses of € 18 million¹⁵ and € 130.000 on LEGO GmbH. The

latter case is noteworthy under the aspect of compliance since LEGO carried out extensive in-house investigations, drew organizational and personnel consequences and "*from the onset significantly contributed to clarifying the facts of the case*"¹⁶. The FCO fully considered LEGO's cooperation in setting the fine.

Actions for Damages

Actions for damages have become "*rather the rule than the exception*"¹⁷. Following the FCO's order in 2014 imposing fines of € 280 million on the three main producers of sugar in Germany, more than **120 companies** have applied to the FCO in 2015 **to inspect the files** in order to prepare damage claims against the cartel.¹⁸ Meanwhile, more than 30 claims are pending before different regional courts in the context of the sugar cartel case. This is just one example of the many follow-on damage claims currently pending before German courts.

Abuse Control

In 2015, the FCO closed 20 proceedings and initiated 14 new proceedings against dominant undertakings. The FCO *inter alia* closed "conventional" abuse proceedings against Deutsche Bahn AG and Deutsche Post AG:

- Following the investigations by the FCO, Deutsche Bahn has undertaken to make far-reaching changes to the sale of passenger tickets which will improve the ticket sales possibilities of its competitors. For example, competitors will now be allowed to sell their tickets in railway station shops.¹⁹
- Deutsche Post AG, with a market share of well above 80% on the German market for postal services, in the past agreed letter prices and loyalty discounts with its large customers which were impossible for other postal service providers to compete against. By offering these prices the company engaged in a so-called margin squeeze. The company abandoned the practice objected to.²⁰

With view to the evolving digital world, President Mundt states in the Annual Report 2015 that it was a key task "*to quickly and consistently punish the abusive practices of the big players, in order to keep the markets open for new business models.*"²¹ In doing so the FCO seems to be pre-

⁹ FCO, [decision B9-121/13](#) of 22.12.2016 (English translation provided by Booking at the FCO's website).

¹⁰ The FCO received the award "European Agency of the Year" as well as "Enforcement Action of the Year" by GCR in 2016 in the context of the hotel booking platform cases, see Annual Report 2015, p. 7.

¹¹ Autorité de la concurrence, [Press Release](#) of 12.07.2016 (in English).

¹² FCO, Annual Report 2015, p. 12.

¹³ FCO, *ibid.*, p. 36.

¹⁴ FCO, [Press Release](#) of 9.5.2016 (in English)

¹⁵ FCO, [Press Release](#) of 22.10.2016 (in English).

¹⁶ FCO's President Mundt in the [Press Release](#) of 12.1.2016 (in English).

¹⁷ FCO, Annual Report 2015, p. 13.

¹⁸ FCO, *ibid.*, p. 19.

¹⁹ FCO, *ibid.*, p. 35.

²⁰ FCO, *ibid.*, p. 34.

²¹ FCO, [Press Release](#) of 22.6.2016 (in English).

pared to leave the routine paths of abuse control and to pick up on new aspects. Most prominent example is the investigation which the FCO opened in March 2016 against **Facebook** following up suspicion that by violating data protection rules Facebook is abusing its possibly dominant position in the market for social networks.²² It is the first time that an European competition authority tries to establish the abuse of a dominant position on the violation of data protection rules.

Merger Control

For several years the number of notified mergers has remained stable. During 2015 the FCO decided on 1,169 merger cases, 13 of which were decided after an in-depth examination.²³

- The only merger that was prohibited concerned the acquisition of a medium-sized food retailer by Germany's largest food retailer.²⁴ At the request of the companies concerned (**Edeka/Kaiser's Tengelmann**), the German Federal Minister for Economic Affairs and Energy granted a ministerial authorization based on job preservation and maintenance of workers rights' reasons. However, the Higher Regional Court of Düsseldorf announced just two days ago that it came to the preliminary conclusion in the course of summary proceedings that the ministerial authorization was void, *inter alia* due to lack of neutrality of the responsible Minister.²⁵
- In the context of the notified transaction *Deutsche Annington/GAGFAH* concerning the German rental housing market the FCO for the first time based its investigations on several alternative market definition models.²⁶ The transaction was cleared since the market shares of the parties have been below 40% on all relevant markets considered by the FCO.

Digital Economy

In early 2015, the FCO set up an **Internet Think Tank** to take account for the growing importance of the increasing digitalization of the economy. The Think Tank has recently published a Working Paper on "*Market Power of Platforms and Networks*"²⁷ which gives an overview of the FCO's practice in this regard and an update on the state of economics and

antitrust research. The Working Paper complements the report on "*Competition Law and Data*" which the FCO jointly published with the French competition authority in May 2016.²⁸

Dawn Raids

Finally, some key figures to the dawn raids conducted by the FCO in 2015: the FCO conducted dawn raids in 18 cases and search 88 companies and 6 private homes. 511 people have been involved in total, including officials of the FCO (61%), police officers (21%), IT experts (17%) and state attorneys (<1%). The FCO secured electronic data with a volume of 17.3 terabyte and approx. 3,500 paper files.²⁹

Comment

The prosecution activity of the FCO remains high in all areas of competition law. The above overview thereby shows the FCO's eager willingness to adapt its competition law enforcement to the changing economic environment, not shying away from taking decisions that do not necessarily fit in with the approach taken within the European Competition Network. While the FCO closed several "internet cases" in 2015 (such as *Booking*) where it took a pioneering role, the European Commission and other national authorities, notably the *Autorité de la concurrence*, now seem to follow the FCO's path and increase their focus on vertical restraints.



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²² FCO, [Press Release](#) of 2.3.2016 (in English).

²³ FCO, Annual Report 2015, p. 39.

²⁴ FCO, *ibid.*, p. 18.

²⁵ Higher Regional Court Düsseldorf, [Press Release](#) of 12/7/2016 (in German only).

²⁶ FCO, Annual Report 2015, p. 21.

²⁷ FCO, "[Market Power of Platforms and Networks](#)", published on 9.6.2016 (in German only; the FCO has published an [Executive Summary](#) of the Working Paper in English).

²⁸ FCO/Autorité de la concurrence, "[Competition Law and Data](#)", joint report of 10.5.2016 (in English only).

²⁹ FCO, Annual Report 2015, p. 17.