

Newsletter, 23 July 2021

## 2020 in review: business as usual despite Corona?

An overview of the activities and most important proceedings of the German Federal Cartel Office and the European Commission in the past year

**In June, the German Federal Cartel Office ("FCO") published its Activity Report for 2019/20 and its Annual Report for 2020/21.<sup>1</sup> At the beginning of July, the European Commission ("Commission") also published its Report on competition policy for 2020.<sup>2</sup> As in the past, both competition authorities provide information on relevant proceedings, legislative initiatives and anti-trust policy developments. This Newsletter summarizes the key facts and figures of the reports.**

The reports focus on the challenges faced by companies, competition authorities and competition in general over the past year as a result of the pandemic and the ongoing digitization of markets, which has been further accelerated by the pandemic.

Both authorities emphasize that competition law has proven to be sufficiently flexible to allow crisis-related cooperation in production, logistics, distribution and warehousing, as well as in the restarting of complex supply chains. The Commission provided guidance in a Communication setting out the main criteria to assess cooperation projects and introduced a temporary tool of *ad hoc* comfort letters for legal certainty.<sup>3</sup>

At a national level, digitization was taken into account with the introduction of new competencies in the framework of the 10<sup>th</sup> amendment of the German Act against Restraints of Competition ("**ARC**")<sup>4</sup> and with the establishment of a new division for the "Digital Economy" within the FCO, while at an EU level the proposal for a Digital Markets Act (DMA) as part of the EU's digital strategy is intended to ensure a secure digital environment for consumers and effective

competition.<sup>5</sup> Contrary to what one might think, however, the conduct of large digital corporations was not the only subject of the antitrust proceedings carried out during the reporting period.

### *Cartel enforcement*

Cartel enforcement continues to be a focus of competition authorities' activities. The number of leniency applications filed with the FCO fell again from 16 in 2019 to 13 in 2020. The trend of a decrease in leniency applications observed throughout the EU since the implementation of the EU Antitrust Damages Directive is therefore also evident in Germany. At the same time, the FCO received almost 700 tip-offs via its anonymous whistle-blower system in 2019/20. In total, the FCO issued fines against companies and individuals amounting to € 847 million in 2019 and € 349 million in 2020.<sup>6</sup> The sectors most affected were steel and aluminum processing (a total of €1 billion in fines have been imposed on the steel industry since 2018), the manufacture of manhole covers and gully tops (this case was triggered by an anonymous tip-off) and the wholesale of plant protection products. The average fine imposed on individuals in 2020 amounted to € 77,000.

With the entry into force of the 10<sup>th</sup> amendment of the ARC and the introduction of a statutory leniency program, the FCO's previous leniency notice of 2006 has been repealed. The FCO is expected to publish general administrative principles on the exercise of its discretion in applying the statutory leniency program in the near future.<sup>7</sup>

<sup>1</sup> FCO, [Activity Report 19/20](#) and [Annual Report 20/21](#) of 23/6/2021 (in German only).

<sup>2</sup> Commission, [Report on competition policy 2020](#) and accompanying [Commission Staff Working Paper](#) of 7/7/2021.

<sup>3</sup> Such a "comfort letter" has been issued *inter alia* for the European generics association „Medicines for Europe“; Commission, [Communication of 8/4/2020](#).

<sup>4</sup> See [COMMEO Newsletter of 19/1/2021](#).

<sup>5</sup> See [COMMEO Newsletter of 25/3/2021](#).

<sup>6</sup> FCO, Activity Report 19/20, p. 38, 41 et seq.

<sup>7</sup> FCO, Activity Report 19/20, p. 16.

The Commission issued € 288 million in cartel fines in 2020, particularly in the chemical, the food retail packaging and auto parts sectors.<sup>8</sup>

### *Merger control*

The FCO recorded a slight decline in filings in 2020.<sup>9</sup> There was no crisis-related wave of mergers, nor was there a particularly high number of restructuring mergers. Nine of the total of 1236 notified mergers were subjected to an in-depth examination as part of a Phase II procedure. In seven cases, approvals were granted, in some cases subject to conditions, while two transactions were abandoned by the parties while the review was ongoing.<sup>10</sup>

Based on initial experience, the FCO expects that the increased national thresholds under the 10<sup>th</sup> ARC amendment will reduce the number of mergers requiring notification by more than 40%.<sup>11</sup> The FCO will use the freed-up resources to specifically examine planned acquisitions of smaller target companies falling below the thresholds where there are clear indications of relevant anticompetitive effects in certain economic sectors. However, the prerequisite for the application of this new competence is that the FCO first conducts a sector inquiry in the economic sector concerned.

