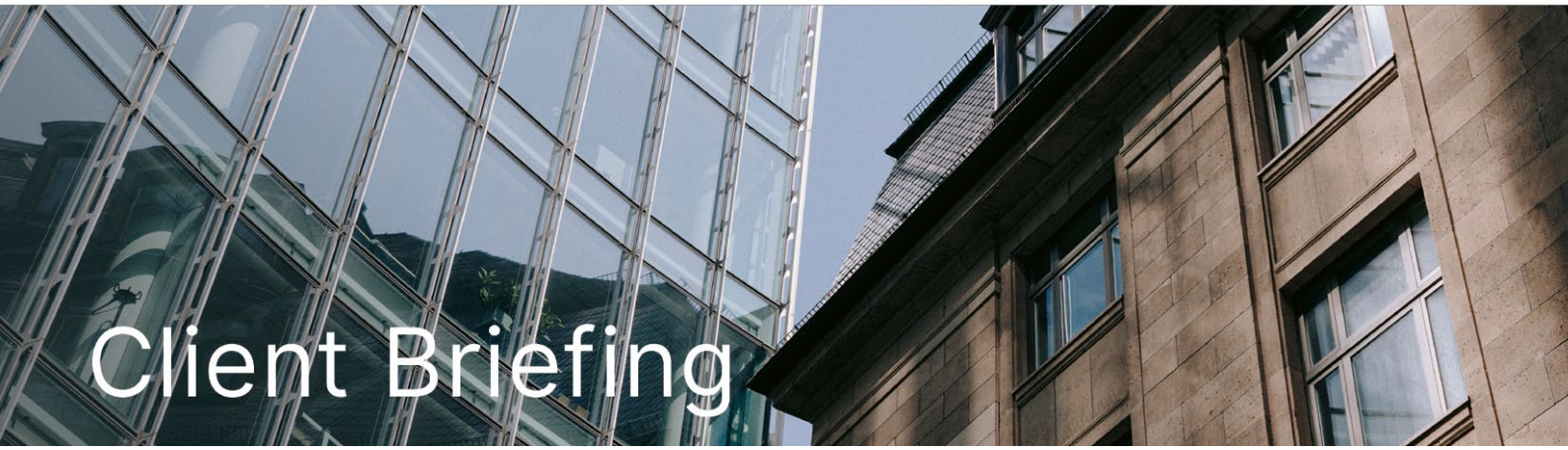

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Major Developments in German Competition Law in the Second Half of 2024

In 2024, the Federal Cartel Office (FCO) reviewed more mergers than in the previous year and imposed significantly higher fines for cartel violations. As usual, the authority was also very active in pursuing abusive practices by dominanant undertakings and enforcing Section 19a of the Act against Restraints of Competition (ARC). In the area of cartel damages claims, the trend towards plaintiff-friendly decisions continues. In this Client Briefing, we highlight the most important decisions in the second half of 2024.

I. Merger Control

In 2024, the Federal Cartel Office ("FCO") examined around 900 mergers, ten of which in Phase II. In addition to one prohibition, there were four withdrawals in Phase II, three of which occurred during the reporting period. Three projects were cleared after in-depth review (for Thermo Fisher/Olink see Newsletter 1/2024), two are still pending.

1. Hospital Merger Prohibited

At the end of July, the FCO prohibited the acquisition of a majority stake in the **University Hospital Mannheim** by the **University Hospital Heidelberg**. The University Hospital Heidelberg is one of the largest university hospitals in Germany and, according to the Bonn authority, holds a dominant position in the Heidelberg hospital market. The FCO held that this position would be further strengthened and extended to the neighboring Mannheim and Heppenheim areas through the merger.

The parties did not prevail with their argument that increasing patient numbers would improve treatment quality (so-called volume-outcome effect). According to the FCO, such effects could not outweigh the competitive disadvantages, especially since the parties were already maximum care hospitals with high specialization. Any efficiency advantages could also be generated through medical and scientific cooperation. As already emphasized in the context of the sector inquiry of 2021, the FCO stated that the diversity of providers is a crucial competitive incentive to ensure high treatment quality. The parties have appealed the decision to the Higher Regional Court of Düsseldorf and publicly considered applying for a ministerial approval.

