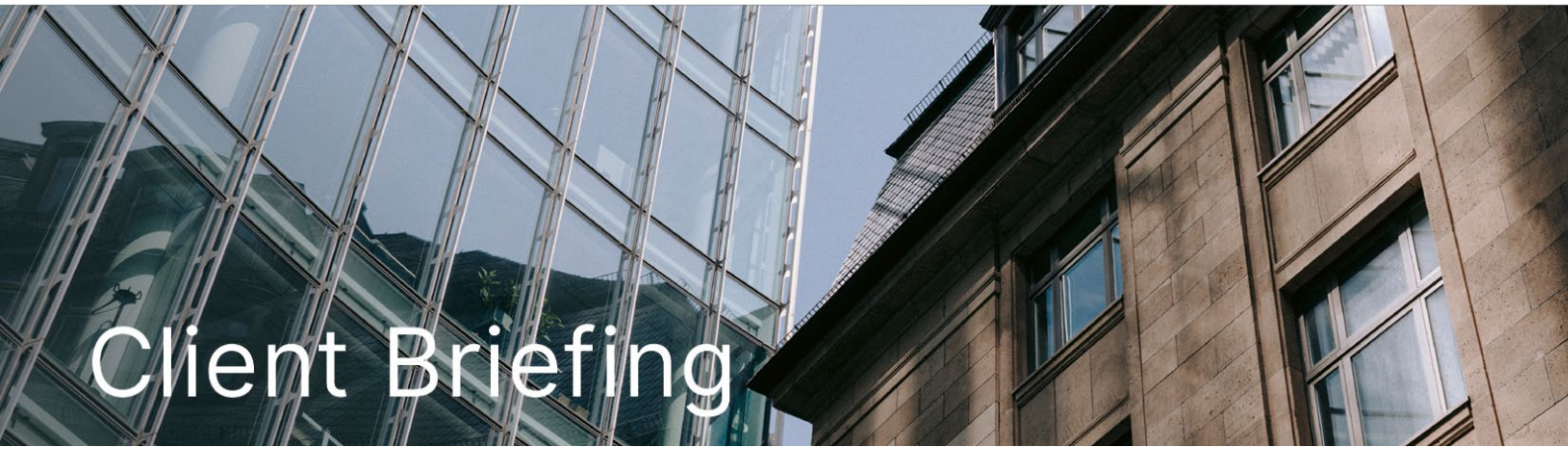

July 2024

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

The first half of the year was characterized in particular by the increased use of relatively new instruments by the Federal Cartel Office and, in keeping with the current major sporting events, produced a number of decisions on the subject of sport. Although there were no major fines, the developments in cartel damages law and sustainability agreements kept gaining momentum.

I. Merger Control

1. Pharmaceutical Transactions Caught by Transaction Value Threshold

In the first half of the year, the FCO cleared four high value pharmaceutical transactions. None of the transactions would have been notifiable under the German turnover thresholds, but were recognized solely via the transaction value threshold, as the purchase price exceeded EUR 400 million in each case:

Back in March, the FCO gave its green light to the acquisition of all shares in Germany's **MorphoSys AG** by the Swiss **Novartis AG** in Phase I. The takeover bid for the biotechnology company MorphoSys amounted to approximately EUR 2.7 billion. In terms of substance, the review focused on research and development concerning active ingredients against a certain form of leukaemia. Here, MorphoSys was on the verge of obtaining marketing authorization for a new active ingredient that is to be used in combination with one of Novartis' already marketed products. Ultimately, the authority did not have competition concerns, since a large number of potential

alternative active ingredients are currently being developed for combination or second-line therapy and generic products are expected to enter the market during the forecast period.

In April, the FCO cleared the takeover of the German company **Cardior Pharmaceuticals GmbH** by Denmark's **Novo Nordisk A/S** for a purchase price of approx. EUR 1 billion in the first phase. Cardior is a biotech company specializing in heart diseases. It does not yet have any authorized products, but has an active ingredient in the development pipeline to treat heart failure following a heart attack. As Novo Nordisk's research and development activities in the field of heart failure are aimed at other patient groups and competition from alternative active ingredients and biosimilars or generic products can be expected, the FCO did not raise any concerns.

