

Newsletter, 9 September 2022

The Annual Report of the German FCO for 2021/2022

An overview of the most recent “facts and figures” and activities of the German FCO

Last week, the German Federal Cartel Office („FCO“) published its Annual Report for 2021/2022.¹ As pointed out in the foreword by Dr. Robert Habeck (Vice Chancellor of Germany and Federal Minister for Economic Affairs and Climate Action) and Andreas Mundt (President of the FCO), this year’s report not only includes “facts and figures”, but also discusses the sharp rising energy and fuel prices, developments in digital markets as well as the rising number of sustainability initiatives. On top of that, the 11th amendment of the German Act against Restraints of Competition (“ARC”) is already in the planning stage. This Newsletter summarizes the key issues addressed in the FCO’s Annual Report.

Cartel enforcement & Vertical restraints

In total, the FCO issued fines against eleven companies, associations and individuals in the amount of € 105 million in 2021² which shows another significant drop in the level of fines after a total of € 349 million in 2020 and € 847 million in 2019.³ A significant amount of last year’s fines related to vertical restraints.

The highest fine was imposed on members of a cartel in the steel forging sector for information exchange on pricing, costs and negotiations with customers/suppliers following a leniency application (in total € 35 million). Further fines were imposed on manufacturers of modular expansion joints for bridges for conducting a quota cartel which was discovered following evidence provided by market participants.⁴ When it comes to vertical restraints, manufacturers and retailers of musical instruments were fined in the amount of € 21 million (the fine also covered the horizontal agreement between both retailers involved), as

well as individual manufacturers of audio products (€ 7 million) and school bags (€ 2 million).⁵ In all cases, the companies involved agreed to a settlement with the FCO.

The introduction of a statutory leniency program in January 2021 (within the 10th amendment of the ARC)⁶ has so far not led to a significant increase of leniency applications. In the field of cartel prosecution, the FCO carried out two dawn raids at the premises of 16 companies/associations and in three private residences.⁷

Merger Control

At the beginning of last year, the FCO had hoped for a significant decrease of merger control notifications (of around 40%) due to the raise of Germany’s national turnover thresholds from € 25 million to € 50 million and from € 5 million to € 17.5 million following the 10th amendment of the ARC.⁸ In the retrospective, compared to 1,236 notified mergers in 2020, the reduction to approximately 1,000 merger control notifications in 2021⁹ was lower than expected. Whilst the vast majority of notifications was cleared by the FCO in Phase I, only ten Phase II proceedings were initiated. Four were cleared (one subject to conditions) and five were withdrawn by the parties. One planned acquisition (between competitors) in the sector of surface drainage with combined market shares in the range of 45-50% was prohibited due to the absence of sufficient alternatives for the customers.¹⁰

In addition, the FCO reported two cases in which it has successfully requested a referral of merger control proceedings from the European Commission due to national or local market concentrations. Both transactions were later

¹ FCO, [Annual Report 21/22](#) of 30/8/2022 (in German only).

² FCO, Annual Report 21/22, p. 9.

³ See [COMMEO Newsletter of 23/6/2021](#).

⁴ FCO, Annual Report 21/22, p. 19 et seq.

⁵ FCO, Annual Report 21/22, p. 17 et seq.

⁶ See [COMMEO Newsletter of 19/1/2021](#).

⁷ FCO, Annual Report 21/22, p. 32.

⁸ See COMMEO Newsletter of 23/6/2021.

⁹ FCO, Annual Report 21/22, p. 9.