The prohibition decision will be the last of its kind for the time being. After more than 400 hospital mergers were reviewed between 2003 and 2024, with only eight being prohibited, hospital mergers were largely removed from German merger control with the Federal Ministry of Health's hospital act of December 2024. At least, until the end of 2030, it will generally be sufficient for hospital mergers to obtain a confirmation from the state authorities for hospital planning that the merger is deemed necessary for improving hospital care. This is intended to enable a consolidation phase for hospitals to merge without competition law review. The new regulation has been widely criticized by the FCO, the Monopolies Commission, and academics.

2. Withdrawal of Notifications

During the reporting period, three were withdrawn during the main review procedure:

- In July 2024, **Ansys/Safe Parents** withdrew their notification. The transaction concerned a conglomerate merger. Following an in-depth investigation, the authority had come to the conclusion that the acquisition of a minority stake of 35% in Safe Parents by Ansys would strengthen the parties' existing dominant position in the global markets for simulation software for crash tests with occupant protection (Ansys) and for physical and virtual crash test dummies (Safe Parent).

  The two parties' offerings are complementary, must be compatible and are jointly demanded by their customers (especially from the automotive industry). According to the FCO, the merged entity would have had the ability and incentive to hinder its competitors, particularly through tying strategies. The remedies offered by the parties were not able to dispel the competition concerns, especially as they would have required ongoing monitoring of conduct, which the FCO does not generally accept.

- The notification in the **Bertelsmann/Paramount** proceedings regarding the merger of the TV channels Super-RTL, the Bertelsmann-owned RTL Group and Nikolodeon (Paramount), was withdrawn in September 2024 after the FCO expressed serious competition concerns regarding the market for motion-picture advertising for the target group of children aged 3 to 13.

- The **Remondis/Biowerk Walldorf** project was re-notified in a modified form after withdrawal in Phase II and cleared in Phase I. The case involved a minority stake by Remondis in a planned anaerobic digestion plant for bio-waste and green waste in Walldorf.

DigitalBridgeGroup's applications to acquire the **Yondr Group** and to establish a joint venture for the marketing of network APIs for standardized access to telecommunications services by **AT&T**, **Deutsche Telekom**, **Vodafone**, **Telefónica** and **Ericsson** were already withdrawn in Phase I.

3. Clearances in Phase II

In the reporting period, the FCO cleared two mergers, even though the respective acquirers already had a very strong or dominant market position. In both cases, however, a significant impediment to effective competition could not be established with the necessary certainty for a prohibition.

- In November 2024, the acquisition of 49% of the shares in **GEST Stameseder** by **Schüco** was approved despite Schüco's dominant position in the German market for aluminum building systems and the submarkets for window, door and façade systems. The decisive factor was that there were only insignificant market share additions and minor portfolio effects.

- In the **KME/Sundwiger** proceedings, the FCO was not able to predict with the necessary degree of certainty that the concentration would allow KME to protect KME's already considerable scope of action for competitive behavior on the EEA-wide market for copper rolled products in a significant way. The gain in KME's market power was too minor to justify a prohibition.

4. Noteworthy Clearances in Phase I

In July, the FCO cleared the acquisition of intellectual property and patent rights of CureVac by **GlaxoSmithKline** in the preliminary review. The transaction involved vaccine candidates for COVID-19, as well as seasonal flu and pandemic and universal influenza. The FCO placed particular emphasis on protecting innovation competition and maintaining research diversity. The project was only notifiable due to the transaction value threshold. In addition to a purchase price of EUR 400 million, milestone and license payments of up to EUR 1.05 billion may be added.

In September, the FCO cleared the creation of a joint venture between **thyssenkrupp Marine Systems**, a subsidiary of thyssenkrupp AG, and NVL, a subsidiary of Lürssen Maritime Beteiligungen. The joint venture aims to jointly bid for the F127 frigate project of the German navy, which is to be awarded in mid-2025. FCO President Andreas Mundt emphasized that the complexity and scope of such projects often require the bundling of resources and expertise. The consortial idea behind this merger serves, among other things, to ensure that such large projects are even feasible. Given the expected investments in defense technology, it is likely that similar cooperations will increase in the future.