In May, the FCO approved the acquisition of all shares in US-based **Shockwave Medical** by **Johnson & Johnson** for approx. USD 13.1 billion in Phase I. Although the acquisition of an innovative medtech company by one of the world's largest pharmaceutical and medical technology group gave by itself reason for closer scrutiny, the authority ultimately had no objections. Shockwave Medical develops technologies for the treatment of cardiovascular diseases and sells products based on these technologies. Although Johnson & Johnson's portfolio also includes cardiovascular technology, it does not comprise any products substitutable with those of Shockwave, meaning that there was no direct overlap.

The acquisition of Swedish biotech **Olink Holding** by **Thermo Fisher Scientific Inc**. for approx. EUR 2.8 billion was cleared in June following a Phase II review. Olink offers analysis systems and services in the field of proteomics, in particular human proteins and has a superior position in the field of proprietary technology for protein analyses. Thermo Fisher has a strong position in a neighboring technology market. Although the two technologies are sometimes used in a complementary manner, the authority defined distinct product markets due to different customer groups. In addition, the FCO ruled out conglomerate effects in the form of bundling due to the diverging technology, procurement processes and prices. Finally, it found that there were sufficient alternatives in the innovative growth markets, which made the joint position of the merged entity contestable.

The decisions show that the transaction value threshold has become an integral part of the German decision practice. However, due to a lack of direct overlaps, the cases under review did not pose any significant competition problems, even where the development pipeline and innovation competition was concerned.

2. Withdrawal of Notification in erfal/Hunter Douglas

In order to avoid a prohibition, **Hunter Douglas** withdrew its notification of the acquisition of **erfal GmbH & Co KG** in April after the Federal Cartel Office had investigated the case for over a year. Hunter Douglas is the leading manufacturer of systems for interior sun protection (e.g. pleated blinds, venetian blinds or roller blinds). erfal is active on the downstream market and assembles these systems individually according to end customer's specifications.

While the transaction only led to minimal horizontal overlaps, the FCO had concerns regarding the vertical effects of the merger. According to the FCO, there was a possibility and an incentive for input foreclosure. In view of Hunter Douglas' almost monopolistic market position of over 90% in the pleated blind systems market, other manufacturers would not have had sufficient alternatives to source input. At the same time, Hunter Douglas would have been able to increase its profits by diverting demand on the downstream market to erfal.

3. Market Delineation in the Retail Sector

In April, in the run-up to the approval of the acquisition of the insolvent **SportScheck GmbH** by **Cisalfa Sport S.p.A.** (including Sport Voswinkel), the FCO again dealt with questions of market definition between online and brick-and-mortar retail as well as the concept of product assortments, but left these, as in previous decisions, ultimately open.

On the one hand, this applies to the scope of the **product assortment.** Following a broad approach, this could be defined as encompassing the entire range of sports and outdoor clothing, footwear and equipment. Under a narrower market definition, on the other hand, there could be separate product markets for each of these categories. In addition, the FCO did not take the opportunity to take a general decision on the delineation between **brick-and-mortar** and **online retail** business. In

any case, as in other retail markets, the authority will take into account the competitive pressure exerted by online retail on the stationary retail of sports and outdoor products.

As a result, the FCO cleared the merger because there was a diverse and lively competitive landscape with other retailers such as Decathlon, JD Sports, Intersport or Sport 2000 both at a national level and in the affected regional brick-and-mortar retail markets.

4. Joining a Cooperative as a Concentration

During the reporting period, the FCO considered the accession of an independent retailer to the **EDEKA group** to be a merger subject to merger control for the first time. The transaction cleared in May was the accession of **Konsumgenossenschaft Leipzig eG** to EDEKA Nordbayern-Sachsen-Thüringen eG.

