Cartels

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Germany

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Overview of the law and enforcement regime relating to cartels

Germany has a long tradition of rigorously and effectively enforcing the prohibition of cartels. In 2017, the German Federal Cartel Office (FCO) uncovered and investigated a large number of different competition law infringements in many different industries. The total fines imposed in 2017 have been relatively low compared to previous years. This, however, does by no means indicate that public enforcement is declining in Germany. Quite the contrary: the FCO repeatedly announced that cartel enforcement will continue to be a top priority on its enforcement agenda.

The competition act in Germany is the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition (ARC)), in its current version of 5 June 2017. The prohibition of cartels is contained in section 1 *et seq.* ARC, which prohibits all agreements, concerted practices or decisions by associations of undertakings which have as their object or effect a restriction of competition. Since 2005, section 1 *et seq.* ARC has been largely aligned with article 101 TFEU. Cartels are not criminalised under German law. Rather, cartels generally qualify as an administrative offence, with one important exception: bid rigging constitutes a criminal offence under section 298 of the German Criminal Code and can be sanctioned with up to five years in prison.

The FCO has published the following guidelines in respect of important aspects of public cartel enforcement, which are available on the FCO's website (www.FCO.de) and are also available in the English language:

- Leniency Program (*Bonusregelung*) – Notice No. 9/2006 which entered into force on 15 March 2006.
- Fining guidelines (*Bußgeldleitlinien*) which entered into force on 25 June 2013.
- *De minimis* guidelines (*Bagatellbekanntmachung*), Notice No. 18/2006 which entered into force on 13 March 2007. It should be noted insofar that the FCO's *de minimis* guidelines do not apply to hardcore restrictions; however, other than the EU Commission, the FCO has not (yet) amended its *de minimis* guidelines following the ECJ's Expedia judgment of 13 December 2012 in order to explicitly clarify that "by object" restrictions are not caught by the FCO's *de minimis* guidelines.

The prohibitions laid down in the ARC are mainly enforced by the FCO, an independent higher federal authority assigned to the Federal Ministry of Economics and Energy. The FCO is organised into 12 operative units, the so-called "decision divisions". Nine of these decision divisions are responsible for the application of general antitrust rules and merger control provisions in specific industries and sectors. Three decision divisions deal exclusively with the cross-sector prosecution of cartels and hardcore restrictions. The decision divisions

are independent bodies that take their decisions without any instructions from above. The three cartel enforcement decision divisions are supported by a special unit for combatting cartels, the main purpose of which is to assist during the investigative phase, in particular in preparing and executing dawn raids.

The FCO may impose monetary fines on undertakings or individuals for wilful or negligent infringements of the prohibition to restrict competition, pursuant to section 1 ARC. Fines levied on individuals for wilful participation in a cartel may not exceed 1 million Euro. In cases of negligent infringements, the maximum fine is 500,000 Euros. Not all individuals may be fined, only directors, officers and certain senior employees. However, if lower-ranking employees have committed the cartel offence and cannot be held responsible, directors or officers can be sanctioned with a fine for breaching their duty to supervise. The FCO may impose fines on undertakings of up to 10% of the worldwide (group) turnover in the most recent fiscal year. There are as yet no criminal sanctions against individuals, nor are there any disqualifications of directors resulting from sanctions for participating in cartels.

In 2013, the FCO published new fining guidelines. Under the new guidelines, the group-wide annual turnover of the company, as well as the turnover which it achieved in the cartelised market during the infringement period, is taken into consideration in the fine calculation. Hence, the size of the company and the affected "volume of commerce", as well as the seriousness and duration of the infringement, will be crucial factors in setting the level of fine. It should be noted in this respect that the fining guidelines are not binding and that judges of the German Federal Supreme Court have publicly questioned the adequacy and legality of the new fining guidelines, in that they do not sufficiently link the level of the fine to the guilt of the undertaking concerned. It is also still possible to waive or reduce a fine if a company that participated in the infringement submits an application for leniency. A reduction of 10% of the fine can be granted for an agreement to have the proceedings terminated by settlement. When setting the fine, the FCO also takes into account the undertaking's financial capacity. Provided that the undertaking provides sufficient evidence that it is unable to pay the fine in the short or medium term, the FCO usually offers that the fine may be paid in instalments.