In September and November, the FCO approved **Thalia**'s acquisition of assets from **Weltbild** and **buecher.de**, respectively, from insolvency. Thalia is by far the largest brick-and-mortar book retailer in Germany. From Weltbild, Thalia acquired customer relationships from the online shop, the e-reader brand Tolino distributed by Weltbild, as well as Weltbild brands and domains. The clearance was significantly influenced by the fact that the already closed Weltbild stores were not acquired due to insolvency. From the pure online retailer buecher.de, Thalia acquired the existing business operations, including customer relationships and the buecher.de brands and domains. The review of both projects also considered Thalia's buyer power over publishers and wholesalers in the procurement markets. However, since the procurement-side increase through buecher.de was minor even after acquiring the Weltbild assets and sufficient demand was identified, the FCO does not expect competitive problems. In both cases, the presence of a significantly larger competitor, Amazon, in online retail also played a role. The FCO again did not take a clear position on whether brick-and-mortar and online book retail belong to the same product market.

In December, after intensive investigations in the preliminary review, the FCO cleared the accession of **Konsum Dresden** to the **Edeka group**. Konsum Dresden is a consumer cooperative with over 20,000 members and operates around 30 predominantly small-scale grocery stores in Dresden and the surrounding area.

In May this year, the FCO had for the first time considered the accession to a cooperative as a merger subject to merger control in the Konsumgenossenschaft Leipzig / Edeka proceedings (see Newsletter 1/2024). The FCO continues to view the Edeka group as an economic unit. The merger was cleared because there are sufficiently strong competitors in the region, such as the Schwarz Group (Lidl and Kaufland) and Rewe, providing adequate purchasing alternatives. On the nationwide procurement level, the FCO considered the increase at Edeka too small to raise competitive concerns but announced that it would continue to closely monitor the procurement markets.

5. Hiring of Employees Can Be Subject to Merger Control

Microsoft hired almost all **Inflection AI** employees back in March 2024. Inflection AI, which was only founded in 2022, developed the chatbot Pi. This is a case of so-called aqui-hires, which involve the hiring of highly qualified employees with special expertise. Such hirings are currently on the rise, particularly in the digital industry.

The case is similar to the constellation of the CTS Eventim/Four Artists transaction. After the FCO prohibited the acquisition of a majority stake in Four Artists by Eventim in 2017, Eventim founded a subsidiary that employed the managing director of Four Artists as well as the majority of the employees. At the time, the FCO did not see any possibility of intervening.

However, in the Microsoft/Inflection AI case, the FCO concluded that the acquisition of the employees together with accompanying agreements on the financing and use of intellectual property rights constituted a concentration within the meaning of German merger control. However, the case did not meet the national thresholds: although the value of the consideration exceeded EUR 400 million, and was thus above the transaction value threshold, Inflection as a target did not yet have sufficient domestic activity at the time of the takeover. The proceedings were therefore discontinued.

The European Commission had already previously assessed the transaction. However, the turnover thresholds of the ECMR were not met. In light of the ECJ ruling in Illumina/Grail, the Commission no longer ruled on the referral under Art. 22 of the Merger Regulation that was subsequently requested by various Member States. In the judgments C-611/22 P and C-625/22 P, the ECJ had meanwhile clarified that Art. 22 of the Merger Regulation cannot be used for referral requests from Member States with their own merger control regime.

II. Abuse of Dominance

1. Facebook Case Closed

In mid-October 2024, the FCO announced the termination of its Facebook proceedings. The case started with a decision of February 2019, in which Meta (Facebook) was prohibited from merging personal user data from various sources without the users' consent. During the subsequent legal dispute (including before the Federal Court of Justice and the ECJ), the FCO and the digital company repeatedly negotiated specific measures to implement the 2019 official decision.

The FCO has now deemed Meta's (Facebook) individual measures as sufficiently effective overall and therefore closed the case. The measures include, in particular, the introduction of an account overview to separate data between the respective Meta services.

2. New Developments on Section 19a ARC

During the reporting period, the FCO continued to advance proceedings against companies of paramount cross-market importance. At the end of September 2024, the FCO decided that the digital company Microsoft – alongside Alphabet (Google), Meta (Facebook), Amazon, and Apple – is also subject to the extended abuse control under Section 19a ARC. This decision considered not only Microsoft's strong position in operating systems and word processing programs but also in other markets (e.g., cloud services, video conferencing software, and artificial intelligence). The FCO is not currently investigating specific behaviors of Microsoft. However, such proceedings are likely to be initiated shortly.