The authority had already previously regarded the multi-level EDEKA group, including the independent retailers, as a single economic unit, since the EDEKA head office provides the members of the eight regional EDEKA cooperatives with far-reaching business policy and strategic guidelines. Due to the special contractual structure, the FCO also assumed an acquisition of control by the EDEKA group in the case in question, although entering a cooperative is not typically considered a concentration.

II. Abuse of Dominance

1. Deutsche Bahn vs. Mobility Platforms

At the end of June 2023, the FCO ruled that various behavior and contractual provisions of **Deutsche Bahn** ("DB") towards **mobility platforms** constituted an abuse of its market dominance (see Newsletter 2/2023). DB had defended itself against this with an application for interim relief.

In its decision of 8 March 2024, the Higher Regional Court of Düsseldorf largely confirmed the FCO's case. As a consequence, almost all of the obligations imposed by the FCO on DB are still enforceable and must be implemented by DB. The Higher Regional Court of Düsseldorf will render a final decision on the legality of these obligations in the pending main proceedings. The outcome of the proceedings is particularly important for the mobility platforms but also for consumers.

2. News on Section 19a ARC

The reporting period saw developments in the manifold proceedings against the digital groups **Alphabet/Google, Apple, Meta/Facebook and Microsoft** based on Section 19a ARC, which came into force in January 2021.

In its decision of 23 April 2024, the Federal Court of Justice confirmed the FCO's finding pursuant to Section 19a ARC (see also Newsletter 2/2022) that Amazon is of paramount importance for competition across markets. There will be no further legal review of this decision , as the Federal Court of Justice acts as sole instance of appeal. The Court based its decision in particular on the fact that the Amazon Group is active on many vertically integrated and interconnected markets and holds a dominant position in particular on the German market for online marketplace services for commercial traders.

The FCO has published a helpful summary of the different Section **19a ARC proceedings** on its website.

Also worth reporting is a decision by the Federal Court of Justice, which was issued on 20 February 2024 in the course of Section 19a ARC proceedings against Alphabet/Google in connection with Google Automotive Services.

As part of these proceedings, the FCO had informed Google of its preliminary legal assessment in June 2023, according to which the FCO intended to prohibit Google from engaging in various anti-competitive practices pursuant to Section 19a ARC. The FCO also wanted to provide two of Google's competitors involved in the proceedings with a partially redacted version of this preliminary assessment, including detailed reasons, in order to give them the opportunity to comment.

Alphabet/Google took legal action before the Federal Court of Justice as the (sole) appellate court and criticized individual redactions as inadequate because the two competitors would thereby gain knowledge of **sensitive trade and business secrets**.

The Federal Court of Justice largely rejected the appeal and considered the disclosure to be proportionate. In particular, it stated that Google's interest in confidentiality

cannot prevail due to the FCO's overriding interest in clarifying the facts and the need to protect the right to be heard of the other parties to the proceedings.

The decision is likely to have an impact not only in the area of 19a ARC. In complex merger control proceedings in particular, the question of the admissibility of disclosing sensitive data to competitors involved in the proceedings arises frequently.

3. Self-Marketing at the Olympics

In the run-up to the Summer Olympics, the FCO provided information about the monitoring of the advertising rules applicable to German athletes, which has been ongoing since 2019. These are set out in a guideline published and continuously updated by the **German Olympic Sports Confederation**.

The background to the monitoring is an administrative antitrust procedure against the Geman Olympic Sports Confederation and the International Olympic Committee on suspicion of abuse of a dominant market position, at the end of which the originally substantially restricted advertising opportunities were opened up in 2019.

The FCO has now announced that this relaxation will also apply to the 2024 Olympics and that the German Olympic Sports Confederation has (even) introduced a further relaxation for the use of social media.

III. Prohibition of Cartels

1. Football

Football not only dominated the news during the Euro 2024. The FCO and the courts have also been looking at Germany's favorite sport from several angles.

