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Working Party No. 3 on Co-operation and Enforcement

PLEA BARGAINING / SETTLEMENT OF CARTEL CASES:

-- The Federal Republic of Germany --

17 October 2006

This note is submitted by the Federal Republic of Germany, Bundeskartellamt, to WP3 FOR DISCUSSION at its forthcoming meeting to be held on 17 October 2006.

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PLEA BARGAINING / SETTLEMENT OF CARTEL CASES:

THE FEDERAL REPUBLIC OF GERMANY

1. In Germany, plea bargaining, i.e. the termination of proceedings by settlement agreement, plays a predominant role in criminal proceedings. With the exception of collusive tendering, competition law violations are not prosecuted as criminal offences in Germany but merely constitute administrative offences that are prosecuted and fined by the Bundeskartellamt. Consequently, in cartel cases a settlement by agreement would have to be reached between the Bundeskartellamt and the cartel members.

1. Legal Framework

1.1 Plea bargaining in criminal proceedings

2. So far, there is no statutory provision covering plea bargaining in Germany, neither with regard to criminal proceedings nor to Bundeskartellamt proceedings.

3. However, there have been three decisions by the highest courts in Germany on plea bargaining that have stated the legal limits of settlement agreements in criminal proceedings.

4. The first of these landmark decisions was taken by the Federal Constitutional Court in 1987.[1] In its decision the Federal Constitutional Court clarified that the principle of fair criminal proceedings under the rule of law did not prohibit an understanding between the court and the parties to the proceedings on the state of the proceedings and the expected outcome. However, this should not be understood in such a way that legal principles such as the judge's duty to investigate the matter and the principles of legal subsumption and penalty determination are open to discussion between the parties to the proceedings. Rather, under the principle of lawfulness there is a general obligation to investigate the material truth of the case and to base a decision on whether or not the defendant is guilty and on the respective legal consequences on the results of this investigation. For example, the judge is not allowed to accept a confession by the defendant which the latter has made because he has been promised or at least informed about the possibility of a mitigation of sentence, if evidence would require the judge to investigate further. Nor may the defendant be coerced into confessing by deceit or by a promise of advantages not provided for by law.

5. The second key decision on plea bargaining was taken in 1997.[2] In this decision the Federal Court of Justice held that despite the admissibility of a settlement agreement, a court is not allowed to ask for a waiver of the right to appeal in exchange for a possible mitigation of sentence. Under the general procedural rules a defendant may waive his right to appeal at the earliest after the pronouncement of the judgement. Consequently, the court may by no means ask the defendant to give up his possibility to have the correctness of the judgement confirmed by way of appeal before the proceedings have been concluded

1 . Federal Constitutional Court NJW 1987, 2662 f.

2 . Federal Court of Justice NJW 1998, 86 ff.

and the judgement has been brought to his knowledge. To conclude, before the judgement has been pronounced it is inadmissible to reach an agreement with the defendant under which he waives his right to appeal. In addition, the Federal Court of Justice clarified in its decision that under the principle of public trial, the court and the parties to the proceedings may only reach an understanding during the public trial. While this does not exclude the possibility of talks between the parties in pre-trial or off-trial meetings to clarify their respective positions and the question of whether the parties are willing to negotiate, the court has to disclose the relevant subject matters and results of these discussions in the trial.

6. In 2005 in the third and last decision on the issue[3] the Federal Court of Justice largely confirmed the principles explained above. However, the decision has a significance of its own because in it the Federal Court of Justice warns that with its case law on plea bargaining it is approaching the limits of judicial development of the law and therefore urges the German legislator to adopt legislation to this effect.

7. On 18 May 2006 the Federal Ministry of Justice submitted a ministerial draft on plea bargaining in criminal proceedings which is to be also applicable to administrative offence proceedings. As regards plea bargaining in criminal proceedings, according to the draft the court may indicate the possibility of a maximum or minimum punishment depending, normally, on whether or not the defendant pleads guilty. However, the draft does not grant the administrative authority (i.e. the competition authority) comparable competences in pre-trial proceedings.

1.2 Plea bargaining in administrative fine proceedings before the Bundeskartellamt

8. The principles explained above can also largely be applied to fine proceedings before the Bundeskartellamt. In administrative fine proceedings before the Bundeskartellamt the principles under the rule of law, which in general allow for a settlement agreement but prohibit a waiver of the right to appeal, are also applicable.