The FCO is currently conducting a market survey in the ongoing "Amazon Price Control" case, which was initiated in 2020. In spring 2024, the Federal Court of Justice confirmed the FCO's decision that Amazon falls under Section 19a ARC (see Newsletter 1/2024). The case involves the allegation that Amazon influences third-party merchants' freedom to set their own prices on the Marketplace through the use of control mechanisms and algorithms. The FCO is now surveying around 2,000 representative merchants. The survey aims to gather information on the impact of Amazon's price checks on the behavior of third-party merchants. A current overview of all Section 19a ARC proceedings is available on the FCO's website.

3. Market Power Report on Electricity Generation 2023/24

On 25 November 2024, the FCO presented the fifth report on market power in electricity generation ("Report on Competitive Conditions in the Generation of Electrical Energy"). The report analyzes the conditions of market power in the generation and sale of electricity from May 2023 to April 2024. The FCO confirms previous findings that RWE, in particular, could hold a dominant position. The report also highlights the special market environment characterized by weak economic conditions and the resulting significantly reduced electricity demand compared to previous years. Recent price spikes during times when when supply of wind and solar electricity was extremely low and the role of the concentrated electricity generation market were also examined.

4. Deutsche Bahn

The FCO's June 2023 decision, which found Deutsche Bahn (DB) to have abused its market power vis-à-vis mobility platforms (see Newsletter 1/2023 and 1/2024), has seen further developments. In mid-August 2024, the FCO announced that Deutsche Bahn had signed initial contracts with mobility platforms for access to rail passenger traffic forecast data under the conditions set by the FCO. This shows that the FCO's actions – despite the ongoing main proceedings at the Higher Regional Court of Düsseldorf – are effective, and the dominant Deutsche Bahn is no longer undermining the business models of competing mobility platforms as it did in previous years.

III. Prohibition of Cartels

In 2024, the FCO imposed fines totaling around EUR 19.4 million. This represents more than a threefold increase compared to the previous year's figure of EUR 6 million but is far from the record sums of recent years with amounts in the hundreds of millions. President Mundt attributes this to after-effects from the Covid pandemic.

Currently, the FCO is once again highly active in cartel enforcement: In 2024, 17 leniency applications – 3 more than in the previous year – were submitted to the FCO. The officials conducted 11 dawn raids. Several large cartel proceedings are currently underway, mostly based on sources outside the leniency program. Increasingly, incriminating information is being received through whistleblower systems.

According to President Mundt, the FCO **continues to work on IT-based efficiency improvements in cartel enforcement**. Software-supported market screening is already being conducted, and more AI is expected to be used in the future, so that "no cartel can feel safe". To enhance IT capabilities, the **"Digital Services" department** was established in August 2024, aiming to bundle relevant activities within the FCO's organization, including IT forensics, i.e., the analysis of large data sets in cartel proceedings.

1. Fines Against Manufacturer of Fritz! Products

The FCO imposed fines totaling nearly EUR 16 million on AVM Computersysteme Vertriebs GmbH and one of its responsible employees for **vertical price fixing** with six electronics retailers. AVM is particularly known for distributing routers, repeaters, telephones, and smart home products under the "FRITZ!" brand.

The proceedings were initiated following an anonymous tip-off in the FCO's whistleblower system and further market information with a dawn raid and ended with a settlement.

According to the settlement, AVM coordinated not only purchase prices with its electronics retailers but also consumer prices for AVM products. The agreements related to a price increase and specific target prices between the recommended retail price (RRP) and the retailers' purchase price. AVM **monitored consumer prices** through research in brick-and-mortar stores and price comparison services on the internet, as well as specialized software solutions. Coordination measures were mainly taken when consumer prices were significantly below target prices or after complaints from retailers about insufficient margins. A corresponding price increase is said to have actually occurred "in many cases."

2. Fines for Construction Services

In November, the FCO imposed a fine of approximately EUR 2.8 million on Strabag AG for prohibited agreements in the context of tenders (**bid-rigging**) relating to the award of the contract for the renovation of the Zoobrücke bridge in Cologne. Employees of Strabag and Kemna Bau Andreae GmbH & Co KG had agreed that Kemna would submit a protective bid to enable the contract to be awarded to the bidding consortium with the participation of Strabag. Kemna received a compensation payment in return. The proceedings were triggered by an anonymous tip-off in the FCO's whistleblower system. The proceedings against Kemna were discontinued under the leniency program, as the evidence submitted made it possible to prove the offence. Strabag also cooperated, so that the proceedings ended with a settlement.