At the end of February 2024, the FCO approved the central marketing model of the German Football League (DFL) for the allocation of media rights for the First and Second Bundesliga as of 2025. The most significant change is that the "**no single buyer rule**" will no longer apply for the upcoming award period. This means that a single provider will once again be able to acquire all live broadcasting rights for the 2025/26 to 2028/29 seasons exclusively.

The "no single buyer rule" was introduced in the 2017/18 season to strengthen competition for innovation, particularly in the case of internet-based offerings. The FCO sees the increasing activities of companies such as DAZN, RTL and Amazon towards more movement on the market for live football broadcasts as a success of its approach. However, it has also been subject to a wide range of criticism, including higher overall prices for consumers who want to watch all matches and have to subscribe to several channels in order to do so. In addition, the FCO continues to attach great importance to ensuring that free-to-air (highlight) coverage remains available in real time so that consumers have the opportunity to follow the league without having to pay for it.

The handling of the **50+1 rule in German professional football** remains open and highly controversial in terms of sports policy. In May 2024, the FCO announced that it would not take a decision in accordance with section 32c ARC ("no reason to take action"). In doing so, the FCO denied the DFL's application by refusing to rubber-stamp the rule as unobjectionable. The 50+1 rule has been included in the DFL's statutes since 1999 in conjunction with the option of spinning off the professional football team into a corporation. Most clubs have made use of this option, but must still hold at least 50% plus one vote. Essentially, this is intended to limit the influence of (foreign) investors and preserve the club character of the sport.

The restriction of league participation to clubs with a club character is being examined as a restriction of competition, but this may be permissible if the restrictive effects on competition are necessary and proportionate. Significant concerns exist with regard to the so-called promotion exception, according to which an exception to the 50+1 rule can be granted if an investor has continuously and significantly promoted the parent club's football sport for more than 20 years. The FCO sees this as a threat to the uniform application and enforcement of the 50+1 rule and has once again taken this as an opportunity to emphasize that antitrust law also applies to professional sport. All sides now have the opportunity to comment.

In March 2024, the Higher Regional Court of Düsseldorf confirmed a decision by the Regional Court of Dortmund of May 2023, which prohibited FIFA and the DFB from applying their own **player agent regulations**. The global regulations, which were adopted in 2022 also include upper limits for the remuneration of players' agents. Three players' agents had filed a lawsuit against the

regulations. Following the interim injunction by the Regional Court of Dortmund, the rules remain in force until the conclusion of the main proceedings at first instance and are not applicable in Germany for the time being when implemented by the DFB. The rules were deemed to constitute disproportionate price-fixing and an overstepping of authority *vis-à-vis* non-association-affiliated third parties. Following the decision of the Regional Court of Dortmund, FIFA temporarily suspended the application of the rules in September 2023. Further proceedings on the validity of the rules are currently pending before the ECJ after the Regional Court of Mainz initiated a referral procedure.

2. Fine Proceedings

The only fining decision of the year to date was issued in March 2024 against Pfanner Schutzbekleidung GmbH with a fine of EUR 783.900. The company is alleged to have practized **vertical price fixing** from 2016 until the end of 2021. Pfanner sells functional and protective clothing such as pants, jackets, shirts and protective footwear as well as helmets (Protos Integral) via specialist retailers. An agreement was reached with these retailers to adjust the resale prices as close to the manufacturer's RRP as possible. Instead of offering monetary discounts, the dealers were to offer small give-aways such as T-shirts and safety goggles in order to keep the price level stable.

The decision is the latest in a number of resale price maintenance investigations in recent years, some of which ended in high fines. The Pfanner case is characterized by classic patterns repeatedly unearthed by the FCO in these proceedings. For example, the manufacturer carried out systematic monitoring, including test purchases. Retailers complained to the manufacturer if they themselves detected conspicuous deviations from the RRP. Repeated violations of the RRP requirements could lead to sanctions such as delivery bans or delays. The proceedings were triggered by an application for cooperation from a retailer, although the dealers were ultimately not prosecuted by the FCO.