Infringements of section 1 ARC become time-barred after five years. The opening of an investigation by the FCO, the EU Commission or a competition authority of another EU Member State, suspends this limitation period.

On 9 March 2017, the German Parliament adopted the 9th amendment of ARC. This act became effective on 9 June 2017. It introduces a number of changes in different areas of competition law. The majority of new provisions implement Directive 2014/104/EU through certain rules concerning private enforcement of cartel damages claims under national law (for details see below). In addition, the 9th amendment to the ARC introduces new rules on corporate liability. First, the reform establishes liability for fines for any company that had "decisive influence" over a company found guilty of a cartel infringement. This is likely to capture parent companies in most cases. Second, the liability of successor companies has been extended. This means that the legal successor of an addressee of a fine can in all cases also be held liable for the addressee's conduct. In addition, the economic successor of the infringing entity shall be liable for the conduct. The provision on economic successors specifically aims to address restructuring cases in which the infringing business is transferred by way of an asset deal and the acquirer continues the business following the transaction. Thus, a loophole that was commonly referred to as the "sausage gap" is now closed. This loophole became part of the political agenda after a sausage producer successfully escaped a fine liability through an internal corporate restructuring.

Overview of investigative powers in Germany

In order to fully investigate a suspected infringement, the FCO may use all the evidence that is generally available in criminal proceedings. In particular, the FCO may take testimonies from witnesses and accused suspects, and it may address information requests to undertakings. However, witnesses can refuse to testify to the extent that they might incriminate themselves. Accused suspects generally have the right to remain silent on the allegations that form the subject matter of the investigation, and do not have to provide any assistance or information whatsoever to the FCO. In case they do agree to be heard, they are not obliged to make accurate or complete statements. Interrogated witnesses and accused suspects must generally be instructed about their rights to remain silent/not to incriminate themselves.

The FCO may furthermore dawn raid offices and search private premises and objects. As a general rule, any such searches have to be ordered by a judge. Only in exigent circumstances may the FCO conduct these searches without a judicial warrant. In addition, the FCO may seize objects which could be of importance as evidence in the investigation, and make copies of any relevant documents. Again, a seizure order by a court is required if the material is not handed over voluntarily, and only in cases of exigent circumstances may the FCO itself order the seizure of objects or documents. The investigative powers in respect of search and seizure also apply to material in electronic form. Computers and company servers may be searched and relevant files may be copied. Also, private locations, such as residences, automobiles, briefcases and persons can be searched.

If necessary, the FCO may use the coercive force as laid down in the Code of Criminal Procedure in order to enforce its investigative powers.

Accused undertakings and natural persons have a right to be heard, which comprises, in particular, the possibility to submit statements to the FCO. The right to be heard also encompasses a right of access to documents in the possession of the FCO. Such access to documents is, however, only granted to the lawyer of the accused suspect, not to the suspect itself. Access to the documents can be denied if the investigation has not been formally completed and if full access would endanger the objective of the investigation.

The parties have a right to legal representation throughout the entire proceedings. Whilst in theory, when conducting dawn raids, the investigators of the FCO do not have to await the arrival of the defence counsel, in practice they normally do consent to wait up to one hour.

Overview of cartel enforcement activity during the last 12 months

In 2018, the FCO imposed fines amounting to approx. 376 million Euros. It concluded its investigations against manufacturers of special steel, potato-based products and daily newspapers. The authority has received 25 applications for leniency and numerous indications of possible infringements of competition law. It carried out 18 dawn raids at a total of 111 companies. In the current year 2019, several cartel proceedings were closed and new proceedings were initiated.

On 13 February 2019, the FCO imposed fines totaling approx. 3 million Euros on eight magazine providers for allocating customers to each other, six special steel companies, a trade association and 10 individuals for concluding price-fixing agreements and exchanging competitively sensitive information.