This case is part of a **series of proceedings** that vividly demonstrate that the **construction industry** remains a focus of cartel authorities (see, most recently, the fine proceedings for road construction, industrial construction, and bridge expansion joints, Newsletters 2/2022, 1/2023 and 2/2023).

3. Cooperation Agreements

During the reporting period, the FCO critically examined several cooperation agreements with varying outcomes for the companies:

The FCO raised no preliminary objections to the **joint advertising marketing** of Heinrich Bauer Verlag KG and AdAlliance GmbH, part of RTL, concerning various magazines in the "lifestyle" sector. The former is active in categories such as "food/drink" (e.g., "Lecker"), "living/furnishing" (e.g., "Wohnidee"), and "women's magazines" (e.g., "Cosmopolitan"), while the latter publishes competing titles such as "Essen & Trinken," "Schöner Wohnen," and "Brigitte." The FCO considered it problematic that the magazines partially overlap in content and target audience, necessitating significant adjustments to the cooperation agreement regarding Bauer's pricing authority and information exchange between the parties. The approval of the cooperation was ultimately based on favorable results from a market survey and the assessment that only limited competitive restrictions were to be expected. From a customer perspective, the affected titles are not close competitors, and a partial shift of advertising budgets to other media is possible. However, the FCO reserves the right to re-examine the cooperation in the event of complaints or extensions of the collaboration.

The FCO, however, **rejected a cooperation for TV marketing** between RTL and RTL2, in which RTL would have taken over

the marketing of TV advertising space from RTL2. The FCO currently saw "no room" for this collaboration. The companies had voluntarily presented their cooperation to the FCO to obtain legal certainty regarding the exemption requirements of their project. Despite modifications, the FCO maintained its negative assessment after 1.5 years of review and extensive and repeated market surveys. Such cooperation between close competitors with significant market importance would lead to higher prices for the market side without offering substantial advantages such as cost savings. This applies despite the shift towards the use of digital media. New players have not yet exerted sustainable pressure on the placement of advertising on linear television. RTL2 remains an important alternative to the leading providers RTL and ProSiebenSat.1 (see also above on the **merger project of RTL and Paramount**). In conclusion, the FCO has been meticulously and thoroughly examining cooperations in the media sector for some time and does not shy away from prohibitions.

In August, the FCO terminated administrative proceedings in the metal industry against Aurubis AG, Wieland Werke AG, and Schwermetall Halbzeugwerk GmbH & Co. KG following commitments. Aurubis and Wieland, manufacturers and competitors in the flat-rolled products market, had adjusted their cooperation in their joint venture (JV) Schwermetall. The JV produces pre-rolled strip, a preliminary product for flat rolled products. The subject of the audit were company agreements in which changes to the product mix, customer portfolio and the production of new alloys were made dependent on the approval of the JV's advisory board. The FCO saw this as a lever to impair competition between the two companies and to prevent or end the production and supply of pre-rolled strip to third-party competitors. According to the FCO's expectations, the revocation of the agreements was intended to prevent any influence on the JV and ensure its independent, profit-oriented economic activity.

4. Federal Court of Justice Decision on Fine Proceedings

In its decision of 17 September 2024, regarding the **bid-rigging case** in **power plant technology**, the Federal Court of Justice partially overturned a ruling by the Higher Regional Court of Düsseldorf in the proceedings against **providers of technical building equipment** (TGA). The Higher Regional Court had imposed fines totaling EUR 21 million on Kraftanlagen Energies & Services GmbH in two cases but acquitted it of another charge, partly due to the statute of limitations.

The Federal Court of Justice clarified that, under national procedural law, the **statute of limitations for bid-rigging** begins not at the contract signing but upon the **full execution of the contract**, which does not occur before the final invoice is issued. Since the statute of limitations is determined by national law, the Federal Court of Justice found no reason to deviate from this interpretation based on the European Court of Justice (ECJ) ruling in the *Eltel* case (C-450/19). The Federal Court of Justice did not see the need for a referral to the ECJ. The Federal Court of Justice referred the case back to a different cartel senate of the Higher Regional Court for further proceedings.

