



Bundeskartellamt



open markets | fair competition

# Effective cartel prosecution

Benefits for the economy and consumers



## Imprint

### Published by

Bundeskartellamt  
Kaiser-Friedrich-Straße 16  
53113 Bonn  
www.bundeskartellamt.de

### Status

December 2016

### Print

Druckerei Raabe OHG, Rheinbach

### Design and production

PRpetuum GmbH, München

### Photo credits

Jetta Productions – Getty (Title); Bundeskartellamt/Gloger (p. 3); shironosov – iStock (p. 4); gargantiopa – iStock (p. 6); sp4764 – Fotolia (p. 7 top); TommL – iStock (p. 7 bottom); efilippou – iStock (p. 8/9); Sezeryadigar – iStock (p. 10); querbeet – iStock (p. 11); Denys Rudyi – Fotolia (p. 12); Rawpixel.com – Fotolia (p. 13); mantinov – Fotolia (p. 14); David Pimborough – Fotolia (p. 17); xixinxing – Fotolia (p. 18); pathdoc – Fotolia (p. 19); Nastco – iStock (p. 20); CatLane – iStock (p. 21); solarseven – iStock (p. 22); davis – Fotolia (p. 23); maxoidos – Fotolia, chaya1 – Fotolia, fischer-cg.de – Fotolia, yulyla – Fotolia, vschlichting – Fotolia (p. 25); Yingko – Fotolia (p. 26); Alex\_Schmidt – iStock (p. 27); Freder – iStock (p. 28); baona – iStock (p. 29); eric – Fotolia (p. 30); monkeybusinessimages – iStock (p. 31); beeboys – Fotolia (p. 32)

### Text

Bundeskartellamt  
Kaiser-Friedrich-Straße 16  
53113 Bonn

This brochure is published as part of the public relations work of the Federal Government. It is distributed free of charge and is not intended for sale.

# Content

Foreword.....	3
<b>I. Cartel prosecution .....</b>	<b>4</b>
Key task of the Bundeskartellamt.....	4
1. What is a cartel?.....	5
2. Increased effectiveness of anti-cartel enforcement.....	5
3. Effective deterrence.....	9
4. Cartels without borders: International cooperation.....	11
<b>II. An effort which pays off, in particular for the consumer.....</b>	<b>14</b>
1. The economic harm caused by cartels.....	15
2. The benefits of effective cartel prosecution.....	16
<b>III. Uncovering cartels: The leniency programme – a key driver of success.....</b>	<b>18</b>
1. The leniency programme fulfils several functions.....	19
2. Development and revision of the leniency programme.....	19
3. How does the leniency programme work?.....	21
<b>IV. Cartel prosecution: an investigative challenge.....</b>	<b>22</b>
1. The investigatory phase.....	23
2. The setting of fines.....	26
3. Court proceedings.....	27
<b>V. Private damages actions: Using opportunities, avoiding pitfalls.....</b>	<b>28</b>
<b>VI. Compliance.....</b>	<b>31</b>
<b>VII. Outlook.....</b>	<b>32</b>
<b>References.....</b>	<b>33</b>



# Foreword

Competition is a cornerstone of our economic and social order. The fact that competition leads to the best overall economic results is now undisputed in most economies around the world. Effective competition encourages businesses to push forward. They must make an effort to win customers. As a consequence, consumers can benefit directly from better quality at lower prices.

Illegal cartels undermine this mechanism and cause significant damage to the economy. Where businesses agree on prices, divide orders, customers and markets between themselves or coordinate key terms and conditions, competition is eliminated to the detriment of customers. In such cases price and quality will no longer be determined by supply and demand, but by conspiratorial cartel activity.

Cartel agreements are rightly prohibited worldwide and subject to severe penalties. German competition law provides for high-level fines against companies that participate in cartels and the individuals involved. Although imposing fines is not the primary objective of cartel prosecution, fines are sometimes necessary to deter companies from engaging in illegal agreements in the first place. The economic viability of the companies concerned is always taken into account when a fine is set. The fines imposed are not intended to permanently weaken the companies participating in a cartel or to even force them into insolvency.

Over the last years the Bundeskartellamt has significantly increased the effectiveness of its cartel prosecution efforts, for example by establishing specialised anti-cartel divisions, revising its leniency programme and launching an anonymous whistle-blowing system. The number of cartels uncovered by the Bundeskartellamt has risen steadily and proceedings are now concluded more swiftly than even a decade ago.



This brochure is meant to provide you with an insight into the Bundeskartellamt's cartel prosecution practice. How do we detect cartels? What is the role of our leniency programme in this context? How does international cooperation work? How do we set the level of fines?

Furthermore, this brochure deals with the option of enforcing private damages claims against members of a cartel and also takes a look at the efforts made by companies to avoid competition law infringements by using compliance programmes.

I hope you will find our brochure useful and informative.

A handwritten signature in black ink, which appears to be 'A. Mundt'. The signature is stylized and fluid, written over a white background.

Andreas Mundt  
President of the Bundeskartellamt

# I. Cartel prosecution

## Key task of the Bundeskartellamt



Anti-competitive agreements lead to excessive prices coupled with inferior product quality. At the same time the elimination of competition undermines the innovative power of businesses. Cartels thus hurt the economy as a whole and the consumer in particular.

The prosecution and punishment of illegal cartels is a key task of public antitrust enforcement. A general prohibition of cartels is provided in Section 1 of the German Competition Act (GWB). A corresponding provision under European law can be found in Article 101 TFEU. Cartels are prosecuted as administrative offences and can be punished with heavy fines. In this regard the competition authorities have powers similar to those of a public prosecutor.

## 1. What is a cartel?

If several competitors coordinate their market conduct with the object of restricting or eliminating competition, this is called a cartel. Anti-competitive agreements between companies can take different forms. Particularly serious types of agreements are those concluded between competitors on prices or product quantities and on the allocation of sales areas or customer groups (so-called hardcore cartels). In principle, the prohibition of cartels can also apply to other types of agreements between competitors, e.g. co-operations or market information systems.

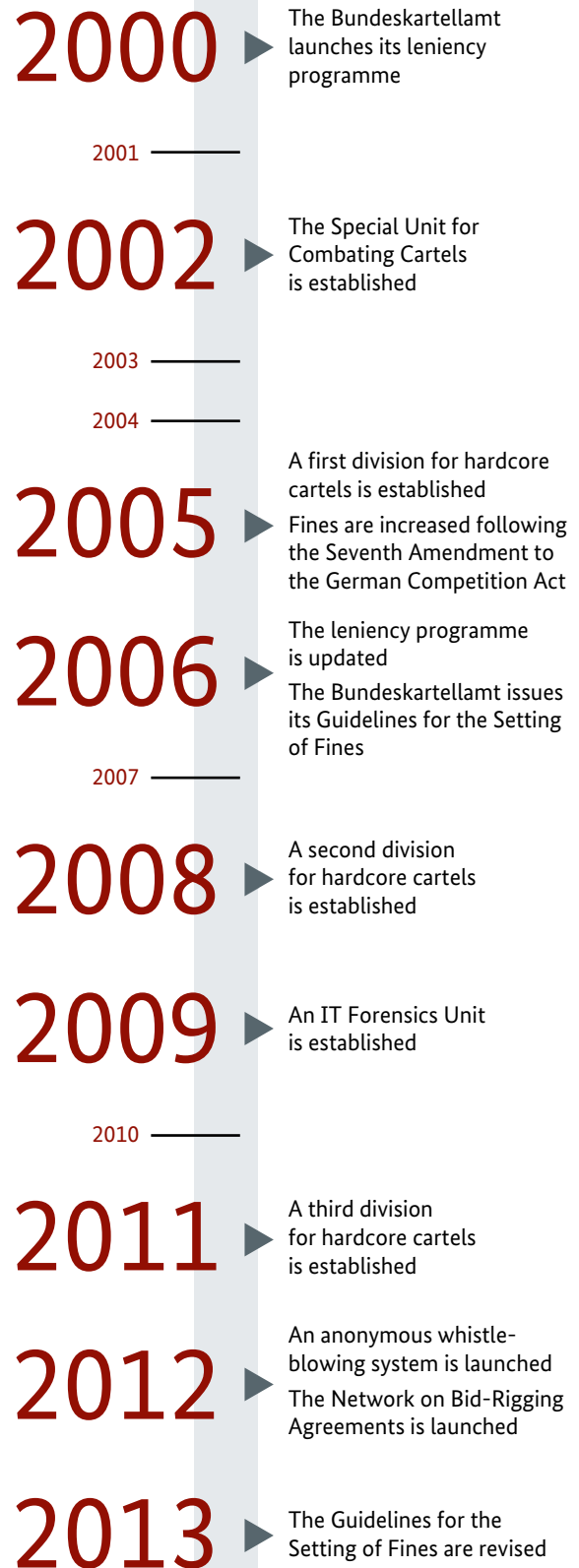
The prohibition of cartels also applies to agreements between companies active on different market levels. Examples are so-called vertical price-fixing measures, i.e. agreements between manufacturers and retailers on retail prices. Manufacturers may give retailers price recommendations, but these must be non-binding (so-called recommended resale prices, RRP). It is, however, prohibited for manufacturers to conclude binding agreements on retail prices with their retailers or even to pressurise them to enforce a certain price level.