On 12 July 2018, the FCO imposed fines totaling approx. 205 million Euros on six special steel companies, one trade association and 10 individuals for concluding price-fixing agreement and exchanging competitively sensitive information. The trade association concerned has

meanwhile been liquidated. Investigations into four other companies and a trade association are still ongoing. The proceeding was initiated in November 2015 with a sector-wide dawn raid following a leniency application. The companies are producers or processors and traders of special steel products. Among the products covered by the agreements are long steel products, in particular engineering steel, tool steel and high-speed steel as well as stainless steel (i.e. rust, acid and heat-resistant steel). At least from 2004 until (at latest) the dawn raid in November 2015, the steel producers had jointly agreed on and implemented the uniform method of calculation of the scrap and alloy surcharges for special steel products across the sector. There was also a basic agreement between the companies that the surcharges be passed on to the customers on a 1:1 basis. The investigations showed that representatives of the steel producers also exchanged information on increases in the base price, at least for engineering steel. In addition, further sensitive information was exchanged, e.g., on the current order situation, customer stock levels, capacities, production stoppages and planned price increases, which was of relevance for the companies' competitive behaviour.

As part of the cooperation within the network of European Competition Authorities (ECN), the FCO has referred its ongoing cartel proceeding concerning metal packaging to the European Commission. The FCO is no longer continuing the national investigation proceeding which it initiated in spring 2015 against several metal packaging manufacturers while the European Commission has initiated its own formal cartel proceeding on the suspicion that the manufacturers have violated European competition law (Article 101 TFEU).

The FCO had initiated an investigation proceeding under competition law against a number of metal packaging manufacturers on the basis of an anonymous tip-off. The tip-off raised the suspicion that national and European competition law provisions had been violated over several years on the respective markets in Germany. From March 2015, the FCO had therefore conducted a number of dawn raids at different production sites of metal packaging manufacturers, including manufacturers of cans made of tin plate and aluminum for filling with foodstuffs or chemical-technical substances and manufacturers of vacuum seals for jars. Subsequently, there was increasing evidence that the alleged offences were not limited to German markets but also affected a number of other EU Member States.

On 20 September 2019, the FCO prohibited the sales cooperation SAKRET Trockenbaustoffe Europa GmbH (SAKRET Europa). This sales cooperation was recognised in 1982 as a so-called cartel of small- and medium-sized undertakings which offered them the possibility to join efforts in the distribution of SAKRET products (concrete, mortar, plaster) in Europe. Since 2010, the FCO investigated in this cartel since a major player, Knauf, had become a partner of this cooperation. Finally, the FCO found that due to the participation of Knauf, the market share of the former SME Cartel was too high.

Key issues in relation to enforcement policy

Particular enforcement priorities for the FCO do not seem to exist. Rather, the FCO's most recent activities seem to reflect an overall balanced approach which equally tackles different types of infringements.

The FCO has sanctioned various types of horizontal anti-competitive arrangements including price-fixing cartels, customer/market allocation schemes, bid rigging, and the exchange of commercially sensitive information. As regards the latter, somewhat disappointingly, the FCO seems to increasingly employ the concept of "exchange of commercially sensitive information" as a fallback argument in case it cannot prove the existence of an agreement or concerted action. This is even more worrying, given that the FCO generally considers

exchanges of commercial information to imply anti-competitive purposes, and thus shifts the burden of proof towards the undertakings involved in any such information exchange. This seems problematic not just from an *in dubio*/fair trial perspective; it has also led to significant legal uncertainty for companies.

Key issues in relation to investigation and decision-making procedures

As in many other jurisdictions, the FCO does not operate with different bodies for the investigation and decision of its cases, respectively. Rather, the same decision body that investigates a potential competition law infringement is also competent to decide the case and – where applicable – to impose administrative fines. Here lies a significant structural shortcoming in the public enforcement proceedings, the downsides of which can be observed in many cases. Even though in theory the FCO is obliged to conduct its investigations in an unbiased and objective manner, in practice the FCO officials who decide to open an investigation do show a strong commitment to close any such case with a decision finding a competition law infringement.

The only type of "peer review" that exists is a review by the FCO's litigation division. Such review, however, only focuses on whether or not the envisaged decision would stand in court. It does not, in turn, question the quality or completeness of the investigative process, or the evidence on which the decision is based.