Additionally, the Federal Court of Justice overturned the acquittal based on the Higher Regional Court 's incorrect assumption that the company's acting head of department did not hold a managerial position and that his offence could therefore not be attributed to the company. The Federal Court of Justice referred this part of the case back to a different cartel senate of the Higher Regional Court.

5. Higher Regional Court of Düsseldorf on Exclusivity Agreements

In its decision of 28 August 2024, the Higher Regional Court of Düsseldorf overturned a decision by the FCO that had retroactively classified a **non-compete clause** in the **distribution agreements** of STIHL Vertriebszentrale AG & Co. KG, Dieburg, as a violation of antitrust law. STIHL had required selective distribution partners not to promote the sale of competitors' products.

Contrary to the FCO's view, the Higher Regional Court of Düsseldorf did not find sufficient evidence for a competition law violation. The FCO had not correctly applied the established criteria for determining a significant restriction of competition by **exclusive supply agreements in vertical supply relationships**. Such agreements can only significantly restrict competition if (a) there are other substantial barriers to market entry and (b) the supply contract — possibly in conjunction with other similar contracts by the same supplier and other suppliers (contract bundles) — can prevent new competitors from entering the market or increasing their market share. Factors to consider include the proportion of bound dealers relative to all sales outlets in the market, the duration of the agreement, and the respective market shares of the contracting parties.

6. Decision of the Regional Court of Munich I on Sports Marketing

In autumn, the Regional Court of Munich I received an application for an injunction regarding the **bundling of advertising and media rights** by sports associations. The International Ski and Snowboard Federation (FIS), which the German Ski Association (DSV) is a member of, passed a resolution on 26 April 2024, on the "centralization of media and broadcasting rights" for World Cup events, which changed the competition rules. The DSV unsuccessfully demanded that the FIS revoke the resolution, arguing that the rights to exploit the competitions they organized belonged to them. The Regional Court issued a preliminary injunction prohibiting the FIS from implementing the resolution concerning the individual events organized by the DSV. The court ruled that an international sports federation cannot reserve the central marketing of competitions organized by national sports associations. The court qualified the resolution as a by-object restriction of competition and an abusive of dominance.

This preliminary ruling is part of a series of decisions critically evaluating the rules and **activities of international sports federations** from an antitrust perspective (see Newsletter 1/2023 and 1/2024).

IV. Cartel Damages

1. ECJ on Collective Debt Collection in Damages Cases

In connection with a damages claim against the **round timber cartel**, the ECJ has been dealing with a referral from the Regional Court of Dortmund regarding the compatibility of a national prohibition on the **assignment of cartel damages claims to debt collection companies** for the purpose of collective enforcement with EU law. The Regional Court of Dortmund assumes that such a prohibition in Germany arises from the Legal Services Act (RDG), at least for stand-alone claims. The Regional Court was concerned that such a prohibition would prevent the effective enforcement of the EU-guaranteed right to cartel damages and therefore referred the matter to the ECJ to clarify its compatibility with EU law.

In his **opinion, Advocate General Szpunar** concluded that - under the premises set out by the Regional Court in its referral questions - the statutory prohibition on assignment contradicts the EU principle of effectiveness. These premises included, in particular, that there was no other option for the injured parties than collective debt collection and that, without this possibility, it would be practically impossible or excessively difficult to bring a claim for minor damages. For procedural reasons, the Advocate General could not deviate from these premises of the Regional Court of Dortmund. Nevertheless, the opinion reveals certain doubts as to whether there were indeed no other options for plaintiffs to bundle their claims other than through an assignment model. The Advocate General explicitly pointed out that it is the responsibility of the referring court to verify the accuracy of its premises and that subsequent instances can also conduct this review.

In January 2025, the ECJ confirmed the Advocate General's opinion in its final judgment. However, the practical value of this judgment appears limited. The dispute over the compatibility of an assignment model with EU law in a given case will now focus primarily on whether it was practically impossible for the injured parties to assert their claims otherwise, i.e., without assigning their claims to a dedicated vehicle. In the future, it may also need to be considered that the Consumer Rights Enforcement Act, which came into force in October 2023, allows consumers and small businesses to bundle claims through remedial actions, including in cartel damages cases.