Subject to specific conditions anti-competitive agreements may be exempted from the prohibition of cartels. This can be the case if an agreement improves the production of goods or promotes technical progress, and if consumers receive a fair share of the resulting profit. Certain forms of cooperation between small and medium-sized businesses are also admissible. There are also special rules for specific sectors of the economy, such as agriculture and newspapers/magazines, that facilitate the conclusion of certain types of agreement.

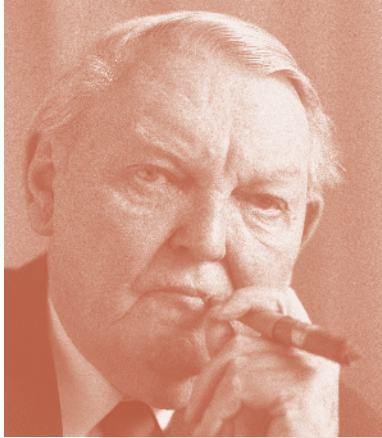
## 2. Increased effectiveness of anti-cartel enforcement

The Bundeskartellamt has always given high priority to the prosecution and punishment of illegal agreements, especially price and quota cartels and customer or territorial allocation agreements (hardcore cartels). With the introduction of several measures over the last 15 years the authority was able to further improve the effectiveness of its cartel prosecution, to the benefit of the economy as a whole and the consumer:

### Measures to increase the effectiveness of cartel prosecution







© Bundesregierung; Foto: Engelbert Reineke

*“There have never been as many unemployed in German economic history as in the period when cartels flourished most strongly. Cartels always have to be paid for by a lower standard of living”.*

Ludwig Erhard: Wohlstand für alle (Prosperity for all), Düsseldorf/Vienna, 8th edition 1964, p. 185 f.

#### Key witness scheme: Leniency programme

Illegal cartels are conducted in secret, which is why it is a great challenge to uncover illegal agreements. In 2000, the Bundeskartellamt introduced its leniency programme which was fundamentally revised in 2006 (often also referred to as “key witness scheme”). Cartel members who confess to the Bundeskartellamt their involvement in illegal agreements with competitors and thus help to uncover and terminate a cartel, can be granted immunity from a fine or a reduction of their fine. The leniency programme has become a key tool for detecting cartels. Around half of all hardcore cartel proceedings are triggered by information provided by a leniency applicant (for details on this see Chapter III).

#### Anonymous whistle-blowing system

In 2012, in order to increase the threat of detection and the probability of punishment for cartel members, the Bundeskartellamt set up an electronic whistle-blowing system that can be accessed from the authority’s website. Insiders who are reluctant to disclose their identity for fear of negative consequences or even reprisal can use the system to provide the authority with specific information about a cartel anonymously. The system guarantees the anonymity of informers while still allowing for continual reciprocal communication with the investigative staff at the Bundeskartellamt via a secure electronic mailbox. Between June 2012 and December 2016, and at 55,582 clicks to the whistle-blowing system’s website, a total of 1,420 tip-offs were posted, some of which have led to the initiation of (fines) proceedings.



#### Anonymous whistle-blowing system: an example

In 2015 the Bundeskartellamt imposed fines totalling around EUR 75 million on five manufacturers of acoustically effective components for cars for having engaged in anti-competitive agreements. The case had been triggered by an anonymous tip-off to the Bundeskartellamt’s whistle blowing system.





When it receives an anonymous tip-off the Bundeskartellamt makes sure first of all that the content of the information meets certain quality criteria, is sufficiently detailed, accompanied by conclusive factual evidence of the infringement or has been confirmed by further research by the authority. If these preconditions are fulfilled, the authority can apply for a search warrant in order to be able to carry out a dawn raid and secure further evidence at the premises of the suspect companies.

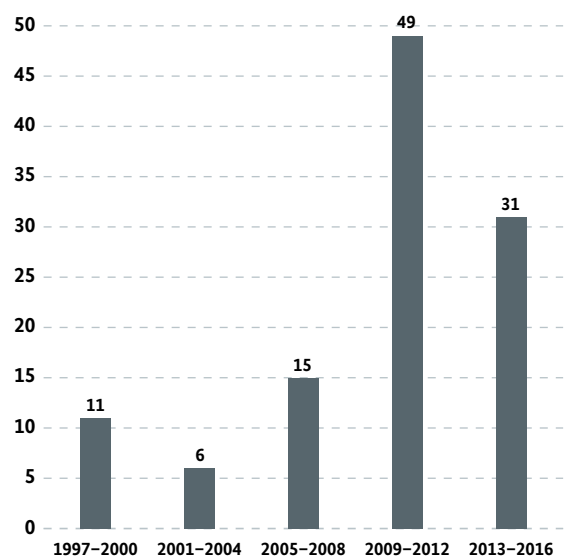
#### Special Unit for Combating Cartels

In 2002 the Special Unit for Combating Cartels (SKK) was launched which centrally registers all tip-offs on infringements of competition law. The SKK assists the Bundeskartellamt's decision divisions in the planning and implementation of investigatory measures (e.g. dawn raids) and in the increasingly complex evaluation of evidence.

#### IT Forensics

In 2009 a unit specialising on IT forensics was set up which assists the decision divisions in collecting and analysing IT data. The unit is also responsible for developing further the forensic expertise in this area.

#### Cartel proceedings concluded between 1997 and 2016



### Specialised decision divisions

The decision divisions at the Bundeskartellamt are mainly organised according to sectors of the economy. In 2005, 2008 and 2011, as a measure to further intensify the authority's cartel prosecution activities, three divisions, the 10th, 11th and 12th Decision Divisions, were set up which are dedicated to the cross-sector prosecution of hardcore cartels (price and quota cartels, territorial and customer allocation agreements).

### Punishment of cartels with heavy fines

The increased intensity in the prosecution of hardcore cartels is reflected, among other things, in the level of fines imposed by the Bundeskartellamt. At the turn of the millennium the total amount of fines imposed in any one year often only lay at a low two-digit million level. In the last few years, however, total fines often amounted to 200 to 300 million euros. In 2014, an exceptional year, fines even amounted to more than one billion euros. The fines collected are paid into the state budget.

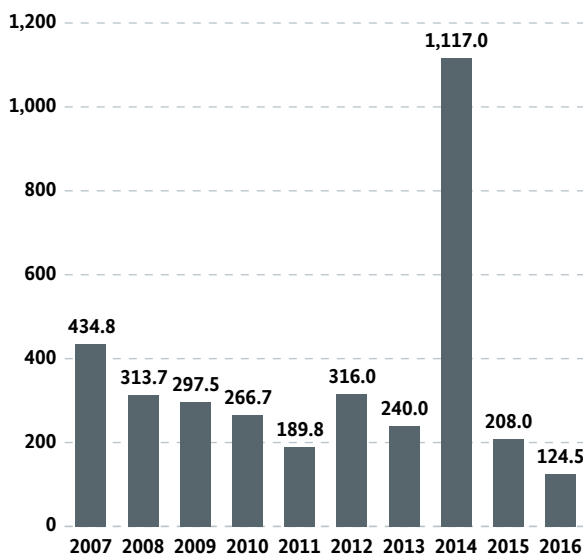
### Selected maximum fines\*

Year	Cartel proceedings	Total fines imposed in euros	of which highest individual fine imposed
2015	Automotive supplier	89,700,000	29,500,000
2014	Beer	338,000,000	160,000,000
2014	Sausage	338,500,000	128,050,000
2014	Sugar	281,700,000	195,500,000
2013	Railways – DB	134,500,000	103,000,000
2010	Ophthalmic lenses	115,000,000	28,760,000
2009	Coffee	159,000,000	83,000,000
2008	Decorative paper	61,000,000	25,000,000
2008	Clay roof tiles	188,081,000	66,280,000
2007	Liquid gas	249,000,000	67,200,000
2005	Industrial insurance	151,400,000	33,850,000
2003	Cement	396,000,000**	175,900,000

\* Figures are rounded. Some cases are still pending and so not all the orders imposing fines are final.

\*\* Based on a judgment issued by the Federal Court of Justice in 2013 now final.

**Fines imposed by the Bundeskartellamt**  
(Total amount in millions of euros per year)





### 3. Effective deterrence

The aim of cartel prosecution is not only to uncover, terminate and sanction cartels. Another major objective is to achieve as much deterrence as possible to prevent businesses from engaging in cartel activity. Due to the effectiveness of cartel prosecution the risk of detection is now significantly higher than a few years ago. If a cartel is uncovered, the businesses and managers involved will face heavy fines. In many cases the public image of cartel members is significantly harmed. The cartel members also have to face substantial private damages claims brought by cartel victims after conclusion of the authority's proceedings. The fact that deterrence works is illustrated by the efforts of many companies to take effective compliance measures in order to prevent infringements (for details on this, see Chapter VI).