The FCO does not have to investigate or decide cases in a specific time frame. Rather, the length and depth of an investigation can be adapted to the individual circumstances of the case. In practice, this can lead to lengthy proceedings which can easily go on for several years. On average, investigations by the FCO take some 20 months between the first investigative measure and the final decision.

German law protects correspondence with defence counsel from seizure and review by the FCO. However, the law only protects correspondence between an outside counsel and his client that directly relates to the investigation at hand and which was created after the opening of the proceeding. All correspondence dating from before the opening of the proceeding is not protected, and nor is internal correspondence by in-house counsel, regardless of when it was created. In order to obtain access to non-privileged documentary evidence, the FCO has in the past even dawn-raided law firms.

In general, any investigative measures undertaken by the FCO can be appealed by the companies concerned. The competent court for hearing any such appeals is the local court in Bonn, the seat of the FCO. In practice, however, appealing investigative measures undertaken by the FCO is normally in vain. The local court in Bonn has conceded to the FCO broad discretionary powers when it comes to determining whether and how to investigate a given case.

As mentioned above, some investigative measures – such as dawn raids – require prior approval by the local court in Bonn, which is normally granted if the FCO can substantiate that the respective investigative measure might yield relevant evidence in relation to a suspected competition law infringement. The standards of substantiation that the FCO must meet in its application for the relevant court warrant are rather low.

Leniency/amnesty regime

The FCO operates a leniency programme broadly similar to the one used by the EU-Commission. The leniency notice is also available in English on the FCO's webpage

(www.bundeskartellamt.de). The notice sets out the conditions for immunity from, or reduction of, fines for leniency applicants in cartel procedures. The conditions for full immunity differ depending on whether the FCO already has sufficient knowledge of a cartel. A leniency applicant is guaranteed full immunity if it reports a cartel to the FCO of which the latter had no prior knowledge, provided that the applicant submits sufficient information and evidence that enables the FCO to obtain a search warrant. If the FCO already has sufficient evidence at its disposal to obtain a search warrant, it will grant immunity from a fine to the first applicant, unless the available evidence already allows the FCO to prove its case, and provided that no other cartel participant has received full immunity under the first alternative. Full immunity is not available for undertakings that were the ringleaders of the cartel, or that have coerced others to participate in the cartel. Full immunity always requires that the applicant cooperates fully and on a continuous basis with the FCO.

Cartel participants who are not eligible for full immunity may still obtain a significant reduction of the fine by up to 50%, provided that they provide the FCO with verbal or written information and, where available, evidence that represents a significant contribution to proving the offence, and provided that the applicant cooperates fully and on a continuous basis with the FCO. The amount of the reduction will be based on the value of the contributions to uncovering and proving the infringement and the sequence of the applications.

A cartel participant can contact the head of the special unit for combatting cartels or the chairman of the competent decision division to declare his willingness to cooperate (marker). The marker can be placed verbally or in writing in German or English. The timing of the placement of the marker determines the rank of the application. If the FCO accepts an application in English, the applicant is obliged to provide a written German translation without undue delay. A leniency application filed by an undertaking is also considered by the FCO as one made on behalf of individuals participating in the cartel as current or former employees of the undertaking. Joint applications by cartel participants are inadmissible.

The FCO asks for basic information on the cartel when the marker is placed, such as the type and duration of the infringement, the product and geographic markets affected, and the identity of those involved. The FCO also asks for clarification as to whether and – where applicable – with which other competition authorities leniency applications have been, or are intended to be filed. Upon placement of the marker, the FCO grants a time period of up to eight weeks within which a full leniency application must be submitted.

The FCO confirms in writing that a marker has been placed and that a leniency application has been submitted, including date and time of receipt. In case of an application for full immunity where the FCO does not have sufficient evidence to obtain a search warrant, the FCO will confirm that the applicant will be granted full immunity, provided that the applicant continues to fully cooperate with the FCO. In all other cases, the FCO will inform the applicant of his provisional position in the ranking order and that he is in principle eligible for immunity or a reduction. A final decision as to whether a possible reduction in the fine will be granted and – where applicable – to what extent, will only be taken by the FCO at the very end of the investigative phase, i.e. once the FCO is in a position to evaluate the received input in view of the established infringement.