In these proceedings, the FCO for the first time used the **extended investigative powers of Section 82b ARC** introduced with the 10th Amendment to the ARC in 2021. These powers enable the FCO to order companies to submit information and evidence could otherwise only have been obtained by dawn raids. The addressees are obliged to answer questions about facts truthfully (up to the limit of a confession) and to provide the requested documents. In the Pfanner case, the procedural efficiencies caused by the speedy replies to several requests for information led to a reduction of the fine. However, a constitutional review of these new and extremely far-reaching powers of the FCO cannot be ruled out in further proceedings.

3. Competitor Cooperations

The goal to promote sustainability also in the context of antitrust rules is not just taken into account at the legislative level (e.g. the Horizontal Guidelines and the forthcoming 12th Amendment to the ARC) but also influences the FCO's decision practice.

Under the umbrella of **Euro Plant Tray eG**, well-known European players in the areas of plant production and trade (including Bauhaus, COOP, Dehner Gartencenter, Globus, Hagebau, Hornbach, Landgard, OBI, Royal Flora Holland) have come together to switch from disposable plant trays to a reusable system for B2B plant transport. SZA provided competition law advice to this **sustainability initiative** from the outset and also defended the project *vis-à-vis* the FCO.

With its "approval" at the beginning of May 2024, the FCO confirmed that the cooperation is unobjectionable under antitrust law. President Mundt expressly stated: *"The Euro Plant Tray project does not only pursue a very worthwhile goal – reducing plastic waste in the plant trade sector – but, in its current form, it is also consistent with competition requirements.."* In addition to merger control aspects when the initiative was founded, the project primarily raised questions regarding the inclusion of sustainability aspects in the antitrust assessment of cooperation between competitors and the design of the necessary exchange of information in accordance with antitrust law. The voluntary nature of participation, which is open to all market participants at the various stages of the value chain, was also a decisive factor in terms of antitrust compliance.

4. Negotiating Group for the Licensing of Standard-Essential Patents

The planned cooperation "Automotive Licensing Negotiation Group" of the companies BMW, Mercedes-Benz, ThyssenKrupp and VW intends to jointly negotiate conditions for the acquisition of licenses to standard

essential patents (SEP). The negotiation group is open to other companies and is the first of its kind in which the FCO examines the licensee side with regard to license package bundles. One of the conditions for the FCO's approval is that the activities are not limited to automotive-specific standards, that the negotiations remain voluntary and that the exchange of information is limited to the essential minimum.

IV. Cartel Damages

1. Implementation of the Heureka Judgement at National Level

The enforcement of claims for cartel damages often fails due to the defence of limitation. Under German law, a three-year limitation period for tort claims begins at the end of the year in which the claim arises and the plaintiff becomes aware of the facts giving rise to the claim. In the case of long-lasting offences, this can lead to claims being fully or partially time-barred before the infringement has even ended. The legislator therefore endeavoured to give the affected plaintiffs more time to assert their claims. In implementing the EU Antitrust Damages Directive, an additional criterion was therefore introduced that the limitation period cannot start before the infringement has ended. However, according to the clear wording of the law, this additional requirement only applies to claims that were not already time-barred at the end of the transposition period of the Directive (December 2016).

Surprisingly for many observers, the ECJ has now declared the termination requirement applicable in the **Heureka/Google case** (case no. C-605/21), even though the relevant claims were time-barred under Czech law before the transposition deadline had expired because of the plaintiff's awareness of the underlying facts. The ECJ justified this by stating that it would otherwise have been practically impossible - or excessively difficult - to enforce the claims. Effective enforcement of EU competition law would therefore not have been guaranteed. At the same time, the ECJ clarifies that "awareness" does not require the Commission decision to be final. Commission decisions therefore benefit from a presumption of legal validity and have legal effects as long as they have not been declared void or withdrawn.