9. However, there are also differences. For example, since proceedings before the Bundeskartellamt are administrative proceedings they are not subject to the principle of public trial. But the main difference between proceedings before the Bundeskartellamt and court proceedings lies in the fact that the Bundeskartellamt as the investigating authority also imposes the fine, whereas in criminal proceedings the investigation is conducted by the public prosecutor's office while the court decides on the punishment. Consequently, the Bundeskartellamt fulfils a double function in its proceedings, that of the investigatory authority and that of the authority imposing the punishment. This has the advantage that the Bundeskartellamt as the investigating authority is at the same time able to ensure the outcome of the proceedings and to find a settlement that is applicable to the whole sector. In the latter case the Bundeskartellamt has to consider the principle of transparent negotiations to ensure equal treatment of all parties concerned. Otherwise it would run the risk of being accused of arbitrariness.

2. Practical experience and interests involved

2.1 The Bundeskartellamt's practice and experience

10. In the past, especially during the 1990s, in a vast number of cases the Bundeskartellamt negotiated and imposed so-called "amicable fine decisions" with individuals and companies involved. In the more recent past this has only occurred sporadically. Instead, in more or less all cases appeals have been filed.

11. The „amicable fine decisions" imposed in the past usually contained an agreement under which the individuals and companies involved confessed to the offence and "in return" were offered a reduction of

3. Federal Court of Justice NJW 2005, 1440 ff.

the fine and sometimes also more favourable payment conditions (e.g. payment by instalments). In some cases proceedings against certain parties were even discontinued or limited to certain aspects of the offence.

12. The preconditions for such a settlement agreement were:

a) Credibility of counsel (i.e. serious negotiations rather than a mere attempt to estimate the amount of the fine that is to be expected and to gain time);

b) Strong evidence regarding the offence and, where a calculation of additional proceeds is required, the additional proceeds (irrespective of whether or not a confession was made);

c) Equal treatment of all individuals and companies involved as well as transparency (in particular where a settlement was sought that is applicable to the whole sector);

d) Where applicable a willingness on part of the Bundeskartellamt to refrain from fining members of the board of directors and the CEOs of the companies concerned;

e) The possibility on the part of the Bundeskartellamt to impose a penalty where a party filed an appeal and thus violated the settlement agreement.

13. The main impediments to a settlement agreement were:

a) The threat of claims for damages;

b) The companies' possibility to gain extra interest. Until the 7th Amendment to the ARC no interests were charged on fines which meant that lengthy proceedings were beneficial to the companies concerned;

c) A high probability that after an appeal to the Higher Regional Court the individuals and companies involved would be fined with a lower fine.

14. Generally, the initial advantage of a settlement agreement was that proceedings before the Bundeskartellamt were abbreviated. This made it possible for the Bundeskartellamt to issue a shortened notice that contained only the most relevant details of the facts of the case and of its legal assessment. Sometimes the written charges could even be shortened to the bare essentials. In addition, since appeals were not filed, there were no intermediate proceedings, no trial before the Higher Regional Court and no possible proceedings on appeals on points of law before the Federal Court of Justice.

2.2 The interests of the parties concerned and the competition authority

15. According to the Bundeskartellamt's experience the interests involved in settlement agreements in administrative fine proceedings can be summarized as follows:

a) Contribution by the party concerned / the competition authority's interests

16. The Bundeskartellamt is primarily interested in obtaining a confession from the party concerned so as to be able to reduce resource expenses in connection with its investigations. A confession by a party concerned can reduce the Bundeskartellamt's investigative expenses, particularly if it is made at a relatively early stage of the investigatory proceedings, if the facts of the case are very complex, and if the infringement has not already been proved to the satisfaction of the authority on the basis of evidence already available. Although an order to impose a fine may not be exclusively based on the evidence

provided by a confession without any examination of the facts of the case, a confession generally facilitates the authority's work and reduces the length of its investigatory proceedings. The authority can base its order to impose a fine on the confession which reduces the work involved in drafting the order.