The FCO endeavours to assure the confidentiality of the process and will seek to avoid revealing the identity of leniency applicants. However, once the FCO issues a statement of objections, the addressees of such statements of objections have the right to fully access the case file, including all confidential information, and in particular all and any leniency applications. If the FCO has to rely on statements of a leniency applicant as evidence to prove its case, it also has to disclose the identity of the leniency applicant in its decision.

As mentioned before, leniency applicants must cooperate fully and continuously with the FCO. Unless requested otherwise by the FCO, they must end their involvement in the infringement immediately, and they must hand over to the FCO all information and evidence available to them. They must also name all the current and former employees involved in the cartel agreement, and take the necessary measures that all employees, from whom information and evidence can be requested, cooperate fully and on a continuous basis with the FCO during the proceedings. Leniency applicants are also required to keep their leniency application confidential.

Administrative settlement of cases

In recent years, an informal practice has evolved that provides the possibility for companies under investigation to enter into a settlement with the FCO. However, other than the EU Commission, the FCO has not published formal settlement guidelines. Even though there is no formal settlement procedure in place, there are a number of general principles that govern the settlement process. A settlement requires in the first place a guilty plea on the part of the undertaking that wishes to settle the case. In return, the FCO grants a reduction of a potential fine of up to 10%, in addition to any reductions granted under the leniency notice. The companies concerned usually also waive their rights for complete access to the file and for a complete statement of objections. However, the Federal Court of Justice has held that a waiver to appeal the final decision by the FCO may never be a part of a settlement agreement. The final decision of the FCO in settlement cases would normally only contain a short summary of the relevant facts, which makes it more difficult for third parties to extract from the decision any information that may be relevant for the preparation of follow-on actions. Settlements are always individual in character. Nothing prevents the FCO from settling a case with one company but ending settlement discussions with another. The FCO is principally bound by the settlement, unless new facts arise *ex post* which would justify re-opening the case.

Third party complaints

Complaints can be lodged by anyone in any form: orally; by fax; email; phone; or in writing. There are no legal requirements for lodging a complaint, as it is only regarded as an incitement for the FCO to open a formal proceeding. Even anonymous complaints are acceptable. However, in practice, a complaint is unlikely to trigger an investigation if it lacks details and exact determinations regarding the alleged infringement. Thus a written complaint, with enclosed copies of all documents/files with potential relevance, increases the chances of success significantly.

The FCO is not obliged to take action on each complaint that it receives. Rather, it has wide discretionary powers in this respect. It is only required to exercise the said power in an objective, thorough and dutiful manner.

In June 2012, the FCO launched an online whistleblower system which allowed it to receive anonymous tip-offs of cartel law infringements. The system guaranteed the anonymity of informers, while still allowing for continual reciprocal communication with FCO investigators via a secure electronic mailbox. The FCO's new whistleblowing hotline has been criticised for lacking a sound legal basis, and for incentivising false accusations by competitors, customers or even frustrated employees.

Civil penalties and sanctions

Infringements of competition law can be sanctioned with administrative fines of up to 10% of the total group turnover. In contrast to European law, according to a February 2013

court order issued by the German Federal Court of Justice, this 10% limit is not a cap but, interpreting it in conformity with German constitutional law, the upper limit of the fining range. As a reaction to this judgment by the German Federal Court, the FCO has issued the new fining guidelines of June 2013, which have been dealt with in detail above.

An issue which is, to a certain extent still open at the moment, is the issue of liability of parent companies to their subsidiaries' infringement of cartel rules. Even though it seems to be generally accepted that a parent is liable for violations by a wholly owned subsidiary, the courts still have to deal with individual aspects, in particular with respect to 50:50 joint ventures, and on the precise reconciliation of the European notion of an "undertaking" which, in this field, is still foreign to the German substantive and procedural rules to law.

Right of appeal against civil liability and penalties

Decisions of the FCO can be appealed before the Higher Regional Court in Düsseldorf, which is exclusively competent. An appeal against a decision imposing a fine produces suspensory effects. During the appeal procedure, it is possible to introduce new facts and evidence. In general, the court is also open to the introduction of economic expert evidence, whilst in some cases the court has claimed sufficient knowledge to assess important economic aspects of the case on its own.