2. Federal Court of Justice on the Plaintiff's Burden of Proof (Truck Cartel IV)

The question of the extent of **the plaintiff's burden of proof** for the occurrence and amount of cartel damages has been occupying the courts for years. Continuing its recent case law, the Federal Court of Justice has now further lowered the plaintiff's burden of proof in a new ruling on the truck cartel.

The Regional Court of Leipzig and the Higher Regional Court of Dresden had dismissed the claim in the lower courts for insufficient substantiation of the damage by the plaintiff. The Higher Regional Court of Dresden had conducted the necessary comprehensive assessment of all circumstances for and against the occurrence of damage. It concluded that it was practically impossible for the end customer prices not to have been influenced by the cartel's conduct. Nevertheless, it dismissed the claim due to insufficient substantiation of the amount of the damage. The plaintiff had presented the well-known Oxera meta-study as an indication of the overcharge amount but had not provided a market comparison analysis.

The Federal Court of Justice ruled that the appellate court had imposed excessive requirements on the plaintiff's burden of proof. The additional evidence required by the Higher Regional Court could ultimately only be provided through an economic expert report, which the plaintiff was not obliged to present. If the court considers a market comparison analysis suitable for determining the damage, it is obliged to commission an independent expert report upon a respective request.

The Federal Court of Justice also rejected the reasoning by which the Higher Regional Court had refused to estimate a minimum damage. The Higher Regional Court had not considered it likely that damage amounting to 15% or another percentage as a minimum damage had occurred. Given the diversity and complexity of anti-competitive agreements, the damage amount could not be scientifically proven even based on the Oxera meta-study. The Federal Court of Justice now found that the Higher Regional Court had either misunderstood its freedom to estimate damages under Section 287 (1) of the Code of Civil Procedure (ZPO) or based its assessment on a contradictory reasoning. If, as the Higher Regional Court itself had found, it was practically impossible for the truck cartel not to have had a price-increasing effect, the cartel could not be one of the few "ineffective cartels" mentioned in the Oxera study. Therefore, the Higher Regional Court was obliged to determine the damage based on Section 287 (1) ZPO. The Federal Court of Justice thus reiterated the trial court's option to estimate a minimum damage itself or to determine it by obtaining an independent expert report.

3. Federal Court of Justice on Remanding to the Regional Court (Truck Cartel V)

Under what conditions can appellate courts remand a cartel damage case to the regional court for the taking of evidence? The latest ruling by the Federal Court of Justice on the truck cartel provides some clarity on this question, which often arises in practice. The Higher Regional Court of Stuttgart had used the option to remand the case to the court of first instance. It had assumed that the damage could only be determined through a regression analysis and that a judicial econometric expert report was therefore necessary. It was not apparent that sufficient grounds for a probability judgment would be available without obtaining such a report.

The Federal Court of Justice overturned the ruling in this regard. Referring to its established case law, the Federal Court of Justice emphasized that remanding a case is only possible as a statutory exception if extensive or complex evidence is certain to be required. It is not sufficient if the taking of evidence is only necessary under certain conditions and the occurrence of these conditions is not sure. In the specific case, the Federal Court of Justice considered it necessary for the appellate court to first conduct a comprehensive assessment of all relevant circumstances, taking into account theorems of experience in favor of the plaintiff. Only based on this comprehensive assessment can it be decided whether further evidence is required and, if so, whether it will be extensive or complex.

Furthermore, the Federal Court of Justice had to address the subject matter of the dispute in cartel damages claims, particularly in **sale and lease-back scenarios**. In such scenarios, a future lessee sells an asset to a leasing company and simultaneously enters into a leasing agreement with the leasing company to retain the use of the asset. This scenario is common in the numerous claims against the truck cartel. The Federal Court of Justice has now provided clarifications for this scenario. The plaintiff had initially purchased trucks from Mercedes Benz, subsequently sold them to leasing and hire-purchase companies, and leased them back. The Federal Court of Justice ruled that the appellate court should not have considered the purchase and subsequent sale and lease-back as two separate procedural claims. The purchase, subsequent sale, and lease-back constitute a single factual situation, giving rise to a single procedural claim.

This client information contains only a non-binding overview of recent developments in German competition law and is not meant to replace legal advice. In case of comments or questions, please contact:

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