#### Higher fines as a deterrent

The fear of being fined can deter others from forming a cartel. However, for the impending sanction to have a deterrent effect, it must be appreciable for the cartel participant. If a cartel member is able to pay the impending fine out of the "petty cash", the deterrent effect of cartel prosecution is inevitably too little. Even the most effective competition authority would be fighting a losing battle here. As a consequence, heavy fines can be imposed to punish cartels. Since the level of fines was brought into line with

European law in 2005, a fine can amount to up to 10% of the turnover of a company. The managers involved also have to expect fines of up to one million euros.

The range of fines imposed on individual companies is very broad as the level of fines depends on the duration and gravity of the infringements. The size of the company concerned and the turnover it achieved with the products and services involved also play a decisive role. Fines ranging from some tens of thousands of euros to up to three-digit million amounts can be imposed in one and the same proceeding. In the last five years single companies were fined on average approx. seven million euros.

The fines imposed are not intended to permanently weaken the companies participating in a cartel or to even force them out of the market or into insolvency. The economic viability of the companies concerned is always taken into account when a fine is set. German law also offers more leeway by allowing for the deferment of payment or payment in instalments; in this way an adequately deterrent level of fines is achieved without jeopardising the further existence of the companies concerned.

#### Leniency programme destabilises cartels

High-level fines can only have a deterrent effect if the cartel members have reason to expect that their cartel activities will be uncovered. The leniency programme as one of the sources available for uncovering anti-competitive agreements thus also has a strong deterrent effect. Cartel members must expect at all times that one of them might have reported the illegal agreements to the competition authorities. As a result the stability of anti-competitive agreements is effectively weakened and it can be assumed that in many cases illegal agreements will not even materialise. The leniency programme is therefore an essential component of pre-emptive competition law enforcement which is focused on preventing illegal cartels from the outset (for details on this see Chapter III).



### The issue of legal succession

**2011** High fines imposed by the Bundeskartellamt cannot be collected on account of restructuring measures undertaken by the companies affected. In proceedings against industrial insurers and in the ready-mixed concrete sector, the Federal Court of Justice confirms that after corporate restructuring measures the legal successor of a company is only liable for fines imposed against that company if the successor's assets are "essentially identical" to the assets of its predecessor.

As a consequence, in both cases legal succession makes it impossible to impose fines. In the Court's view, this loophole can only be closed by the legislator.

**2013** The 8th Amendment to the German Competition Act closes loopholes regarding the liability of legal successors. Practical experience reveals, however, that in particular large companies facing high fines continue to have the incentive and possibility to avoid a fine by taking restructuring measures.

**2016** The orders imposing fines on two companies of the "Zur Mühlen" group in the context of the "sausage cartel" become void on account of restructuring measures within the company group. Fines in the amount of EUR 128 million cannot be collected. There is a serious risk that fines will not be enforceable in other cases as well.

**2017** With the 9th Amendment to the German Competition Act the legislator intends to close the remaining loopholes in the antitrust fines regime.

have increased the clear-up rate which, together with the threat of fines, also deters illegal agreements.

### Private damages actions

Private damages actions represent an instrument which in recent years has increasingly accentuated the deterrent effect of competition law. If cartel members have to expect actions for damages from customers harmed by the cartel in addition to a heavy fine, this appreciably weakens the attractiveness of illegal agreements. The conditions for asserting damages actions from infringements of competition law have improved in recent years as a result of an increasing number of court cases and decisions taken by the Federal Court of Justice. With the implementation into German law of the EU directive governing actions for damages for infringements of competition law (Directive 2014/104/EU), which is foreseen for 2017, the rights of injured parties claiming for damages will be further strengthened and the enforcement of claims simplified. In this process, anti-cartel enforcement and damages claims go hand in hand. Without an authority's investigations many injured parties would not even have a chance to notice, let alone prove the existence of a cartel. While anti-cartel enforcement serves to uncover and sanction cartel activity, private damages claims fulfil the important function of compensating for the individual financial damage caused by an infringement (for details on this see Chapter III).

### Measures to uncover bid-rigging agreements



In the awarding of contracts for public construction projects alone, the damage caused by bid-rigging agreements is estimated to amount to several billions of euros each year. In 2015, the Bundeskartellamt published an information brochure on how to uncover bid-rigging agreements in order to help contracting entities and other injured parties

to identify such illegal agreements and report them to the law enforcement authorities. Together with the public prosecution offices and competition authorities of the Länder the Bundeskartellamt has also set up a "network on bid-rigging agreements" (Netzwerk Submissionsbetrug) which is to intensify the joint prosecution of bid-rigging agreements and make it more effective. These measures





### Cartels – a criminal offence?

Various voices have called for a criminalisation of competition law infringements, for example the German Monopolies Commission in its 2015 special report on the planned amendment to the German Competition Act<sup>1</sup>, claiming that this would achieve even more effective deterrence. In the Bundeskartellamt's view the existing options for sanctioning anti-competitive infringements generally fulfil their purpose and achieve credible deterrence. Many businesses have made substantial investments in compliance programmes, also in order to avoid violations of competition law. The growing number of cartel cases shows that anti-cartel enforcement has been improved; it should not be interpreted as an indication that there are more cartels today. It is a fact that unfortunately the threat of prison sentences does not prevent violations of the law. Engaging in cartel activity to the detriment of the state, so-called bid-rigging, is already a criminalised offence in Germany. Nonetheless, infringements have continued to occur in this area, as illustrated by well-known cases such as the fire-fighting vehicles cartel or the rail cartel. It should also be considered that criminal law requirements would make cartel proceedings (that are already extremely complex proceedings) even more difficult. It is doubtful whether, within a criminal law framework, the Bundeskartellamt

would still be able to offer businesses sufficient incentives to come forward and cooperate with the authority. In the view of the Bundeskartellamt effective deterrence not only requires the threat of penalties as provided for by the law, but also effective detection and prosecution of infringements as well as proper enforcement of the penalties.

### 4. Cartels without borders: International cooperation

Today businesses are increasingly operating across borders. The competition authorities have been quick to react to this development. The network of European competition authorities (ECN) has been in existence since 2003. It provided an institutional framework for the already well-established cooperation between the national authorities and between the national authorities and the European Commission. With Regulation (EC) no. 1/2003 a system of parallel competences was created within which the European Commission and the competition authorities of the Member States apply the European competition rules to anti-competitive infringements with cross-border effects<sup>2</sup>. Consequently, instead of the European Commission, one or several national authorities can intervene in order to punish violations of European competition law.



If a violation of European competition law is found in a specific case, a process of case allocation will be initiated within the ECN. Its objective is to ensure that the best placed authority deals with a cartel (or abuse) case. At the start of its proceedings each EU competition authority posts a case in which European law is (also) applied on the high security intranet of the EU competition authorities. In this way the information is made available to all the other competition authorities within the ECN. Criteria for finding the best placed authority to deal with the case are the geographical scope of the effects of a competition infringement, the possibilities for gathering evidence and the means for ending the infringement. As a rule the European Commission is to be considered the best placed authority if, for example, an infringement affects competition in more than three Member States.

In order to be able to secure all necessary evidence each national competition authority is authorised to request that another authority undertake investigations on its behalf to collect information for a specific proceeding and to exchange evidence. In practice the requests for official assistance have proved to be a useful investigative tool by which evidence from other EU countries can be secured for proceedings conducted by the Bundeskartellamt.

Apart from the formal investigative requests, many contacts take place between European and non-European competition authorities to allow for an informal exchange of general information or experience relating to specific proceedings. The working groups within the European Competition Network are also particularly important as they promote this mutual exchange of experience and pursue the aim of a greater convergence in fines proceedings within the European Union.

#### Examples of cooperation within the ECN

Upon request by the Bundeskartellamt several competition authorities, among them the Austrian, Swedish and French authorities, have carried out dawn raids in their countries, secured evidence on behalf of the Bundeskartellamt and transmitted this to Germany.

The Bundeskartellamt has conducted investigations on behalf of the competition authorities of Austria, Denmark, France and the Netherlands.







Businesses act on a global stage, their activities are not limited to Europe. Mergers have effects in several countries and continents. Cartel activities are organised on an international scale.

For this reason the Bundeskartellamt regularly cooperates with competition authorities all over the world. This cooperation is based on bilateral agreements or takes place within international networks.

At international level the national competition authorities work together within the International Competition Network (ICN). The ICN was set up in 2001 by the representatives of 14 jurisdictions. The Bundeskartellamt was one of its founding members. With now more than 130 member authorities the network has become the most

important association of competition authorities worldwide. The ICN is committed to engaging lawyers as well as representatives of the business and academic sectors in the work of the ICN as non-governmental advisors (NGAs). Its work is achieved in working groups which cover the key areas of the competition authorities' activities: merger control, anti-cartel enforcement, unilateral conduct, advocacy and the cross-cutting issue of agency effectiveness. The ICN's work products, a comprehensive and unique source of practice-oriented knowledge, are available online via the ICN's website ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

Since September 2013, Andreas Mundt, the President of the Bundeskartellamt, has been the Chair of the ICN's Steering Group.



