

Newsletter, 29 January 2024

German FCO “Wrapped” – The year 2023 in review

An overview of the FCO's activities in 2023

At the beginning of a new year, it is worthwhile to take a look back at the previous year – especially in the field of competition law. This is because past activities can provide a foretaste of the German Competition Authority's ("FCO") future priorities. With the entry into force of the 11th amendment to the German Competition Act¹, the FCO gained significant new competences this year. At the same time, the FCO was once again very active in its core tasks in the areas of cartel, merger and abuse control. Not surprisingly, the FCO also focused on the global super-trend of sustainability last year. After one and a half years of experience with the competition register, we can also take a look at interesting initial statistics.

Cartel enforcement post pandemic

In 2023, the FCO imposed fines totaling approx. EUR 2.8 million for prohibited cartel agreements. A total of eight companies in the industrial construction sector² and seven individuals were fined. The fines were once again significantly lower than in previous years (EUR 105 million in 2021 and EUR 24 million in 2022). This massive decrease in the amount of fines imposed is likely due to the aftermath of the covid-pandemic. Therefore, this cannot be seen as a lasting trend. On the contrary, the FCO was very active in the area of cartel enforcement in 2023 – as in the previous year – and carried out twelve inspections (following 18 inspections in 2022). According to the FCO, several major cases are also nearing completion. Fines are therefore expected to increase again in the coming years.

In addition, the FCO concluded administrative proceedings against the Working Group of Associations of Suppliers of Medical Aids (Arbeitsgemeinschaft von Hilfsmittelverbänden, ARGE) in 2023, resulting in the termination of anti-competitive price coordination in the supply of medical aids.³

With 14 leniency applications submitted by companies to the FCO in 2023, the number of leniency applications remained constant compared to the previous year (2022: 13 leniency applications). In addition, the FCO received many reports through the external reporting unit which was newly established in 2023 under the German Whistleblower Protection Act.⁴

Merger control

In 2023, the FCO examined approx. 800 mergers (2022: approx. 830), four of which were examined in depth in main examination proceedings (2022: three). Several mergers were only cleared subject to conditions:

The planned acquisition of the Royal Friesland Campina dairy business ("Tuffi" and "Landliebe") by Theo Müller was approved by the FCO at the beginning of 2023 subject to a resolving condition: Since in some national markets Theo Müller's market share exceeds 60 % and – albeit minor – market share additions are expected, Theo Müller has to divest the "Tuffi" division and grant exclusive third-party licenses for the "Landliebe" brand. This will allow new competitors to step into Royal Friesland Campina's market position. However, the FCO did not consider joint market shares below the presumption threshold for market dominance of 40% as giving rise to sufficient competition concerns.⁵ The FCO also authorised the planned acquisition of one of the largest regional providers in the waste disposal sector by a supra-regional provider only on the condition that a waste disposal site be sold in order to allow a new competitor to enter the market.⁶

In a further main examination proceeding, the FCO cleared the acquisition of a wholesaler by a manufacturer of cleaning robots for private pools, as there were no significant competition concerns in the wholesale market for swimming

¹ See [COMMEO Newsletter of 7 November 2023](#).

² FCO, [Press Release of 14 December 2023](#).

³ FCO, [Press Release of 6 November 2023](#).

⁴ See [COMMEO Newsletter of 3 July 2023](#).

⁵ FCO, [Press Release of 22 February 2023](#).

⁶ FCO, [Press Release of 30 November 2023](#).

pool equipment. Since the total turnover on the relevant domestic market was below the *de minimis* market threshold of EUR 20 million (Section 36 (1) no. 2 ARC), the FCO was unable to investigate the indications that an uncompetitive duopoly on the manufacturing market for cleaning robots could emerge.⁷ For the same reason, two regional mergers in the press sector were cleared in phase 1 despite the FCO's competition concerns.⁸

Abuse control

In the past year, the FCO was particularly active in abuse control concerning Deutsche Bahn ("DB"), energy supply companies, digital markets and the food retail sector.

The FCO issued an order against DB, the dominant German rail company, to stop the abusive behaviour towards mobility platforms concerning DB's own offers and real-time data access. The FCO's accusation included not only the restriction of access to real-time traffic data, but also related to advertising and discount bans, vertical price specifications and the commission structure, in particular in comparison to DB's own strong market mobility platform "DB Navigator". DB has lodged an appeal against the FCO's order.⁹

Based on the new abuse control powers under the laws on energy price relief, the FCO has initiated investigation proceedings against 57 suppliers of gas, heat and energy. In cases where the objections have not been remedied by the suppliers, the FCO has already announced refund orders.¹⁰ In addition, the FCO has opened proceedings against possible excessive price increases due to the use of inappropriate indices by district heating suppliers.¹¹

A number of proceedings is currently underway against the major digital companies on the basis of Section 19a ARC, which was introduced with the 10th amendment to the ARC. While Alphabet/Google, Amazon, Apple and Meta/Facebook have already been found to be of "paramount significance for competition across (digital) markets", the proceedings against Microsoft are still pending. On this basis, the FCO issued a warning against Alphabet/Google in 2023 due to the bundling of infotainment licenses for vehicles.¹² Proceedings are still ongoing against

Amazon regarding possible price control and "brand gating" (vis-à-vis marketplace retailers) and against Apple regarding the data protection regulations for third-party apps. The FCO is not concerned about its "parallel" proceedings against the "digital gatekeepers", which are also regulated at EU level by the Digital Markets Act¹³: It intends to continue to cooperate closely with the EU Commission in this regard.