Given that the Higher Regional Court in Düsseldorf is exclusively competent for hearing appeals against decisions by the FCO, the court is highly specialised and its decisions reflect profound competition law knowledge and expertise. Whilst the appeal procedure is generally highly effective and straightforward, it can also entail significant efforts and costs for the parties involved. In a recent case (*Flüssiggas*, LPG), the oral hearing before the Higher Regional Court in Düsseldorf took almost three years, and more than 130 sessions.

The Higher Regional Court in Düsseldorf is, in practice, not shy in overturning or rectifying FCO decisions. In a ruling of 26 June 2009 in relation to the cement cartel case, for instance, the court reduced the FCO's original fine of 660 million Euros to 328.5 million Euros. On the other hand, the court is also entitled to increase the level of the fine, and has not hesitated to do so. In the LPG-case mentioned above, the court increased some of the fines that were originally imposed by the FCO by 80%. It should be noted, however, that the legality of such *reformatio in peius* is highly questionable. However, the Higher Regional Court in Düsseldorf, in essentially all cases in the last two to three years, has increased the fines as compared to the fines issued by the FCO.

Under certain circumstances, the decisions of the Higher Regional Court in Düsseldorf can be appealed – confined to points of law – before the German Federal Court of Justice. The long duration of the appeal proceedings before the Higher Regional Court in Düsseldorf, and the "openness" of the decisions, have largely contributed to the significant increase in settlement proceedings before the FCO.

In recent months, the German Federal Court of Justice overturned quite a number of decisions by the Higher Regional Court of Düsseldorf. By decision of 9 October 2018 (KRB 51/16, KRB 58/16, KRB 60/17), the Federal Court of Justice overturned a judgment of the Higher Regional Court for a miscalculation of the fine (liquefied petroleum gas) and for not having properly taken evidence. In the confectionery cartel by decision of 21 June 2019, the Federal Court of Justice overturned a judgment (KRB 10/18) of the Higher Regional Court for lack of proper assessment of evidence.

Criminal sanctions

Cartels are not criminalised under German law. Rather, cartels generally qualify as an

administrative offence, with one important exception: bid rigging constitutes a criminal offence under section 298 of the German Criminal Code and can be sanctioned with up to five years in prison.

Cooperation with other anti-trust agencies

The FCO traditionally cooperates rather closely with US and ECN authorities. It is to a certain extent remarkable that this cooperation has not yet triggered major complaints by undertakings in cartel cases. On the other hand, there are no noteworthy examples of cartels of an international character sanctioned by the FCO.

Developments in private enforcement of antitrust laws

In June 2017, the 9th amendment to the ARC entered into force and implemented the EU cartel damages Directive 2014/104/EU. The following changes are of particular relevance: firstly, it is now presumed that a cartel infringement leads to damages. However, the cartel defendant has the right to rebut this presumption. Secondly, it is now expressly stipulated that the defendant (cartel member) may invoke the passing-on defence against (direct) customers. For the benefit of any claimant that is an indirect purchaser, there is a rebuttable presumption that the damage was passed on. Thirdly, for (potential) claimants, as well as for defendants, the new law provides tools to require the other party to disclose some of its internal information or documents. Third parties can also be required to disclose certain evidence. The claim is, however, limited by the principle of proportionality. Also, leniency applications and settlement documents are not captured by the disclosure provisions. Fourthly, whereas leniency applicants thus far only benefited in relation to the imposition of fines, applicants will now also benefit from restricted civil damages liability. In this regard, they only have to compensate for damages incurred by their direct or indirect purchasers. In relation to other damaged parties, leniency applicants are liable only if these parties cannot obtain full compensation from the other cartelist. Fifthly, the 9th amendment also intends to make settlements more attractive. The settlement of one cartel member with a damaged party will now prevent not only the damaged party from bringing further claims concerning the damage caused, but will also prevent the other cartel members from recourse in terms of their contribution claims regarding damages covered by the settlement. Consequently, the liability of the other cartel members is reduced by the damage caused by a settling cartel member. Sixthly, the regular limitation period for cartel damages claims is extended from three to five years after the end of the year in which the claim arose and the claimant gained knowledge. Seventhly, in Germany, the losing party generally bears all court costs, including those incurred by the counterparty. This approach led in the past to a relatively high financial risk exposure, given the fact that often participating cartel members join the defendant (third-party intervention). Thus, the imminent costs of bringing a claim are often unforeseeable for the claimant. To reduce this risk, the reform introduces a limitation: a claimant is now only liable for the cost of one additional intervening third party.