## II. An effort which pays off, in particular for the consumer

The prosecution of illegal hardcore cartels (price, quota, customer allocation and territorial agreements) is of key relevance for effective competition protection and, as such, has a direct positive effect on the economy and consumers. Cartels cause great harm to the economy because they lead to higher prices, lower product quality and less innovation. This harm can only be prevented if cartels are effectively prosecuted.

Once a cartel has been uncovered, the pressure from reinstated competition often immediately leads to lower prices. The companies need to make an effort to win the customers' favour. Effective cartel prosecution therefore produces considerable benefits, especially for the consumer.





## 1. The economic harm caused by cartels

Numerous economic studies provide concrete evidence on the extent of harm caused by illegal cartels and on the benefits of effective cartel prosecution. A scientific study which analysed more than 1,000 cartels produced the following results:<sup>3</sup>

- On average cartel agreements increase prices by 15 %, i. e. customers and consumers have to pay a price which is 15 % higher than the price they would pay if competition were not distorted and functioning well.
- International cartel agreements involving suppliers from several countries are usually more damaging than national cartels. The average cartel-induced price increase caused by international cartels is **about 18 %**. National cartels lead to an average price increase of **about 13 %**.

In some cases these percentage figures represent large amounts of money in absolute terms. For example, the estimated total damage caused by an international cartel which had completely eliminated competition in the manufacture of synthetic vitamins, amounted worldwide to over US\$ 8 billion from 1990 to 1999<sup>4</sup> (at the current rate approx. EUR 7.4 billion). The damage caused to European consumers amounted to approx. US\$ 3 billion (at the current rate approx. EUR 2.8 billion).

Another example is the European laundry detergent cartel which was active from 2002 to 2005 and involved eight European countries, among them Germany. A recent scientific study<sup>5</sup> has found that the financial damage caused to German consumers in the last nine active months of the cartel alone amounted to about EUR 13 million. Based on this figure the overall damage caused by the cartel in all countries involved and for the entire duration of the cartel is estimated to have been approx. EUR 315 million.

Also in Germany hardcore cartels have led to overly excessive prices and harmed the economy and, in particular, consumers. For instance, in a proceeding before the Düsseldorf Higher Regional Court an economic expert ascertained that due to an illegal cartel operated between 1991 and 2002, prices for a tonne of cement in Germany were on average six euros higher than the competitive price (price overcharge of about 10%).

### Example: The cement case

In a judicial review of a fines decision by the Bundeskartellamt, the Düsseldorf Higher Regional Court commissioned an economic expert to determine the price effect of a long-standing illegal cartel in the German cement market. Substantiated by extensive empirical data, the expert's analysis came to the following conclusions:

- As a result of the illegal cartel, the prices for a tonne of cement were nationwide almost six euros above the price that would have been charged if effective competition had been in place. The economic expert himself declared this amount a very conservative estimate.
- A competitive cement price of approx. 50 to 60 euros per tonne was assumed for the relevant period of the cartel agreement.
- According to the expert's estimate, the cartel members had thus succeeded in enforcing a cartel price which on average exceeded the price under effective competition by about 10%.

In Germany the annual demand for cement is approx. 30 to 40 million tonnes. In the first year after the cartel was uncovered, its discovery already prevented potential losses in the three-digit million range.

The price effect of this cartel alone caused an annual loss in the three-digit million range. If the Bundeskartellamt had not uncovered and terminated this cartel, the German economy and consumers would have continued to pay these excessive prices year after year. After the cartel had ended, there was a strong upturn in price competition and the prices per tonne of cement immediately dropped by more than ten euros per tonne. This case alone clearly exemplifies the direct benefits which can be gained from effective cartel prosecution and a preventive approach which is aimed at effectively deterring illegal agreements.

Cartel agreements also cause immense monetary damage to the public sector. Just like private consumers, the Federal Government, the *Länder* and the municipalities have to pay excessive prices if cartels are not detected and terminated. This not only applies to building materials like cement and concrete, which are used in great quantities for public works. The Bundeskartellamt has, for example, also conducted proceedings against cartel agreements on the supply of road salt, fire engine bodies, hydrants and rails. Also in these areas the public sector suffers greatly from excessive cartel prices.

## 2. The benefits of effective cartel prosecution

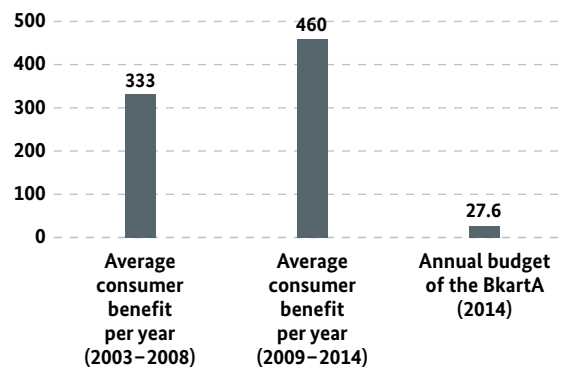
Specific cartel cases give us an idea of the extremely anti-social character of cartel agreements and the benefits of effective cartel prosecution. The real dimension of the harm caused by cartels, however, only becomes apparent on the realisation that such illegal restraints of competition are still by no means a rare occurrence. The growing number of cases and the increasing success of intensified prosecution activity, not only by the Bundeskartellamt, bear witness to this. Cartel agreements have been uncovered in a wide variety of sectors: Confectionary, coffee, sugar, beer, flour, ophthalmic lenses, chipboard panels, sausages – these are only some of the Bundeskartellamt's most significant cartel cases of recent years.

Some countries provide estimates on the extent to which their economy benefits from effective cartel prosecution. The British competition authority, for example, estimates that the average annual consumer savings for the period 2012–2015 amounted to at least GBP 65 million (approx. EUR 90 million).<sup>6</sup> This figure refers exclusively to the direct monetary benefit consumers gain from the detection and prosecution of cartels by the CMA. The additional indirect effects of cartel prosecution are not considered in the amount quoted.

### Direct benefits of at least EUR 460 million per year

And how do German consumers benefit from the Bundeskartellamt's cartel prosecution activities? To provide an answer to this question the Bundeskartellamt has estimated the economic benefit resulting from the detection of the most relevant cartels on which fines were imposed between 2009 and 2014. As the Bundeskartellamt consciously made a conservative estimate, the results indicate the minimum benefit generated for consumers by its cartel prosecution activities. The actual benefit may well have been higher. The estimated direct consumer benefit from the detection and prohibition of cartels for the entire period was at least EUR 2.75 billion. This corresponds to average annual savings of at least EUR 460 million for consumers.

#### Estimated direct consumer benefit from the prosecution of hardcore cartels by the Bundeskartellamt (in EUR million per year)\*



\*The estimated direct consumer benefit for the whole period (2009–2014) amounts to around EUR 2.75 billion.

### Assessing the direct benefits of cartel prosecution

The assessment of the direct economic benefits of the Bundeskartellamt's cartel prosecution activities for consumers was largely based on recent recommendations by the OECD<sup>7</sup>. In line with a conservative approach, the following assumptions were applied:

- On average, a cartel increases prices by at least 10 % (although empirical studies show that the price effect of illegal agreements is well above this figure).
- Without detection by the authorities, the cartel would have continued for another three years (many cartels exist over a significantly longer period).
- For the period under consideration (2009 to 2014), only the most relevant cartel cases (in terms of fines imposed) and the companies against which a fine was imposed were included in the assessment. If all companies or all cartel cases had been considered the estimate would have been much higher.
- The question of whether and to what extent other companies that did not participate in the cartel raised their prices on account of the cartel (so-called shadow effect) was not considered.

Even these (moderate) estimates show the considerable direct benefits of cartel prosecution. Yet these figures represent only a fraction of the overall benefit to the economy that can be achieved with effective cartel prosecution. Cartel prosecution also has positive indirect effects, such as, in particular, signal and deterrent effects. A study commissioned by the British competition authority in 2011 concluded that for each cartel case investigated by the authority, 28 others were deterred.<sup>8</sup> The overall positive effect of cartel prosecution is therefore significantly higher than indicated above. Even if the deterrent effect of effective cartel prosecution prevents just a single cartel in a market which is significant for the wider economy, this will bring benefits to the economy and consumers on a scale of several hundred million euros.

By comparison, the annual budget of the Bundeskartellamt is currently (in 2016) around EUR 29 million. In view of these figures it seems fair to conclude that the Bundeskartellamt's cartel prosecution activities and the fact that they have been intensified over the past years, are an effort which pays off, not least for the consumer.



# III. Uncovering cartels:

## The leniency programme – a key driver of success



There are many different sources which can lead to the detection of cartels. For example, the Bundeskartellamt has received information indicating illegal agreements from market players, some of which have used its anonymous whistle-blowing system which was launched in 2012, or from other law enforcement agencies. The Bundeskartellamt also conducts its own research or follows up on new information gathered in ongoing proceedings.

