

Newsletter, 26 July 2024

## Living in times of transformation – key focus areas of the German Federal Cartel Office

The recent publication of the FCO's Annual Report 2023/2024 provides insight into the FCO's current areas of focus and an outlook for the future

On 26 June 2024, the German Federal Cartel Office (“FCO”) published its Annual Report for 2023/2024.<sup>1</sup> 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), we live in times of overall transformation. It's therefore the goal of the Ministry and the FCO to ignite new economic dynamics by strengthening competitiveness and sustainability for the benefit of consumers. Besides facts and figures,<sup>2</sup> the Annual Report contains information about the focus areas of the FCO's current agenda, such as the new competition tool following a sector inquiry, the digital economy and the control of the behavior of large digital companies, artificial intelligence, sustainability, and consumer protection.

### *Sector inquiries and remedy options: new competition tools under Section 32f ARC<sup>3</sup>*

Sector inquiries allow the FCO to obtain an overview of economic sectors where there are indications of restrictions or distortions of competition. Even though this instrument has existed since 2005, the German legislator only recently – with the 11th Amendment of the ARC<sup>4</sup> in 2023 – armed the FCO with extended powers to order behavioural and structural remedies to put an end to any “significant and continuing malfunctioning of competition” identified in a sector inquiry.<sup>5</sup> These new remedies do not require an actual violation of competition law or any individual wrongdoing of a company, but can be ordered where a significant and persistent disruption of competition has been found during the sector inquiry.

Whereas *Minister Habeck* considers the new competition tool with its additional remedies following a sector inquiry to form the 4th “pillar” within the German competition policy for closing existing gaps,<sup>6</sup> FCO's President *Mundt* seems to be more reserved, as indicated in a recent panel discussion: “Due to its complexity, Section 32f ARC appears to be difficult to apply and can therefore primarily be seen as a ‘lobbying success’. But one thing is for sure: uncertainties will be clarified in court!”<sup>7</sup>

### *Digital economy*

The digital economy has been one of the focus areas on the FCO's agenda for many years, and the FCO is considered one of the world's leading authorities in going after the large tech companies. Since 2021, Section 19a ARC enables the FCO to take action – at an early stage and in a more effective way – against any abusive behaviour of large digital platforms found to be of “paramount significance for competition across (digital) markets”. Whereas the FCO's earlier findings of the paramount significance of Alphabet/Google and Meta/Facebook were not challenged,<sup>8</sup> the decision of the German Federal Court of Justice of April 2024<sup>9</sup> fully confirming Amazon's paramount significance was celebrated by the FCO as a major boost for all ongoing proceedings.

This first decision of the Court of Justice in the context of Section 19a ARC indicates that the criteria for establishing the paramount significance of a company are clear enough and court-proof. Nevertheless, since the digital markets are in constant transformation, it is possible that in due course the German legislator will take into consideration the German Monopolies Commission's recent

<sup>1</sup> FCO, [Annual Report 23/24](#) of 26 June 2024.

<sup>2</sup> See [COMMEO Newsletter of 29 January 2024](#) regarding the relevant facts and figures of 2023.

<sup>3</sup> German Act against Restraints of Competition (“ARC”).

<sup>4</sup> See [COMMEO Newsletter of 7 November 2023](#).

<sup>5</sup> See Section 32f (3) and (4) ARC.

<sup>6</sup> FCO, Annual Report 2023/2024, p. 4.

<sup>7</sup> President *Mundt*'s statement during the 19<sup>th</sup> Annual Ascola Conference, University of Würzburg, in July 2024.

<sup>8</sup> See FCO, [Press Release of 5 January 2022](#) and [Press Release of 4 May 2022](#).

<sup>9</sup> FCJ, Decision of 23 April 2024 - KVB 56/22, *Amazon*.

suggestion to modify the criteria for defining paramount significance under Section 19a (1) sentence 2 ARC to better address possible risks within the constantly evolving digital ecosystems.<sup>10</sup>

In another recent Section 19a ARC case, Google agreed to provide its users with sufficient choice to consent or reject the company's cross-service data processing.<sup>11</sup> This will give Google users more control over their personal data while preventing Google from gaining a serious competitive advantage over its competitors who do not have access to a comparable data volume. During these proceedings, the FCO closely cooperated with the EU Commission<sup>12</sup> since some of the services provided by Alphabet/Google now also fall within the scope of the Digital Markets Act ("DMA"). The DMA became applicable on 2 May 2023 and, among other things, imposes certain obligations on designated gatekeepers regarding their users' consent to cross-service data processing.