In the reporting period, the German Federal Ministry of Economics carried out an evaluation of the transaction threshold introduced in 2017. To date, no in-depth examination has been initiated on the basis of Section 35 (1a) ARC (e.g. against a “killer acquisition”). Among the cases examined, the technology sector accounted for a smaller share and the pharmaceuticals sector for a larger share than expected.<sup>12</sup>

The Commission also recorded a slight decline in merger control filings in 2020. It had to decide upon 352 cases; 13 mergers were approved subject to conditions in Phase I, three in Phase II and one merger without conditions in Phase II. The simplified procedure was applied in 76% of all cases.<sup>13</sup>

### *Abuse of dominance*

In the reporting period, control of market dominance focused mainly on the conduct of

digital groups, in particular the so-called “GAFAs”.<sup>14</sup>

Based on new Section 19a ARC, the FCO has initiated proceedings against Google, Amazon, Facebook and Apple in recent months.<sup>15</sup> However, by making use of the “traditional” intervention powers against abuse of dominance, the FCO was also active outside digital markets. In total, it opened 17 proceedings in 2020 and was able to conclude one.<sup>16</sup>

The Commission opened four proceedings against Apple during the reporting period and is currently examining, among other things, the extent to which the use of Apple Pay for in-app purchases without alternatives constitutes an abuse of market power. The Commission is also looking into the question of whether Amazon gives preference on its marketplace to its own retail offers and offers from sellers who use Amazon's logistics and delivery services.<sup>17</sup> The Commission further imposed interim measures against chip manufacturer Broadcom for abusive exclusivity agreements in 2020.<sup>18</sup>

### *Vertical restraints*

In the area of vertical restraints, the FCO focused on online retail. Its particular concern here is that the quality requirements within the framework of selective distribution systems are comparable for stationary and online sales.<sup>19</sup> The Commission imposed fines totaling € 21 million in two cases due to contractual provisions that resulted in the partitioning of the internal market.<sup>20</sup>

### *Sector inquiries*

Furthermore, during the reporting period the FCO completed inquiries into comparison portals, smart TVs and user ratings on the Internet. New sector inquiries were launched, for instance in the areas of messenger and video services, online advertising and the publicly accessible charging infrastructure for electric vehicles.<sup>21</sup>

With the aim of gaining a better understanding of the functioning and relevance of the “Internet of Things” in terms of competition law, the

<sup>8</sup> Commission, Staff Working Paper, p. 31.

<sup>9</sup> In 2020, 1236 mergers, in 2019 1433 mergers were notified to the FCO; Activity Report 19/20, p. 29.

<sup>10</sup> FCO, Activity Report 19/20, p. 30.

<sup>11</sup> FCO, Activity Report 19/20, p. 16.

<sup>12</sup> FCO, Activity Report 19/20, p. X.

<sup>13</sup> Commission, Annual Report 2020, p. 9 et seq.

<sup>14</sup> Google, Amazon, Facebook and Apple.

<sup>15</sup> FCO, [Press Release of 21/06/2021](#).

<sup>16</sup> FCO, Annual Report 20/21, p. 7.

<sup>17</sup> Commission, Annual Report 2020, p. 21 et seq.

<sup>18</sup> Commission, Annual Report 2020, p. 19 et seq.

<sup>19</sup> FCO, Annual Report 20/21, p. 48.

<sup>20</sup> Commission, Annual Report 2020, p. 20 et seq.

<sup>21</sup> FCO, Activity Report 19/20, p. 45, 140; Annual Report 20/21, p. 39, 57.

Commission has been taking a closer look at this area since July 2020.<sup>22</sup>

### *Competition Register for public procurement*

Entrusted with the task of being the register authority, the FCO has just completed the creation of the Competition Register, Germany's first fully digitalized state register. In the future, public contracting authorities will be obligated to check in the register whether companies have been involved in economic crimes (including antitrust infringements) and must therefore be excluded from public award procedures. The register has officially started operating, but the obligation to check the register is only applicable once it has been published in the Federal Gazette.<sup>23</sup> If companies are listed in the register, they can apply for early removal by means of a self-cleaning process before the time limit expires. For the purpose of public consultation, the FCO published guidelines and practical advice for removal requests in June 2021.<sup>24</sup>

### **Comment**

The Corona pandemic may have posed challenges for the competition authorities, but this has by no means led to a standstill in their activities. Although the FCO and the Commission largely refrained from conducting raids at the beginning of the pandemic, initial raids have taken place again subject to a corresponding hygiene policy. Against this background, it should be noted that, since the 10<sup>th</sup> ARC amendment, the FCO has been equipped with new investigative powers (companies now have a duty to cooperate during raids, subject to fines) and can also demand the disclosure of documents and the provision of information by means of requests for information.

During the last year the FCO has further expanded its self-declared pioneering role in the area of the digital economy. The next few months will show to what extent the ongoing proceedings against the GAFAs will be coordinated between the competition authorities or concentrated at the Commission.

Finally, it is worth pointing out that the draft bill for an Association Sanctions Act, which has been controversially discussed in 2020 and which provided for extended criminal liability of companies, has failed.<sup>25</sup> Thus, for the time being, no further far-reaching legislative changes are to be expected in Germany in the area of

competition law. At EU level, on the other hand, there is a lot happening: in addition to the DMA, the Commission's agenda for this year includes the review of the most important block exemption regulations and guidelines, including the rules on distribution and supply agreements and horizontal cooperation agreements as well as the notice on market definition.



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<sup>22</sup> Commission, Annual Report 2020, p. 22.

<sup>23</sup> FCO, [Press Release of 25/03/2021](#) and Annual Report, p. 60 et seq.

<sup>24</sup> See the [FCO's website](#) for details (in German only).

<sup>25</sup> See [COMMEO Newsletter of 17/6/2020](#).