The Bundeskartellamt's leniency programme is of particular significance. Over half of all cartel proceedings are triggered by information provided by key witnesses. The Bundeskartellamt can grant cartel participants, who by their cooperation contribute to uncovering a cartel, immunity from or a reduction of fines. The leniency programme sets the conditions under which immunity from or a reduction of fines can be granted. The vast majority of competition authorities worldwide use such an investigation tool.



## 1. The leniency programme fulfils several functions

### The leniency programme helps to uncover cartels

In cases of anti-competitive agreements (in contrast to most offences such as theft, criminal damage to property or bodily injury), it is not only unclear who committed an infringement. Even the fact that an infringement has taken place is initially unknown. Illegal cartel agreements are conducted in secret. There is a high level of conspiracy: The cartel members rarely produce written documents and try to hide possible evidence or destroy evidence at an early stage. In the eyes of outside observers the result of anti-competitive agreements, for example excessive prices, could have many other causes. As a consequence, it is usually a big challenge for competition authorities to discover an infringement at all, let alone secure sufficient evidence to prove the illegal cartel agreement and impose a fine. After all, the administrative order imposing the fine needs to withstand judicial review. In order to effectively combat cartels it is often necessary to uncover cartel agreements with the help of an insider. It is therefore essential to induce cartel members to cooperate with the competition authority. This is achieved by a key witness scheme, the Bundeskartellamt's leniency programme. The incentive for cartel members to cooperate with the Bundeskartellamt and uncover a cartel is the prospect of gaining immunity from a fine or at least a substantial reduction of the fine imposed.

It might appear unjust that the application of the leniency programme can lead to an offender "escaping" punishment. It should be noted, however, that without the information provided by the key witness the cartel might not have been uncovered at all, in which case no sanctions could have been imposed and the cartel could have continued longer. Private claims for damages can also be brought against key witnesses after the authority's proceedings have been concluded, albeit with some restrictions.



### The leniency programme in brief

Whoever as the first participant in a cartel agreement uncovers a cartel of which the Bundeskartellamt has no previous knowledge, receives **immunity from a fine** ("first come, first served" principle).

Immunity from fines can also be granted at a later date, if the Bundeskartellamt is provided with decisive evidence without which the existence of a cartel could not have been proved.

The sole ringleaders and those members of a cartel who have coerced others to participate in the cartel are excluded from immunity.

All other applicants can have their **finances reduced** by a maximum of 50%, provided they cooperate with the Bundeskartellamt and thus help to uncover the infringements.

Immunity from and reduction of fines depends on the continuous and unlimited cooperation of the leniency applicant with the Bundeskartellamt throughout the proceedings.

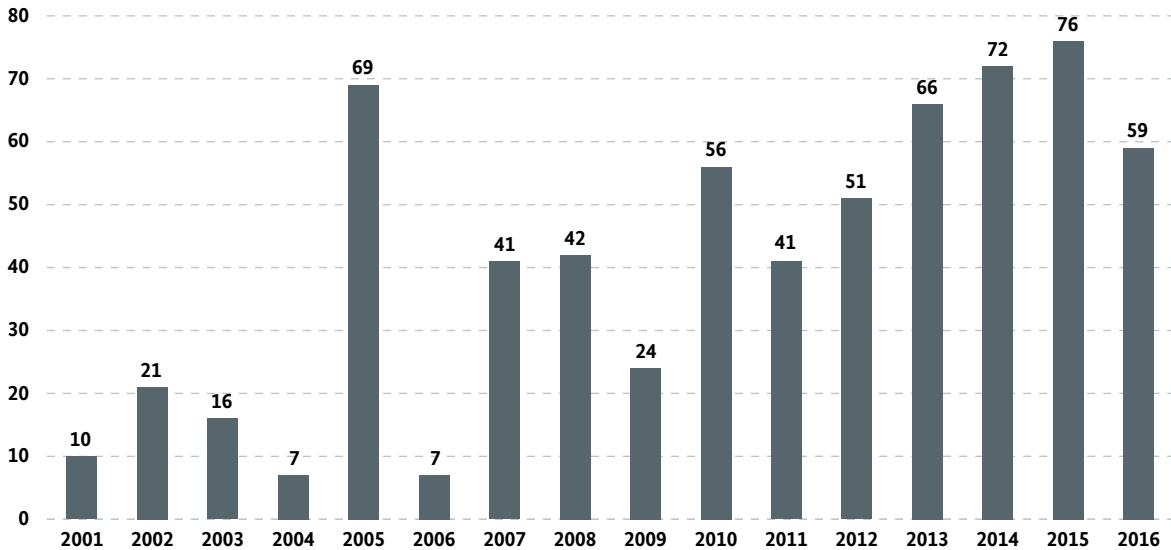
### The leniency programme serves as a deterrent

The leniency programme not only serves to improve the gathering of evidence, but also has a second objective: an increased deterrent effect before an agreement is reached. The prospect of immunity from a fine creates uncertainty among cartel members as to whether one of them might blow the whistle at some stage to secure immunity. This element of uncertainty has an effect even before an illegal agreement is reached because the companies have to reckon with the cartel agreement being uncovered and proved through a leniency application and them having to face painful sanctions and damages actions from injured parties. As a consequence, companies shy away from entering into such illegal agreements which, in turn, prevents considerable damage to the national economy.

## 2. Development and revision of the leniency programme

As one of the first competition authorities apart from the European Commission, the Bundeskartellamt decided as early as 2000 to make a special offer to cartel members willing to leave a cartel. Those uncovering an until then unknown cartel will be granted immunity from a fine. Those cooperating after the Bundeskartellamt has already become aware of the agreement will be granted a reduction of their fine; the amount of the reduction will depend on the value of their contribution to clarifying the facts of the case. The 'first come first served' principle applies: those

### Number of leniency applications received by the Bundeskartellamt 2001 – 2016



who approach the Bundeskartellamt first will be granted the largest reduction. By and by, other competition authorities in the European member states also introduced leniency programmes. For this reason, and also in view of the fact that agreements in Europe increasingly have a cross-border dimension, a model leniency programme was drafted at European level<sup>9</sup>, which was to be used as a reference by the national authorities and the European Commission.

Today almost all of the competition authorities within the European Union have introduced leniency programmes. It should be noted that there is no legal connection between identical leniency applications filed with both the European Commission and a national competition authority for the same cartel. The national authority is neither obliged to assess the application it received in the light of the application filed with the European Commission nor is it under any obligation to contact the European Commission in order to obtain information on the subject and results of the leniency proceedings initiated at the European level. Leniency applicants will thus have to ensure themselves that the applications they have filed with different authorities have the intended scope.

Based on its experiences with its first programme, and in anticipation of the European model programme, the Bundeskartellamt revised its leniency programme in 2006. Its aim was to define more clearly the provisions of the programme and to provide companies with more transparency and legal certainty. On 15 March 2006 the new leniency programme came into force.<sup>10</sup> Since then the number of applications for leniency received has remained high. The leniency programme has become a key tool for detecting cartels.



### 3. How does the leniency programme work?

The leniency programme is applicable to all participants in a cartel, natural persons as well as companies. It clearly distinguishes between immunity from and reduction of a fine. Only the first applicant will be granted immunity from a fine, later applications can only lead to reductions of a fine of up to 50%:

The **first applicant** to disclose information and evidence giving rise to the initial suspicion of a hardcore cartel will be automatically granted immunity from a fine. This provision only applies if the applicant cooperates fully and on a continuous basis with the Bundeskartellamt, and was neither the only ringleader of the cartel nor coerced others to participate in it. If the first applicant only comes forward after the Bundeskartellamt has already formed an initial suspicion, he/she will have to do more to be granted immunity, i.e. he/she will have to enable the Bundeskartellamt to prove the offence.

**All other applicants** who cannot be granted immunity can have their fines reduced by a maximum of 50%, provided they cooperate fully and continuously with the Bundeskartellamt. The amount of the reduction granted depends on the value of the cooperation and the order of precedence of the application in the leniency queue.

The leniency programme is only applicable in cases of horizontal agreements and coordination between competitors. For other infringements of competition law, for example violation of the prohibition of vertical price fixing, the cooperation provided by applicants can, however, also be taken into account as a mitigating factor in the calculation of the fines. One objective of the leniency programme is to make it as easy as possible for cartel members to cooperate with the Bundeskartellamt. An application can therefore also be filed verbally and/or in English.

The applicants' position in the leniency queue is decisive for their immunity from fines or the amount of reduction of their fines. However, cartel members often do not have

immediately available the extensive information required for a leniency application. With its 'marker' system the leniency programme offers the possibility to secure a position in the queue for a certain amount of time. Applicants declare their willingness to cooperate with the Bundeskartellamt and indicate the type and duration of the infringement, the product and geographic markets affected as well as the identity of the cartel members. In addition, a marker application must state at which other competition authorities applications have been or will be filed. The applicant then receives a confirmation of receipt and has a maximum of 8 weeks to draft a complete leniency application. If the application is filed within this period, the position in the leniency queue is safeguarded and other leniency applications filed in the meantime move down in the queue.