¹⁰ FCO, Annual Report 21/22, p. 26, 32.

cleared by the FCO after the implementation of extensive offsetting measures.¹¹

Abuse of dominance

In 2021, the FCO has initiated 18 and concluded five proceedings when it comes to the control of abuse of dominance. Apart from its activities in the digital sector (which will be explained below), the FCO has, *inter alia*, followed a complaint issued by Condor against Lufthansa in which Lufthansa was alleged abusing its dominant position in the market for connecting flights by terminating an agreement with Condor that guaranteed connecting flights operated by Lufthansa for Condor's own long-haul flights. The FCO ultimately prohibited the termination of this agreement.¹²

In another case in the area of transportation, the FCO issued a formal warning against Deutsche Bahn as dominant player in the German rail market. In the view of the FCO, Deutsche Bahn is obliged to share real-time traffic data with mobility platforms (that offer mobility services combined with train journeys). So far, Deutsche Bahn has only shared such data with a selected group of customers.¹³

Digital markets

With Section 19a ARC a new instrument for the control of abusive behaviour of big tech companies was introduced. The provision follows a two steps approach: At first, the FCO analyses whether a company has a paramount significance for competition across markets. In a second step, the FCO can prohibit specific practices, e.g. self-preferencing.

Alphabet/Google¹⁴, Amazon¹⁵ and Meta/Facebook¹⁶ have already been considered by the FCO as having a paramount significance for competition across markets by offering digital ecosystems on which third parties are dependent. Apple's review is still pending. As a next step, the FCO has already opened proceedings against Google's data processing conditions, possible restrictions by the "Google News Showcase"-service, as well as against the "Google Maps Platform"¹⁷. In addition, the FCO is investigating Meta/Facebook's coupling of Oculus' VR products with Facebook and

Amazon's influence on the pricing on Amazon Marketplace as well as an alleged hindrance on the sale of brand products by independent retailers. Against Apple, several complaints were reported to the FCO, i.e. on tracking restrictions of iOS users, pre-installed software on Apple products and the compulsory use of an in-app purchase system.¹⁸

At the European level, the Digital Markets Act ("DMA") for "digital gatekeepers" (which, in principle, covers the same companies as Section 19a ARC), is currently in the final adoption process.¹⁹ In the FCO's view, both regimes offer room for coexistence: the DMA has a specific catalogue of permitted and prohibited behaviours whereas the FCO sees Section 19a ARC as a more flexible and individual tool on a national level.²⁰

Energy and Fuel

Most recently, in the context of the Ukraine crisis, the prices in the German fuel market increased significantly compared to prices on the level of refinery and wholesale. As a response, the FCO has launched an *ad hoc* sector investigation that will, *inter alia*, examine cost structures and margins²¹, as well as the "passing-on" of the so-called "fuel discount" (a temporary tax reduction on diesel and gasoline in Germany). First results are expected this fall. Mr. Mundt announced that the FCO will apply an approach of strict observance on mineral oil companies, which will include the extension of the FCO's market transparency unit for fuels.²² When it comes to high prices for electricity and gas, the FCO currently does not see structural issues in competition and has, so far, not opened any investigations.²³

Sustainability and Competition

Sustainability aspects have become significant competition parameters. While unilateral sustainability efforts by companies will generally be classified as unproblematic, coordinated behavior (between competitors) must be compliant with antitrust law. Sustainability initiatives are on the rise and have been under scrutiny by the FCO in 2021. The FCO assessed four sustainability initiatives, namely an initiative to promote living wages along the

¹¹ FCO, Annual Report 21/22, p. 30, 43.

¹² FCO, [Press Release of 1/9/2022](#).

¹³ FCO, Annual Report 21/22, p. 39.

¹⁴ FCO, [Press Release of 5/1/2022](#).

¹⁵ FCO, [Press Release of 6/7/2022](#).

¹⁶ FCO, [Press Release of 4/5/2022](#).

¹⁷ FCO, [Press Release of 21/6/2022](#).

¹⁸ FCO, Annual Report 21/22, p. 36 et seq.

¹⁹ [Draft DMA](#) as adopted by the European Parliament on 5/7/2022.

²⁰ FCO, Annual Report 21/22, p. 38.

²¹ FCO, [Press Release of 4/8/2022](#).

²² FCO, Annual Report 21/22, p. 6, 40 et seq.