Furthermore, in 2023, the German legislator created the legal basis for "enforcement" of the DMA at national level. The FCO is now entitled to carry out its own investigations into possible violations of Art. 5-7 of the DMA by digital companies designated as gatekeepers<sup>13</sup> but is still required to report back to the EU Commission on the outcome of such investigations.<sup>14</sup>

Even though the DMA's provisions – applicable only to companies designated as gatekeepers – are complementary to German and European antitrust law concerning the abusive behaviour of large digital companies, the FCO's President stresses the difficulty to distinguish the application of Section 19a ARC from the scope of the DMA. In addition, President *Mundt* finds it "unfortunate" that the national competition authorities were not entrusted with more powers to enforce the DMA but are more or less only called to send staff to Brussels to assist the EU Commission in its role as sole enforcer of the DMA.<sup>15</sup>

### Artificial Intelligence

Many national competition authorities, such as the CMA in the UK and the French Autorité de la Concurrence, have dealt intensively with the

topic of artificial intelligence ("AI") in the context of enforcing antitrust law. Last year, the FCO missed the chance to dive deeper into the world of AI, since Microsoft's investment in OpenAI, the company behind ChatGPT, and the cooperation between the two companies did not trigger a filing obligation under the German merger control regime.<sup>16</sup> Nevertheless, in the FCO's current Annual Report, AI is mentioned as a key technology that needs to be closely monitored, as it entails not only the chance for competitive impulses but also the risk of cementing dominant market positions and can therefore constitute a threat to competition.<sup>17</sup> During the presentation of the FCO's Annual Report 2023/2024, President *Mundt* even called for a joint European cloud solution and pointed out the paradox of conducting proceedings against Big Tech companies while using their cloud services to store the relevant case files. AI is likely to accelerate the development set in motion by the Big Techs, alongside the risk of gatekeepers closing the doors to their digital worlds.

It remains to be seen whether the FCO will keep up pace with the more "active" national competition authorities and tackle not only the imminent economic but also the possible socio-political risks which President *Mundt* does not fail to recognize. The FCO could follow the example of the CMA and hire more staff with AI expertise,<sup>18</sup> or it could draw inspiration from the Autorité de la Concurrence, which made recommendations to the EU Commission to pay particular attention to the development of services that grant access to generative AI models in the cloud (MaaS) and assess the possibility of designating companies providing such services as gatekeepers specifically for those services under the DMA.<sup>19</sup>

At EU level, the Artificial Intelligence Act<sup>20</sup> ("AI Act") will apply as of 2 August 2024 with a staged introduction of different prohibitions over the next three years. The AI Act aims to standardize and secure the use of AI systems in the EU introducing a comprehensive cross-sector framework for the development, deployment, and distribution of AI systems.

<sup>10</sup> Monopolies Commission, [Biennial Report XXV of 1 July 2024](#), p. 231 et seq.

<sup>11</sup> FCO, Annual Report 2023/2024, p. 38; see also FCO, [Press Release of 5 October 2023](#).

<sup>12</sup> FCO, Annual Report 2023/2024, p. 38.

<sup>13</sup> As of July 2024, the following digital companies have been designated as gatekeepers: Alphabet, Amazon, Apple, Booking, ByteDance (TikTok), Meta, Microsoft. See [COMMEO Newsletter of 30 November 2023](#) for more details about the obligations under the DMA.

<sup>14</sup> Section 32g ARC.

<sup>15</sup> *Mundt's* statement at the 19<sup>th</sup> Annual Ascola Conference at the University of Würzburg in early July 2024.

<sup>16</sup> FCO, Annual Report 2023/2024, p. 42.

<sup>17</sup> *Ibid.*

<sup>18</sup> See CMA, ["AI strategic update" of 29 April 2024](#).

<sup>19</sup> See Autorité de la Concurrence, ["Generative artificial intelligence" of 28 June 2024](#).

<sup>20</sup> [EU Regulation 2024/1689](#) of 13 June 2024.