# IV. Cartel prosecution:

## An investigative challenge



It is very difficult to uncover and prove illegal cartels such as price fixing and customer allocation agreements. The persons involved in the agreements are usually very secretive and handle information that suggests the existence of such agreements with great care.

For the Bundeskartellamt it is always a major challenge to detect and uncover an infringement. All relevant evidence must be secured and analysed. Even where cartel agreements have been proved and an order imposing a fine issued, the authority's proceedings are not terminated: In many cases they are followed by extensive court proceedings.





## 1. The investigatory phase

### Concrete indications of cartel activity

The challenge starts by uncovering an illegal cartel. Many cartels are disclosed by cartel members themselves who make use of the Bundeskartellamt's leniency programme. In addition, the authority receives numerous tip-offs from market participants or informants about alleged agreements, sometimes via its anonymous whistle-blowing system which was launched in June 2012. Serious indications are thoroughly investigated by the Bundeskartellamt. In many cases, indications of illegal agreements in a specific market can be found in ongoing proceedings which concern a neighbouring market or in previous merger control proceedings or abuse control proceedings concerning the same market. Indications of infringements of competition law are also provided by other law enforcement agencies, e.g. via the network on bid-rigging agreements (Netzwerk Submissionsbetrug). In cases where the investigations reveal sufficient indications of a competition law infringement, the competent decision division decides on the initiation of fines proceedings.

### Example: Fire-fighting vehicles cartel

For several years manufacturers of fire-fighting vehicles carved up the market among themselves by agreeing certain shares of sales, so-called target quotas. The companies would notify their order intake to an accountant based in Switzerland who would create and update lists of all orders received by the cartel members. In regular secret meetings at Zurich airport the cartel members monitored adherence to the agreed quotas.

Illegal market sharing agreements were also concluded in the market for fire-fighting engines with turntable ladders. In order to conceal the cartel agreements, the sales managers initially communicated with each other via prepaid mobile phones and, since the 2006 football World Cup, by means of a "football code", referring to cartel meetings as "training sessions" and to rebates in the form of match results.

### No compulsory self-incrimination

Once fines proceedings have been instituted, they broadly follow the rules on criminal procedure. In particular, the persons and companies that are suspected of having participated in the illegal cartel agreements are not obliged to cooperate in the proceedings. The 'nemo tenetur' principle applies, i.e. no-one is obliged to incriminate themselves. Legal persons will only have to provide information and documents on specific turnovers. All other evidence required for proving an infringement must be obtained and secured by the Bundeskartellamt, in particular from the persons and companies concerned, by means of searching the relevant premises.

### Dawn raids – preparation and deployment of staff

The next step for the Bundeskartellamt is therefore to prepare a dawn raid on the premises of the persons and companies concerned. This is one of the major tasks of the Special Unit for Combating Cartels (SKK) whose staff consists of legal and investigative experts.

In coordination with the competent decision division, the unit

- identifies the premises to be searched,
- requests the required police assistance,
- applies to the local court for a search warrant.

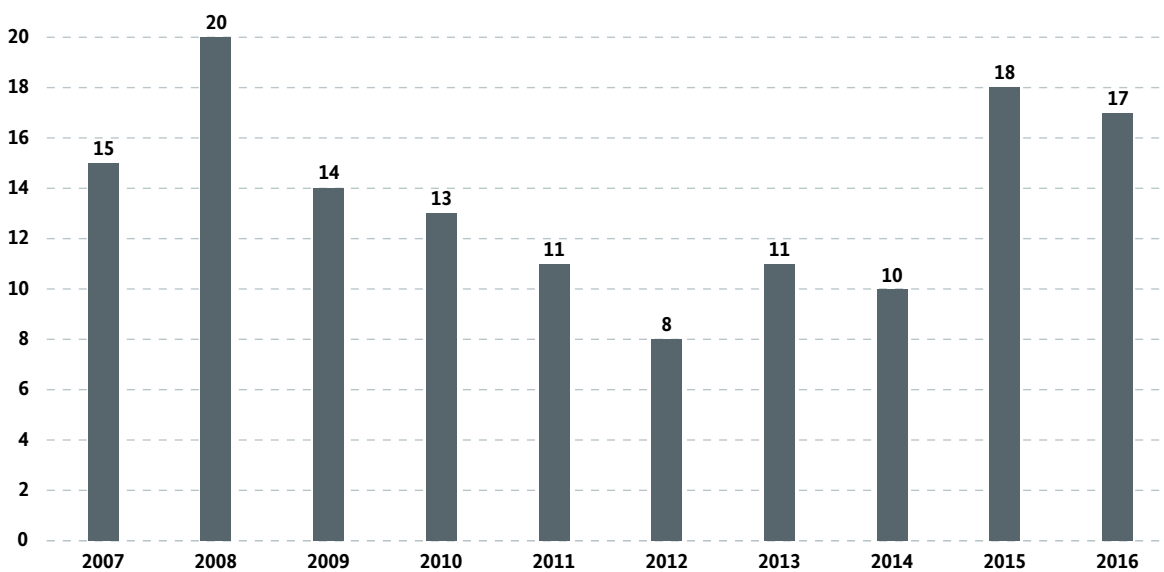
In addition, the SKK involves the Bundeskartellamt's forensic IT experts in the planning stage, because documents that indicate illegal cartel agreements are increasingly saved electronically or sent via e-mail, due to the growing significance of electronic media. Today there are hardly any major antitrust proceedings that do not involve the securing of IT data.

The SKK organises a search team of several Bundeskartellamt staff members for each premise to be searched and provides the team with all relevant information. How many sites are searched depends on the dimension of the case. The number of staff involved depends on how many locations are to be searched and how many persons to be searched are expected to be present at the respective premises.

### Dawn raids on business premises

On the date of the dawn raid the judicial search warrants are executed. Search teams consisting of Bundeskartellamt staff and police officers search for relevant evidence, in particular in the offices of individuals that are suspected of having participated in the agreements. If relevant evidence is found, this will be secured and, in cases where evidence is not voluntarily handed over, seized. Due to their significance in proving cartels, electronic data are generally also secured on the spot for further use in the proceedings. Since companies store immense amounts of data, a detailed on-site inspection is not possible without seriously impeding the company's business operations. The data are inspected after the dawn raid in the offices of the Bundeskartellamt.

### Dawn raids conducted by the Bundeskartellamt 2007 – 2016\*



\*The number of dawn raids indicated does not correspond to the number of proceedings initiated in the same year. In some proceedings several dawn raids are conducted, in others none.



### Dawn raids and evidence seized in 2016



### Evaluation of evidence secured

In order to keep interference in business operations at a minimum (also for reasons of proportionality), only a rough screening of potentially relevant data is conducted on site: The electronic data of persons whose documents could be relevant for the proceedings are copied. These data are provisionally secured and taken to the premises of the Bundeskartellamt, where they are sifted with the help of special forensic software. The Bundeskartellamt IT experts use elaborate laboratory techniques to secure and decrypt the data and display them in readable formats. This is followed by data analysis using key words and special filters, which is carried out by the case handler, sometimes with support from the SKK. Finally, the filtered data that are considered to be potentially relevant evidence are burned on a DVD. All other data are deleted. The companies are provided with a copy of the data that constitute potentially relevant evidence and are given the opportunity to release them on a voluntary basis. If they refuse to do so, a judicial order authorising the seizure of the data will be applied for.

In order to combine the electronically assisted examination of IT data with the analysis of the paper documents secured during the search, it has been the Bundeskartellamt's practice for several years to scan and digitalise paper-based documents. Although this helps to simplify and speed up the analysis, the evaluation of the data is still like working on a jigsaw puzzle as many documents are not self-explanatory and can only be understood in conjunction with other documents. Further obstacles are abbreviations or encryptions.

### Practical experience

In early 2014 the Bundeskartellamt conducted a major dawn raid at the premises of providers of port towage services on the suspicion that several providers had been involved in customer allocation agreements as well as quota and market sharing agreements for several years. The dawn raids were conducted at several premises in Germany owned by a total of six companies. A total of 21 Bundeskartellamt staff members participated in the searches, assisted by staff from the local criminal investigation departments.

The data to be analysed (electronic and paper-based evidence) included:

- approx. 667,089 documents (PDF, Word, GPX)
- approx. 164,281 tables
- approx. 8,421 presentations
- approx. 189,989 database files
- approx. 1,468,638 e-mail messages
- 235 box files (paper).

### Other investigatory powers

During the investigations, witnesses and parties affected are questioned and further investigations conducted, e.g. at other authorities. Furthermore, in many cases the companies participating in a cartel decide to cooperate with the Bundeskartellamt and assist in its investigations. Where the suspicion of a cartel agreement is confirmed, the persons and companies suspected to be involved in the agreement are informed in writing of the accusation and given the opportunity to comment. In addition, comprehensive access to the files has to be granted.



