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**Competition law**

**Disclosure of Google's trade and business secrets to competitors**

**BGH: The Federal Cartel Office v Google (GAS) antitrust administrative proceedings**

On 20.02.2024 (KVB 69/23), the Cartel Senate of the Federal Court of Justice (BGH) rendered - as far as can be seen - its first decision on the scope of protection of trade and business secrets in proceedings under Section 19a ARC in an appeal case brought by Alphabet Inc. and Google Germany GmbH against the Federal Cartel Office (FCO).

Background to the decision: Proceedings of the FCO pursuant to Section 19a ARC against Google (GAS)

Section 19a ARC came into force in January 2021 as part of the 10th amendment to the ARC. The FCO has thus been given a new instrument for the supervision of large digital groups. According to this, the authority can prohibit undertakings that have an outstanding cross-market significance for competition from certain practices that threaten competition. In the first step, the FCO examines whether an undertaking has an overriding cross-market significance for competition. This market position has so far been established for Alphabet Inc./Google, among others.

In the second step, the authority can then prohibit anti-competitive practices. The case on which the BGH's decision is based concerns the FCO's examination of possible restrictions of competition through practices in the licensing of services for infotainment systems and through the terms of use of the Google Maps platform. In June 2023, the German FCO sent a preliminary legal assessment to Alphabet Inc, Mountain View, USA, and Google Germany GmbH, Hamburg, regarding certain practices of Google in connection with Google Automotive Services (GAS). The FCO intends to prohibit Google from engaging in various anti-competitive practices under the new provisions of Section 19a ARC.

GAS is a product bundle that Google offers vehicle manufacturers for licensing. It includes the Google Maps map service, a version of the Google Play app store and the Google Assistant voice assistant. In principle, Google only offers vehicle manufacturers the services as a bundle and, in the opinion of the FCO, makes further specifications for the presentation of these services in the infotainment system of the respective vehicle manufacturer so that they are used preferentially. According to the FCO's preliminary assessment, Google's behavior meets the requirements of several elements of Section 19a (2) ARC, on the basis of which undertakings with cross-market significance can be obliged to end the respective practices in accordance with Section 19a (1) ARC if they are not objectively justified.

**Proceedings to date:**

The FCO intends to disclose its preliminary assessment of Google's practices to two of Google's competitors involved in the proceedings in a partially redacted version so that they can comment on the competition concerns. Google objects to the redactions as inadequate because they would give competitors knowledge of Google's business and trade secrets, which do not have to be disclosed to third parties in antitrust proceedings pursuant to Section 56 (4) ARC.

Google has therefore lodged a complaint with the FCO against the disclosure of certain specified test passages. After failing to remedy the complaint, the FCO submitted it to the BGH for a decision pursuant to Section 73 (5) ARC. The FCO and Google reached an agreement with regard to some text passages prior to the oral hearing before the BGH and with regard to other, but not all, text passages in dispute during the oral hearing.

**Jurisdiction of the BGH:**

The jurisdiction of the BGH is based on Section 73 (5) ARC. This is a special provision for the area of proceedings of the FCO pursuant to Section 19a ARC. According to this provision, the BGH has jurisdiction for all disputes at first and final instance. The BGH is also responsible for all independent procedural acts in connection with proceedings pursuant to Section 19a ARC, in this case therefore also for the disclosure of alleged trade and business secrets to competitors, which serves to concentrate jurisdiction.

The jurisdiction of the BGH, which was not previously provided for in this form, was justified in the legislative process of the 10th amendment to the ARC with the particular urgency of proceedings in the digitalization sector. In addition to the creation of additional powers of intervention for the FCO pursuant to Section 19a ARC and the extended possibility of ordering interim

measures pursuant to Section 32a ARC, a shortening of the legal process and thus an expected reduction in the overall duration of proceedings was also considered necessary.