The FCO initiated proceedings against Coca-Cola Europacific Partners Germany to investigate a possible abuse through rebates (bundling) to food retailers, in particular for the purchase of the full range of products. The FCO has announced that it will investigate a potential dominant position or relative market power on the market for cola beverages and soft drinks.¹⁴

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. The FCO focuses 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.¹⁵

In 2023, the FCO once again addressed the "Animal Welfare Initiative", an industry alliance that aims to reward livestock farmers for improving animal husbandry conditions. The core element until the end of 2023 was the payment of a standard premium to livestock farmers participating in the initiative. The FCO had tolerated these standard premiums for a transitional phase due to the pioneering nature of the initiative.¹⁶ Due to the fundamental competition concerns, the FCO has now worked towards abolishing the previously applicable mandatory price premium for the buyers of participating producers by 2024 and instead introducing a non-binding recommendation for

⁷ FCO, [Press Release of 23 June 2023](#).

⁸ FCO, [Press Release of 9 November 2023](#).

⁹ FCO, [Press Release of 28 June 2023](#).

¹⁰ FCO, [Press Release of 13 December 2023](#).

¹¹ FCO, [Press Release of 16 November 2023](#).

¹² FCO, [Press Release of 21 June 2023](#).

¹³ See [COMMEO Newsletter of 30 November 2023](#).

¹⁴ FCO, [Press Release of 4 November 2023](#).

¹⁵ FCO, Annual Report 22/23, p. 59.

¹⁶ See [COMMEO Newsletter of 23 March 2022](#).

financing the additional costs associated with the animal welfare criteria.¹⁷

However, the FCO saw no reason to conduct an in-depth examination of the German Initiative on Sustainable Cocoa (Forum Nachhaltiger Kakao e.V.).¹⁸ The main objective of the Cocoa Forum is to promote living incomes for cocoa farmers in the relevant production countries of Ghana and Côte d'Ivoire. To this end, the members of the forum are to conclude voluntary commitments on individualised minimum prices, quotas and premium systems in order to achieve better farm-gate prices for the producers. However, the initiative does not provide for standardised price premiums. Furthermore, the proposed commitment is voluntary, meaning that the FCO saw no signs of a threat of restriction of competition.

Competition register

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 an electronic search whether a company has committed violations of the law (including antitrust infringements), which might lead to its exclusion from public award procedures.¹⁹ Registrations on the basis of antitrust infringements are deleted after three years. Furthermore, companies can apply for early cancellation by means of a “self-cleaning” process before the end of the three-year-period. In this case, early cancellation takes place if the company can credibly demonstrate a legitimate interest in removal and has proven “self-cleaning” for the purposes of the public procurement procedure.²⁰

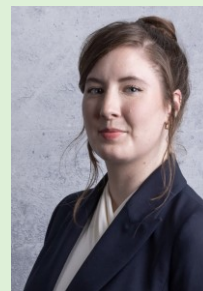
In 2023, around 5,500 economic offences were recorded in the competition register. Around 1,000 queries are made daily by public contracting authorities. Since the register became fully operational in June 2022, there have already been 390,000 queries. In addition, the FCO has received 27 requests for cancellation based on “self-cleaning”, of which 16 were granted, four were withdrawn and seven are still pending.

Comment

In 2023, the FCO once again focussed on cartel enforcement, even if the total fines imposed do not reflect that. An overall increase in fines can therefore be expected in the coming years. In the area of merger control, the number of proceedings examined remained largely constant compared to the previous year. Abuse control also focussed on sectors that have already been examined by the FCO in the past: Energy and digital markets as well as food retail. These sectors are also expected to remain under scrutiny in the coming year. Sustainability initiatives will also continue to play an important role. A case-by-case assessment of compliance with antitrust law will remain necessary. The 12th amendment to the ARC, which was already announced when the 11th amendment to the ARC came into force on 7 November 2023²¹, is intended to address sustainability in particular, in addition to consumer protection issues.



Christopher Brendel



Constanze Ely

COMMEO Rechtsanwälte PartGmbH

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.

¹⁷ FCO, [Press Release of 25 May 2023](#).

¹⁸ FCO, [Press Release of 13 June 2023](#).

¹⁹ FCO, Annual Report 22/23, p. 69.

²⁰ See in detail the [website of the FCO](#).

²¹ See [COMMEO Newsletter of 7 November 2023](#).