## 2. The setting of fines

If, following its investigations and hearings the competent decision division considers that a fine is required for punitive reasons and for the purpose of deterrence, an administrative order imposing a fine will be issued. Depending on the gravity of the infringement and the characteristics of the case, the fine imposed on persons participating in a cartel may amount to up to EUR 1 million. In the case of companies a fine amounting to a maximum of 10% of the worldwide group turnover will be imposed, depending on the gravity and duration of the infringement.

Although sometimes very substantial fines are imposed to deter and punish cartel activity, the economic viability of the companies is always taken into account to ensure that no company will be driven into insolvency. If the companies can prove that they have financial difficulties it is possible for them to pay by instalments or have the payment of their fine deferred.

### Corporate liability in cartel cases

- The 9th Amendment to the German Act against Restraints of Competition (German Competition Act, GWB), expected to enter into force in 2017, is intended to include a provision according to which not only a group company directly involved in a cartel infringement can be fined, but also its legal or economic successor as well as the controlling parent company.
- This is to ensure that businesses cannot avoid liability for fines by implementing restructuring measures.
- With the new provision German law will be harmonised with European law where group liability for fines already exists.

### Guidelines on the setting of fines

The individual steps of setting a fine have been described in the Bundeskartellamt's Guidelines on the setting of fines which were first published in 2007 and revised in 2013.<sup>11</sup>

#### The Bundeskartellamt's guidelines for the setting of fines of 25 June 2013

- New ruling of the Federal Court of Justice (decision of 26 February 2013, Ref. KRB 20/12) made an adjustment to the guidelines for setting fines necessary. Upper fine limit: maximum of 10% of the total turnover achieved by the company in the previous year.
- Calculations to determine the overall turnover of the company must be based on the turnover achieved by the so-called "economic unit", i.e. the company group behind the company.
- Calculation of individual fines proportional to the duration and gravity of the infringement.
- Turnover relating to the infringement as key factor in the calculation. This is the turnover achieved during the infringement period with products and services which were the subject of the agreement.
- For this reason, among others, the fine can amount to far less than 10% of the total turnover achieved by the group of companies, depending on the case in question.
- The size of the companies and their financial situation are taken into account.

### Settlement

Proceedings can also be terminated by settlement. Settlement agreements can help to conclude fines proceedings within a relatively short period of time, thus avoiding lengthy court proceedings. Cartel members have increasingly made use of this option. If a settlement is reached, the Bundeskartellamt will grant an additional reduction of a maximum of 10% of the fine, followed in most cases by only a brief administrative order imposing the fine. As a precondition the facts of the case as established by the Bundeskartellamt must be admitted in a settlement statement. In 2013 the Bundeskartellamt published a detailed information leaflet on the legal framework, the subject and procedure of settlement proceedings.<sup>12</sup>

### 3. Court proceedings

The companies and individuals concerned can appeal against the Bundeskartellamt's fining decisions. The appeal will be followed by a full judicial review of the case exercised by the Düsseldorf Higher Regional Court.

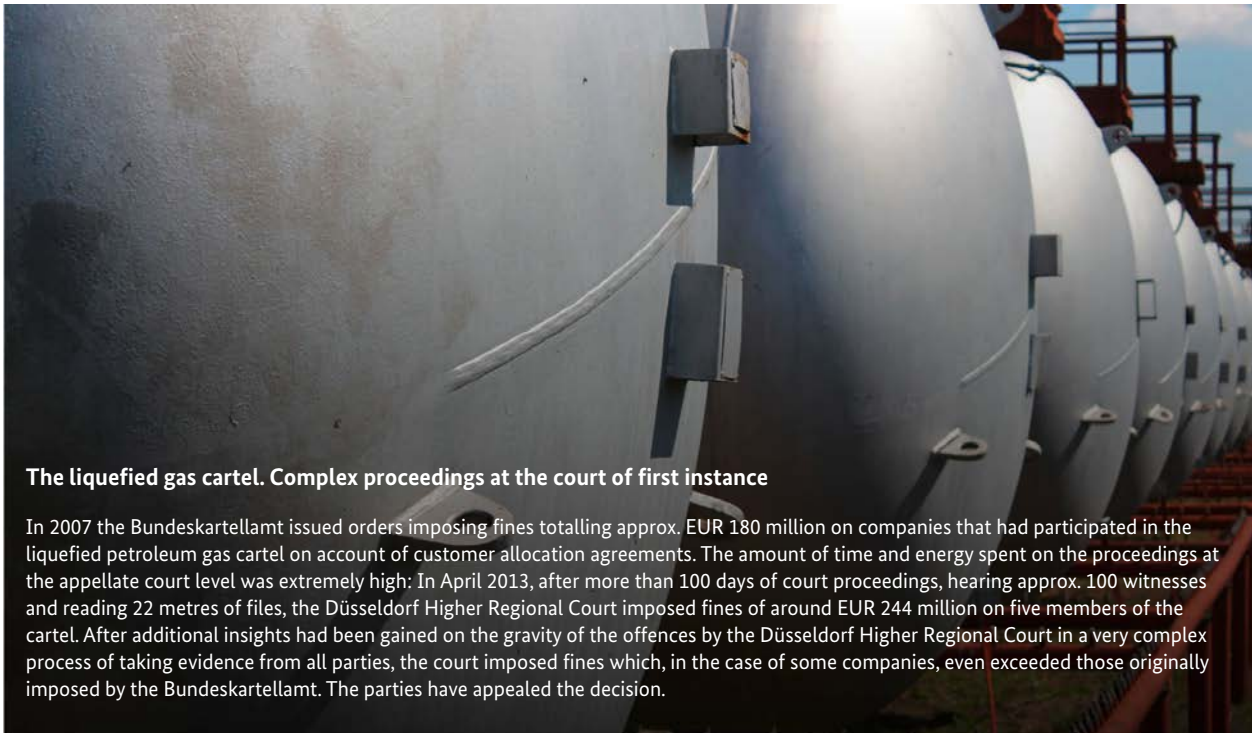
If an order imposing a fine is appealed against, the Bundeskartellamt will examine first of all whether the order will be upheld or revoked (so-called intermediate proceedings). If the Bundeskartellamt upholds its decision, the facts of the case will be examined and decided on by the court. For this purpose the Bundeskartellamt first refers the proceedings to the Düsseldorf General Prosecutor's Office which will again examine the charge. If there is reasonable suspicion of an infringement, the General Prosecutor's Office will submit the files to the Düsseldorf Higher Regional Court which has five specialised cartel divisions. With the start of the main hearing, the Bundeskartellamt's order imposing a fine assumes the function of an indictment.

In the main hearing, witnesses will again be heard, documents will be submitted and experts interviewed. The court generally orders that the cartel participants appear personally in court for the main hearing. Throughout the hearing the Bundeskartellamt is represented in court, in addition to the General Prosecutor's Office, in order to contribute its case expertise.

Based on the insights obtained from the main hearing, the Düsseldorf Higher Regional Court makes a new decision on the case and, if applicable, imposes a fine. At the end of the main hearing the Higher Regional Court will give judgment.

#### The expert group on cartel enforcement ("Expertenkreis Kartellsanktionenrecht")

- The Bundeskartellamt's fines proceedings are currently carried out in accordance with the provisions of the German Administrative Offences Act (OWiG). Under this act any appeal against a fine is dealt with in court proceedings, where the Code of Criminal Procedure (StPO) applies.
- The requirements under the StPO lead to main hearings dominated by oral proceedings which often last for months and in which witnesses are again personally questioned.
- The expert group on cartel enforcement ("Expertenkreis Kartellsanktionenrecht") was formed in 2012 to discuss alternative solutions which would allow for faster and more efficient procedures. The group comprises law professors and representatives of the Bundeskartellamt.
- An interim report published in 2015 illustrated options for structuring court hearings in a more efficient way, for example by abandoning the strict prerogative of the hearing of witnesses and attaching greater importance to the authority's files.



#### The liquefied gas cartel. Complex proceedings at the court of first instance

In 2007 the Bundeskartellamt issued orders imposing fines totalling approx. EUR 180 million on companies that had participated in the liquefied petroleum gas cartel on account of customer allocation agreements. The amount of time and energy spent on the proceedings at the appellate court level was extremely high: In April 2013, after more than 100 days of court proceedings, hearing approx. 100 witnesses and reading 22 metres of files, the Düsseldorf Higher Regional Court imposed fines of around EUR 244 million on five members of the cartel. After additional insights had been gained on the gravity of the offences by the Düsseldorf Higher Regional Court in a very complex process of taking evidence from all parties, the court imposed fines which, in the case of some companies, even exceeded those originally imposed by the Bundeskartellamt. The parties have appealed the decision.

# V. Private damages actions:

## Using opportunities, avoiding pitfalls



Anyone violating the ban on cartels is obliged to compensate the injured party for the damage incurred. Private damages actions can be a useful complement to public prosecution activities by the competition authorities. In this regard they play an important role in competition law enforcement. If, in addition to a heavy fine, cartel members have to expect actions for damages from customers or suppliers harmed by the cartel, this appreciably weakens the attractiveness of illegal and socially damaging agreements. Another important objective (and the main purpose of damages actions) is the compensation of individual damages caused by a cartel, which is achieved through private enforcement.