On 12 July 2016, the German Federal Court of Justice delivered its judgment in the *Lottoblock II* case. With this judgment the court has further clarified the scope of the binding effect of decisions by the competition authorities, as well as the requirements for subsequent follow-on actions. The underlying case concerned a follow-on action in a boycott/refusal to deal case. The defendants had on one single occasion taken the joint decision not to deal with the claimant in the future. This decision was later found to be in violation of the applicable German and European competition rules. The claimant lodged an action for damages in

respect of the *lucrum cessans* that it had allegedly suffered as a result of the boycott. In the first place, the German Federal Court of Justice held that the binding effect of a competition authority's decision is not confined to the operative provisions of the decision but rather also comprises the factual and legal findings contained in the body of the decision. The court then clarified that the mere existence of a prohibition decision does not as such in every single case imply that the infringement had actually been put in practice and executed for a certain time period. The court recalled in this respect that under the applicable laws, a prohibition decision could even be issued in order to prevent a future restriction of competition.

However, the German Federal Court of Justice held that there exists a general legal presumption that anti-competitive agreements which are aimed at permanently restricting competition and are indeed executed by the cartelists for as long as the cartelists do not take action which clearly evidences that they stopped acting in line with the cartel arrangement. On this basis, the court rejected the defendants' argument that the single agreement not to deal with the claimant had ceased at the latest on the day when the German cartel office issued its prohibition decision. Rather, the court found that the mere issuance of the prohibition decision was not sufficient to assume that the joint boycott had indeed stopped. In order to rebut the legal presumption that the anti-competitive boycott was permanently executed, the defendants would rather have been required to explicitly and undoubtedly distance themselves from the cartel arrangement, which had not happened in the case at stake. The practical relevance and importance of this judgment cannot be overestimated. It basically opens the door widely for the recovery of so-called "post cartel" damages claims. Whereas until today the general view had been that cartel infringements and their respective anti-competitive effects would normally cease on the day of the dawn raids and that cartel damages claims going beyond this point of time would be limited to a rather short "cartel shadow" period, this will no longer apply in the future. Rather, claimants will in the future regularly be able to recover damages also for longer time periods after the cartel activity has ceased.

A common misunderstanding is that actions for declaratory judgments in the context of private competition litigation are not possible in Germany. In practice, this misunderstanding has led in many cases to actions being brought before the courts of other EU Member States (in particular, in the Netherlands) notwithstanding the fact that the case had its closest links to Germany, and even German substantive law was applicable.

In its judgment of 9 November 2016, the Higher Regional Court of Karlsruhe has – in line with a number of earlier judgments by other regional and higher regional courts – made clear that actions for declaratory judgments are very well admissible in private competition litigation – and not only in exceptional cases but rather as a general rule. The claimants in this case sought a declaratory judgment from the court finding that the members of a cartel in respect of ready-mix concrete were jointly and severally liable for compensating the claimant for all losses resulting from the cartel. The defendants argued that such action for a declaratory judgment was inadmissible in view of the German law principle that actions for declaratory judgments are only possible where the claimant is unable to bring an action for (specific) damages (principle of primacy of damages actions). The defendants alleged that the claimant was very well in a position to calculate/estimate its losses so that it would be obliged to bring a proper damages action. The Karlsruhe court, however, rejected the defendants' argument. It held that the claimant did not have sufficient knowledge from the publicly available information which would allow it to determine the precise scope of its damage, nor to provide the court with sufficient information in order to allow it to estimate the damage according to section 287 German Code of Civil Procedure. In the court's view, the claimant would have had to conduct extensive investigations, or to engage economic

experts in order to obtain sufficient information for the determination of its damages, and that requiring claimants to do so would illegitimately undermine their protection under the civil law system.