## Sustainability

The legal framework for assessing sustainability initiatives has rapidly evolved in the EU during the past years: The EU Commission's new Horizontal Guidelines, published in 2023, for the first time include a chapter on sustainability initiatives.<sup>21</sup> In addition, Article 210a CMO entered into force in December 2021, followed by guidelines published by the EU Commission in 2023 providing for an antitrust exemption for sustainability agreements between producers of agricultural products.<sup>22</sup> Although the EU Commission has not yet reviewed any sustainability cases since the publication of the Horizontal Guidelines,<sup>23</sup> the FCO has received multiple inquiries concerning sustainability cooperations.<sup>24</sup> Recently, the FCO gave green light to a reuse system to reduce plastic waste in the plant trade sector.<sup>25</sup>

It is expected that the 12<sup>th</sup> amendment to the ARC, which is currently underway and a first draft is expected shortly, will transpose the provision of Article 210a CMO into national law. Furthermore, the amendment would be a chance for the German legislator to address the relevance of "out-of-market efficiencies" of cooperations that do not pay off directly for consumers but serve general sustainability goals. "We were disappointed by the EU Commission's Horizontal Guidelines on this point," *Dr. Käseberg*, head of the responsible division at the German Ministry for Economic Affairs and Climate Action, said recently.<sup>26</sup> At the same time, however, the Scientific Advisory Board of the Ministry published an expert opinion on "Antitrust law and sustainability", rejecting considerations to give the antitrust authorities and courts further opportunities to consider sustainability aspects in their decision practice. In the Advisory Board's view, weighing up sustainability goals and consumer welfare is a genuinely political task that should not be assigned to antitrust authorities. Otherwise, there would be a risk of politicizing antitrust law and blurring the boundaries between antitrust law and regulatory law.<sup>27</sup> It will be interesting to see if and to which extent sustainability considerations will ultimately find their way into the 12<sup>th</sup> amendment of the ARC.

<sup>21</sup> EU Commission, [Guidelines on the application of Art. 101 TFEU to horizontal co-operation agreements](#), 2023/C 259/01, p. 110 et seq.

<sup>22</sup> See Art. 210a CMO [Guidelines](#).

<sup>23</sup> Statement of DG Comp Director-General Olivier Guersent during an ICN workshop on 2 July 2024.

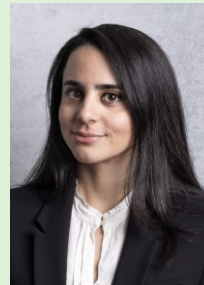
<sup>24</sup> E.g. Animal Welfare, Fairtrade and "Grüner Knopf", see FCO, Annual Report 2023/2024, p. 56.

<sup>25</sup> See FCO, [Press Release of 8 May 2024](#).

## Consumer Protection

Since mid-2017, the FCO has been entrusted with limited competence in consumer protection to address possible shortcomings in the enforcement of consumer rights, particularly in the digital economy. Since then, the FCO has conducted six sector inquiries under consumer law: In May 2023, the FCO published the final report on the sector inquiry into messenger and video services, which deals with the technical and legal framework conditions for these services. One particular focus was on data protection and data security issues. In June 2024, the FCO uncovered during another sector inquiry problems regarding scoring in the online retail sector where credit checks of online shoppers are standard practice. The FCO identified shortcomings particularly in terms of transparency and the provision of information on the personal data used.<sup>28</sup>

The FCO has not yet been granted any intervention powers for consumer protection, e.g. a cease-and-desist order.<sup>29</sup> In context of the current 12<sup>th</sup> amendment to the ARC extended intervention powers, particularly in the case of systematic violations of the law by companies with market power and which affect a large number of consumers, are discussed.<sup>30</sup>



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<sup>26</sup> Statement of *Dr. Thorsten Käseberg* at a conference of FIW research institute, as reported by [LebensmittelZeitung on 4 July 2024 \(€\)](#).

<sup>27</sup> Expert opinion "[Antitrust law and sustainability](#)", published on 4 July 2024.

<sup>28</sup> FCO, Annual Report 2023/2024, p. 65.

<sup>29</sup> FCO, Annual Report 2023/2024, p. 64.

<sup>30</sup> See Fn. 26.