The provision has not remained without criticism: With regard to the suitability of the new provision for achieving the objective, it is pointed out in particular that the BGH, which typically acts as a court deciding only on legal issues, is not ideally equipped for the fact-finding that must be carried out in appeal proceedings on the basis of the principle of official investigation. It is therefore questionable whether a significant shortening of the proceedings can be achieved at all. According to empirical findings, the average duration of abuse proceedings outside of Section 19a ARC is currently 2.4 years between the decision of the antitrust authorities and the decision of the BGH. For this reason, the legislator apparently saw the need to shorten the legal process, namely to exclude the appeal proceedings by the Düsseldorf Higher Regional Court, which normally precede the BGH proceedings. In view of the two-tier nature of Section 19a ARC with an order to determine the status of the norm addressee and a further order to prohibit certain conduct, there is particular potential for a "ping-pong of appeals". In this respect, the Facebook proceedings before the Higher Regional Court of Düsseldorf and the BGH, which took place at the same time as the legislative process, may have been an example in the eyes of the legislator for proceedings taking unduly long.

It is expected that the Cartel Senate of the BGH, which has limited resources in matters of fact, will have to take particular care in clarifying the facts of the case precisely because of its elevated procedural position and will have to obtain the necessary factual knowledge in this regard through follow-up investigations by the cartel authority and statements by the Monopolies Commission, which are permissible under Section 75 (5) ARC. It will also have to give the parties involved the opportunity to comment on these findings. It remains to be seen - according to the critical voices - to what extent the time required in this regard will actually be less than that of the parties involved at the Düsseldorf Higher Regional Court.

**Decision of the BGH:**

The BGH had to decide on the protection of Alphabet Inc./Google's designated trade and business secrets. It is recognized that the legislator in the relevant provision of Sec. 56 (4) ARC did not use the narrow concept of trade secrets according to Sec. 2 No. 1 of the Trade Secrets Act, but wanted the traditional broad concept of trade and business secrets to be applied. According to this, business or trade secrets are all facts, circumstances and processes relating to a company that are not in the public domain but are only accessible to a limited circle of persons and which the legal entity has a legitimate interest in not disclosing. The mere designation of a trade secret by the company is

not sufficient for this purpose. Trade secrets that are considered to merit protection as such are technical knowledge in the broadest sense (production processes, operational know-how, etc.), while business secrets are commercial knowledge such as calculations, conditions, sales, profit margins, market strategies, etc. Business or trade secrets that do not merit protection are facts that have not yet leaked to the outside world, but whose disclosure would not cause any legally significant disadvantage to the undertakings concerned.

The BGH granted appeal in one point to Alphabet Inc./Google with respect to a single verbatim reproduction stemming from Google's internal documents but rejected the remainder of the appeal. Besides to the evaluation of Google's strategy, the rejection relates in particular to the verbatim reproduction of individual clauses from Google's contracts with vehicle manufacturers.

According to the BGH, the disclosure of business and trade secrets to competitors involved in the proceedings for investigative purposes and to safeguard their procedural rights is possible if the principle of proportionality is observed. Disclosure to competitors must be suitable, necessary and appropriate to clarify the facts. It is appropriate if, in the balancing of interests to be carried out, the FCO's interest in clarifying the facts outweighs the interest in safeguarding the trade and business secrets protected by fundamental rights. The first step is to determine the weight of the specific disadvantages threatened by disclosure and the interest in clarifying the facts. Furthermore, the interest of the FCO and the competitors involved in the proceedings in preserving the right to be heard must be taken into account.

In the opinion of the BGH, the text passages still in dispute, with the one exception mentioned, are either not even trade or business secrets of Google or the FCO's interest in clarifying the facts outweighed Google's interest in maintaining secrecy.

**Conclusion:**

With its decision, the BGH has promoted the interests of the FCO in the expedite continuation of the proceedings. As far as can be seen from the available sources, the BGH has appropriately weighed up the interests of both parties and made an appropriate decision. It can be assumed that, contrary to the fears of various voices that the BGH could not meet the legislative objective of shortening the duration of proceedings due to a supposed lack of resources to clarify the facts, a large number of proceedings will take place in the range in which the present proceedings took place. It will not always be necessary to fully clarify the facts of the case. The present case in particular, with its document-based clarification of the facts, shows that the legislator's intention to avoid the ping-pong of appeal was correct and can be achieved in a large number of cases through the new regulation.