### Strengthening private damages actions

The German legal system already has an effective private damages regime. During the last few years its effectiveness was further strengthened through legislative action and landmark court rulings. The implementation of the EU directive governing actions for damages for infringements of competition law (Directive 2014/104/EU), which was passed in November 2014, will harmonise Europe-wide the conditions for the enforcement of private damages actions resulting from competition law infringements.

The implementation of the EU directive in Germany will make it possible for victims of cartels to demand from the cartel members or third parties that they provide them with the evidence they need to substantiate their damages action.

### Increase in private damages actions

The effectiveness of this legal framework is also proved by the fact that with the intensification of the Bundeskartellamt's prosecution activities, the number and, above all, the scope of damages actions against hardcore cartel members have considerably increased. The cases in which private damages actions are pending or have been concluded involve very different economic sectors such as e.g. cement, paper, vitamins, beer and sugar, but also marine hoses, rails, lifts and airfreight services. Today, there is hardly any fine decision by a competition authority that is not followed up by private damages actions. Of these, major proceedings which involve compensation in the high double to triple-digit million range attract public attention on a regular basis. Upon conclusion of a cartel proceeding, the

### Specifics of private damages enforcement

- In principle, the buyers or suppliers directly harmed by an anti-competitive agreement are always entitled to compensation for the damage incurred.
- Indirect buyers and suppliers are also entitled to claim damages from the cartel members if the direct buyers and suppliers have passed the excessive prices on to them.
- Buyers of the cartelised product who have purchased the product from a competitor of the cartel members can also be entitled to claim damages if the competitor has used the high cartel prices as an excuse to also raise his prices.
- A final decision made by a competition authority against a cartel has a declaratory effect in private damages proceedings. This means that a claimant is not obliged to prove the cartel law infringement anew.
- Individual damages do not have to be accurately calculated, but can be estimated by the competent court.
- The limitation period for private law damages actions is suspended for the duration of the cartel proceeding. This is a significant aspect as cartel proceedings can be quite lengthy.

parties injured by the cartel can request access to the Bundeskartellamt's fine decision to obtain information for their private damages claims. In the sugar cartel case, the Bundeskartellamt received more than 130 requests for access to the file. In the rail cartel case, 70 requests were filed with the authority (both figures as at December 2016). Even if there are only a few requests, the procedures for access to the file are time-consuming for the Bundeskartellamt and absorb substantial resources. Irrespective of the number of requests filed, those affected by the requests (in particular the parties to the proceedings, but also third parties) must be heard before access to the file is granted. Quite often, several metres of files need to be looked at to check for business secrets or personal data that have to be blacked out.

### Balance between public antitrust enforcement and private damages actions

Private damages actions help to effectively prevent cartels and are a useful complement to public cartel prosecution. It should not be forgotten, however, that private damages claims are typically follow-on claims brought after public enforcement and therefore depend on the effectiveness of public prosecution.

Private individuals and companies do not have the necessary means to detect and prosecute cartels. With its leniency programme, whistle-blowing system and investigative powers (in particular in the form of dawn raids), the competition authority alone is in a position to effectively detect and eliminate cartels.

Private individuals and companies that have suffered damages on account of a cartel law infringement therefore profit from public cartel prosecution. In fact, private damages actions would not be possible without the preliminary work of the competition authority. In addition, the declaratory effect of the authority's fine decision in private damages proceedings makes it significantly easier for injured parties to enforce their damages claims in court. They no longer have to prove the cartel law infringement.

In the case of damages claims, leniency applicants should be granted a certain amount of protection. A company or individual that fully informs the Bundeskartellamt of a cartel and its involvement therein could easily become a favourite target of damages claims by cartel victims. Of course, this does not mean that leniency applicants should be relieved of any liability for damages. But it would be equally unjustifiable to place them in a less favourable position than the other cartel members. By limiting access to files containing documents and statements of leniency applicants, the Bundeskartellamt ensures that, upon conclusion of its proceedings, leniency applicants are not in a worse legal position than their co-infringers. The EU Directive on antitrust damages actions also pays attention to the protection of leniency applicants. In future, leniency applicants will not only be exempted from fines in public cartel proceedings but will also enjoy certain advantages with regard to their liability for damages. This ensures that the leniency programme will remain attractive for cartel members.





# VI. Compliance



Intensified competition law enforcement has induced businesses to make greater compliance efforts in this area, for example by establishing special programmes and/or appointing compliance officers. The risk that cartels will be uncovered and punished with heavy fines is considerably higher today than even a few years ago. It has become increasingly unattractive for companies to violate competition law. From a business perspective, measures to avoid infringements have thus gained great importance. The Bundeskartellamt very much welcomes systematic efforts made by companies to avoid violations of competition law as this lends strong support to public antitrust enforcement.

Businesses have many options for taking preventative measures that must be adapted to the respective sector, size and corporate culture. Such measures usually include staff training, specific risk analysis, setting up warning and control systems as well as providing for internal sanctions in cases of competition law infringements. There is already a variety of excellent manuals, guidelines and templates available to businesses that provide useful guidance for the development of compliance schemes that are adapted to their specific activities and structures.<sup>13</sup> In the Bundeskartellamt's experience, however, what ultimately counts is that such measures are supported and thoroughly implemented by the management.

Effective compliance measures help companies to prevent competition law infringements. If, despite such efforts, an infringement has occurred, this can be uncovered and terminated on the basis of a compliance scheme. Compliance measures can thus contribute to avoiding or reducing fines. If it is highly likely that a company has been prevented from participating in a cartel, or if its participation has been terminated faster than it would have ended without a compliance scheme, the risk of a multi-million fine has been avoided and the company has been spared (often serious) damage to its image and liability for substantial damages claims. Investing in effective and genuine compliance programmes is therefore likely to pay off.

Furthermore, the Bundeskartellamt's leniency programme rewards effective corporate internal monitoring and detection mechanisms on the basis of which companies are enabled to make use of the programme. Early detection or uncovering of an infringement through effective corporate internal monitoring mechanisms (which can be assumed to be part of each compliance system) can thus result in full immunity from a fine, or at least in a substantial reduction of up to 50 % of the fine.

# VII. Outlook

As the figures show, the considerable intensification of cartel prosecution activities has paid off. Still, cartels remain a challenge. Their detection requires effective investigatory powers. The leniency programme will continue to play an essential role in this regard. The success it has achieved so far multiplies its deterrent effect as cartel members trust each other less and less: secret cartel agreements become more and more unstable.

Private damages actions will increasingly complement public antitrust enforcement and not only increase deterrence but also help to compensate those harmed by a cartel. However, successful damages actions are not possible without successful public antitrust enforcement.

It is important for the Bundeskartellamt to be well positioned and equipped for this task. It will continue and strengthen its efforts in this area. This is the only way to ensure that cartels, which cause substantial damage to consumers and national economies year after year, are broken up and the creation of new cartels is prevented.

# References

- 1) <http://www.monopolkommission.de/index.php/en/reports/special-reports/special-report-72>
- 2) Cf. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1/1 of 4 January 2003.
- 3) Boyer, Marcel and Kotchoni, Rachidi (2015): How Much Do Cartels Overcharge?, CIRANO Scientific Series, p. 28 f.
- 4) Connor, John M., Global Price Fixing, Berlin 2008, p. 338.
- 5) Laitenberger, Ulrich and Smuda, Florian (2015): Estimating Consumer Damages in Cartel Cases, Journal of Competition Law & Economics 11 (4), 955–973.
- 6) Competition & Markets Authority, CMA impact assessment, CMA47, p. 6; report available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447017/CMA\\_impact\\_assessment\\_2014-15.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447017/CMA_impact_assessment_2014-15.pdf)
- 7) OECD, Guide for helping competition authorities assess the expected impact of their activities, April 2014 (available at: [www.oecd.org/competition/guide-impact-assessment-competition-activities.htm](http://www.oecd.org/competition/guide-impact-assessment-competition-activities.htm))
- 8) Office of Fair Trading, Positive Impact 13/14, OFT1532, p. 11.
- 9) The ECN Leniency Programme is available here: [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf)
- 10) Notice No 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme – of 7 March 2006; available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?\\_\\_blob=publicationFile&v=5](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5)
- 11) Available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3)
- 12) The information leaflet “Settlement procedure used by the Bundeskartellamt in fine proceedings” in its current version of 2 February 2016 is available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet\\_Settlement\\_procedure.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet_Settlement_procedure.pdf?__blob=publicationFile&v=3)
- 13) See also the Bundeskartellamt’s website [www.bundeskartellamt.de](http://www.bundeskartellamt.de). A brochure published by the European Commission on relevant elements of effective compliance schemes is available here: [http://ec.europa.eu/competition/antitrust/compliance/index\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/index_en.html)



**Bundeskartellamt**  
Kaiser-Friedrich-Straße 16  
53113 Bonn

[www.bundeskartellamt.de](http://www.bundeskartellamt.de)