In more general terms, the court then continued by saying that – irrespective of the individual circumstances of the case at stake – one must not apply too strict standards when assessing the admissibility of actions for declaratory judgments in private competition litigation. In line with the jurisprudence of the German Federal Court of Justice in unfair competition cases, claimants should be entitled to bring actions for declaratory judgments if they can substantiate that they have been affected by anti-competitive behaviour "with a certain likelihood".

Secondly, the court found that cartels presumably produce their anti-competitive effects during a period of at least one year after the infringement ceased. This finding is in line with the Federal Supreme Court's judgment of July 2016 in which the Federal Supreme Court found that there existed no presumption whatsoever that the opening of a cartel investigation or even a prohibition/fining decision would automatically eliminate all anti-competitive effects. Whereas the Supreme Court found, however, that the anti-competitive effects would normally persist as long as the cartelists have not pro-actively returned to normal competition, the Higher Regional Court of Karlsruhe applied a more conservative approach in that it deems the "cartel shadow effect" to be generally limited to one to two years.

Thirdly, according to the Higher Regional Court of Karlsruhe, a general presumption for umbrella effects exists. The court argued insofar that under normal competitive conditions, companies would always set their prices in relation to their competitors' prices. Only under unusual circumstances – for which the defendants would bear the burden of proof – exceptions from this general rule are conceivable.

Fourthly, in respect of the passing-on defence, the court confirmed prior jurisprudence by other German courts according to which a defendant must meet very high standards if it wishes to raise a passing-on defence successfully. The court emphasised in this respect that the defendant has to substantiate and prove all relevant market parameters such as, in particular, demand elasticity, price developments, and product specifications in order to show that the passing-on of the cartel overcharge is more than just a hypothetical theory but rather a likely scenario. But that's not all: the defendants are also required to show that the passing-on of the cartel overcharge has not resulted in other types of damages for the direct purchasers, such as, for instance, volume effects.

Fifthly, the court took the view (and insofar contradicted the Higher Regional Court of Düsseldorf) that a mere competition authority's press release normally does not suffice in order to convey "sufficient knowledge" so that the subjective, at that time still applicable, three-year limitation period would start upon publication of such press release. Rather, sufficient knowledge generally requires, in the court's view, access to the file. Hence, only if the claimant has not taken the appropriate measures in order to be granted access to the file within a reasonable time frame, can it be deemed to "ought to have" sufficient knowledge which would trigger the start of the knowledge-based three-year limitation period.

On 12 June 2018, the Federal Court of Justice rendered a landmark judgment with respect to the statute of limitations of cartel damages claims (Grey Cement II). The Court ruled, in deciding controversies among various Higher Regional Courts, that the rules on the tolling of the statute of limitations by investigations of the EU Commission or any national competition authority, which were introduced on 1 July 2015, would also apply to any and all claims which had come into existence before that date. This judgment is in favour of plaintiffs since in this way quite a number of claims which had come into existence in many larger cartels, in particular in the trucks cartel, may still be successfully brought.

On 11 December 2018 (KZR 26/17), the Federal Court of Justice, again in a landmark judgment, ruled that there was no *prima facie* evidence in the sense of a presumption that a transaction within the framework of a cartel as decided with binding effect would be affected by the cartel and that damage resulted from such a transaction. Following this judgment, the lower courts have taken the approach that there was a factual presumption for a transaction being affected by the cartel and damage resulting from such transaction, if it were covered by the authority's decision on the cartel. The Federal Court of Justice has still to decide on the lower courts' judgments to this effect.

Reform proposals

The efforts of both the FCO and the Ministry for a 10th amendment of the GWB focus on the law against abuse of a dominant position in the market. The idea of certain expert reports is to strengthen the position of the FCO and of courts with respect to strong internet companies, issues of tipping or market power of intermediate internet platforms.

On a broader perspective, the German legislator is interested to introduce the liability of legal entities as such, essentially in the way as interpreted in EU competition law in the notion of "undertaking" under Art. 101 (1) TFEU for any infringements by individuals working for such legal entities. Under the current state of law, any liability of legal entities requires that any individual having corporate responsibility must be found to have acted at fault in breaching a regulatory obligation to which the legal entity is subject.

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