17. A waiver of the right to appeal, in which the Bundeskartellamt is very much interested, is unfortunately ineffective under the case-law. If the party concerned does not file an appeal against the order imposing the fine, the Bundeskartellamt will not have to spend any further resources on subsequent proceedings before the Düsseldorf Higher Regional Court and, if applicable, the Federal Court of Justice. Due to the complex nature of many fine proceedings in antitrust cases, the financial and personnel resources required for court proceedings can be substantial. If the party concerned does not file an appeal against the order imposing the fine, this has the further advantage, from the Bundeskartellamt's point of view, that he can testify before court against other parties concerned, i.e. participants in the same cartel. The unappealability of the order imposing the fine involves a so-called *ne bis in idem.* This means that after a decision has become final, the party concerned can no longer be prosecuted for an administrative offence but at the most for a criminal offence. If a criminal offence does not come into consideration, he cannot incriminate himself by testifying in proceedings against other parties concerned. He therefore has no right to withhold information. The unappealability of an order imposing a fine can therefore raise the chances of the conviction of further parties concerned, especially in those cases in which there is no detailed confession incriminating them.

18. Even if the reduced expense in resources is of priority for the Bundeskartellamt in plea bargaining, the decision to enter into negotiations is also based on weighing-up the risks and benefits. Other factors also to be considered in this decision are e.g. the sincerity of the negotiations. It should be ruled out that the motivation behind the negotiations is only an attempt to find out the general level of the fine or to gain time. Finally, the Bundeskartellamt might be interested in clarifying certain issues of law before court for reasons of legal certainty and thus is not interested in plea bargaining negotiations.

b) Consideration by the authority / interests of the party concerned

19. The party concerned will often hope in the first place for the least possible fine and possibly favourable conditions for paying this (in instalments). He may also be interested in the authority focusing on certain elements of the offence in its investigations and not following up other facts. Reducing or limiting the fine is as a rule also admissible from a legal perspective because the so-called post-offence conduct as a sign of understanding, regret and willingness to improve reduces the charges and justifies a milder fine.

20. In hardcore cartel cases, however, it has to be considered that the leniency programme's effectiveness must not be impaired by such a reduction of fines. A distinction has to be made between a confession on the one hand and cooperation under the leniency programme on the other. Although the leniency programme does not require the parties concerned to make a confession, it clearly exceeds the scope of a (mere) confession, in particular due to the extensive duties of cooperation required. Confession and cooperation under the leniency programme can thus be combined. As a confession is clearly less valuable it must result in a clearly lesser reduction of the fine.

21. Another aspect could be the hope of protecting individuals directly involved such as members of the board or managers in the wording of the order imposing the fine, particularly with regard to supervisory measures related to the criterion of reliability of the manager. A termination of proceedings against the individuals for reasons of opportunity can as a rule only be considered if there are further reasons which weigh in favour of terminating the proceedings.

22. The speeding up of proceedings as a result of a settlement agreement may be either convenient for the party concerned, or inconvenient in view of the threat of claims for damages (see also para. **3**.).

3. Plea agreements and courts

23. For the same reasons that apply to the Bundeskartellamt (proceedings that are very time-consuming and costly, complex, lengthy and resource intensive) the Higher Regional Court is also greatly interested in a settlement agreement and the withdrawal of appeals by the parties concerned. For this purpose it is the Higher Regional Court's practice in some cases to separate proceedings against one or several parties concerned, make a decision on these and suggest to the remaining parties to reach a settlement agreement on this basis.

24. In administrative fine proceedings a confirmation of the settlement agreement by the court is not provided for and not required because the parties concerned can appeal against the order imposing a fine at any time. The risk of the Bundeskartellamt having excessive discretionary powers can be excluded as a waiver of the right to appeal is not admissible and the parties concerned can take legal action against the Bundeskartellamt's order at any time.

4. Settlements and Private Litigation

25. According to the Bundeskartellamt's experience the threat of possible claims for damages is the most important obstacle for cartel members to enter into negotiations for a settlement agreement. The basis of each settlement agreement is a confession by the party concerned. If the party concerned has thus admitted to having taken part in the offence, it is to be expected that he will be the first to face possible claims for damages. Moreover there is the risk of further sanctions, e.g. exclusion from public tendering procedures.

26. Restitution to the persons affected by the cartel should not be a mandatory precondition for a settlement agreement. However, this positive overall solution should be supported by the competition authority. Under its new guidelines on the setting of fines, published in September 2006, the Bundeskartellamt takes into account the compensation for third parties' financial losses as an extenuating circumstance in its setting of fines.