²³ FCO, Annual Report 21/22, p. 44.

supply chain of private label bananas, the Animal Welfare Initiative²⁴, an initiative of the representatives of German milk producers in the so-called Agrardialog Milch²⁵ and the QM + Program for increasing animal welfare in milk production²⁶. The initiative Agrardialog Milch was declared to be anticompetitive, while the FCO had no antitrust concerns in relation to the other initiatives.²⁷

The FCO bases its examination of such sustainability initiatives in particular on the following factors: the intensity of the restriction of competition (e.g., through an alignment of cost components), effects on prices, the possibility of non-discriminatory access to the respective cooperation, elaboration of the sustainability aspects in an open process as well as sufficient transparency for consumers.²⁸

Competition Register for public procurement

With the Competition Register for public procurement, the first fully digitalized state register became operative in 2021. Since June 2022, public contracting authorities are obliged to consult the register once the value of the order reaches EUR 30,000. Public contracting authorities can check in a single electronic search whether a company has committed violations of the law (including antitrust infringements), which might lead to its exclusion from public award procedures. Below the value limit, public contracting authorities have the option to make a query. Companies and individuals can access their individual information contained in the Competition Register. Requests can be made in both written and electronic form and are subject to a fee.²⁹

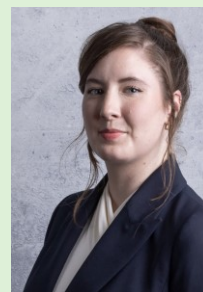
An existing registration does not automatically lead to the exclusion from the award procedure. The public contracting authority will assess based on all information available if there is a reason for exclusion under procurement law. Registrations on the basis of antitrust infringements are deleted after three years. Furthermore, registered companies can apply for early removal by means of a self-cleaning process before the end of the 3-year-period.³⁰

Comment

The FCO has demonstrated in the past year that it remains very active in enforcing the existing provisions as well as in the application of new competences stemming from the 10th amendment of the ARC. The four main big tech companies (GAFA's) are already under scrutiny (Section 19a ARC) even before the parallel DMA came into force on an EU level. When it comes to high energy and fuel prices, the authority acted with an initiative of transparency instead of suggesting a tighter (price)regulation. The FCO also shows an active role in shaping the assessment of sustainability initiatives and other forms of cooperations. This week, the first cooperation for mitigating a possible gas shortage to the benefit of sugar producers was permitted by the FCO for a limited period.³¹ In addition, Dr. Habeck has already announced a new agenda for competition policy and the 11th amendment of the ARC. This will include the strengthening of sector inquiries, dissolution powers for the FCO in consolidated markets as well as enhanced possibilities of profit retention.³² Such powers of intervention will confront companies "under scrutiny" with a whole new regulatory regime.



Christopher Brendel



Constanze Ely

Many thanks to **Jonas Gödelmann** (Legal Trainee) for his contribution to this COMMEO Newsletter.

COMMEO Rechtsanwälte PartGmbB

Rechtsanwälte und Notar
Speicherstraße 55
D-60327 Frankfurt am Main
www.commeo-law.com

COMMEO is an independent law firm specialized in competition law. We are an established team of experienced lawyers advising clients on all aspects of German and European competition law.

This publication is intended to highlight issues. It is not intended to be comprehensive nor to provide legal advice. Any liability which might arise from the reliance on the information is excluded.

²⁴ FCO, [Press Release of 18/1/2022](#).

²⁵ FCO, [Press Release of 25/1/2022](#) (in German only).

²⁶ FCO, [Press Release of 29/3/2022](#).

²⁷ See [COMMEO Newsletter of 23/3/2022](#).

²⁸ FCO, Annual Report 21/22, p. 51.

²⁹ FCO, Annual Report 21/22, p. 61.

³⁰ For details see [the FCO's website](#) on the Competition Register (in German only).

³¹ FCO, [Press Release of 6/9/2022](#) (in German only).

³² FCO, Annual Report 21/22, p. 4 et seqq.