The Heureka judgement has a direct impact on numerous pending proceedings before the courts of the Member States. In particular, pending proceedings in Germany will be significantly influenced by the decision. In an ongoing case before the Regional Court of Dortmund, the court reacted to the ECJ's decision by issuing a guidance order. The decision was based on an action against members of the pesticide cartel. In this case the Regional Court of Dortmund had to deal with the question whether the claims were time-barred under the statutory **10-year limitation irrespective of the claimant's knowledge**. The court intends to apply the additional Heureka-criterion that the infringement must have ended before the limitation period can start also in this scenario. It draws the conclusion from the Heureka judgement that national law must ensure that the statute of limitations cannot expire without the injured party even having the opportunity to take legal action. In the court's view, this would be the case if the statute of limitations can occur regardless of knowledge, even though the infringement is still ongoing.

In addition, the Higher Regional Court of Vienna recently dismissed an action against members of the sanitary fittings cartel (some of whom are based in Germany) as time-barred with reference to the Heureka judgement. In the opinion of the Higher Regional Court of Vienna, the limitation period did not begin with the final judgement on the legality of the Commission's decision, but - as clarified by the ECJ - with the publication of the summary of the decision.

2. Higher Regional Court of Munich on the Bundling of Claims

The issue of bundling cartel damages claims also keeps the courts busy. In June, the Higher Regional Court of Munich overturned the judgement of the Regional Court of Munich in the **Financialright Claims** case from 2020 regarding the truck cartel. The Regional Court of Munich thus has to reconsider the case. The Regional Court had dismissed the claim, in particular due to the lack of legal standing of the claims vehicle.

In contrast, the Higher Regional Court of Munich now found that the assignment of the claims by the more than 70,000 buyers to Financialright Claims did not violate the provisions of the German Legal Services Act (RDG) and that the plaintiff was therefore authorized to act. The plaintiff's business model of having mass cartel damages claims assigned to it and then asserting them collectively in court was covered by the debt collection authorisation under the RDG.

However, as another judgement by the Higher Regional Court of Munich shows, particular attention must be paid to the specific structure of a bundled assertion of cartel damages. Equally relating to claims based on the trucks cartel, the Higher Regional Court of Munich ruled that in this decision there was no legal standing. The plaintiff in this case was a 'protective association' in the legal form of a registered association, which also had claims from truck buyers assigned to it for assertion in court. However, in the opinion of the Higher Regional Court of Munich, this association lacked the necessary authorisation under the RDG. In the opinion of the Higher Regional Court of Munich, none of the requirements for a respective licence were met.

The question of the admissibility of assignment models for the bundled assertion of antitrust damages claims will therefore continue to bear uncertainties for the foreseeable future, especially as the courts of first instance sometimes hold different legal opinions even in similar situations. Clarifying words from the Federal Court of Justice are therefore eagerly awaited by all sides.

3. No Claims from the Coffee Roaster Cartel

In the appeal proceedings against the judgement of the Regional Court of Dortmund on the coffee roaster cartel, the plaintiff felt compelled to withdraw the appeal after the taking of evidence before the Higher Regional Court of Düsseldorf. The Regional Court of Dortmund had originally dismissed the claim because the plaintiff, a retail company, had been involved in the agreements and was therefore part of a **hub-and-spoke cartel** between the coffee manufacturers and retailers. It was therefore unable to establish any damage. This judgement has become final following the withdrawal of the appeal. At the hearing before the Higher Regional Court of Düsseldorf, it had become apparent that the Senate would confirm the legal opinion of the lower court. The witness hearings had thus revealed that employees of the plaintiff were aware of the price fixing agreements of the coffee manufacturers and that the plaintiff also benefited from this.

A similar result can also be expected in parallel proceedings before the Regional Court of Stuttgart. The taking of evidence in that case also showed the interplay between retailers and manufacturers. Both cases confirm the requirement, repeatedly postulated by the Federal Court of Justice, of a detailed consideration of all the indications in favor of, and against the occurrence of, a damage in the individual case. Not only in the coffee roaster cartel, but also in the judgement of the Higher Regional Court of Düsseldorf in the wallpaper cartel case, this case-by-case assessment resulted in the empirical principle according to which cartel agreements typically result in damage ultimately being outweighed despite its indicative effect.

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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