



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/WP3/WD(2010)6
For Official Use**

Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND
ADMINISTRATIVE PROCEEDINGS**

-- Germany --

16 February 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03277635

1. Introduction

1. Procedural fairness is a fundamental constitutional principle in the German legal system and therefore plays a key role in German administrative law and in the German competition law regime. Consequently, specific rules that deal with procedural fairness have also been included in the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter “ARC”). This submission seeks to give an overview of the principle of procedural fairness in German competition law. In doing so, it will focus on transparency issues in administrative enforcement proceedings. For this purpose, it will in a first part treat the publication of the Bundeskartellamt’s enforcement decisions (2.), before it turns to procedural fairness in the enforcement process (3.).

2. Publication of the Bundeskartellamt’s enforcement decisions

2. The German ARC contains several rules that deal with the publication of the Bundeskartellamt’s enforcement decisions. While some of these rules cover transparency issues in a more general way, others relate to specific forms of enforcement proceedings (e.g., merger and non-merger proceedings). Against this background, the following section starts with an overview of general issues (a.), before turning to specific rules regarding ongoing investigations (b. and c.). As different rules apply, it will differentiate between merger and non-merger investigations.

2.1 General issues

3. Section 53 (1) sentence 1 ARC states that the Bundeskartellamt shall publish a biennial report on its activities and on the situation and development in its field of responsibilities. This Activity Report is published in the official series of the German Bundestag (*Bundestagsdrucksache*) and can also be downloaded from the official website of the Bundeskartellamt.¹ It provides the specialized as well as the general public with valuable information on the Bundeskartellamt’s enforcement practice, as it contains information not only on cases in which a formal decision was issued (and published) but also on cases in which no formal decision was made.²

4. Moreover, Section 53 (1) sentence 2 ARC states that the Bundeskartellamt shall regularly publish its administrative principles.³ In this context, the Bundeskartellamt has in the past published its “Principles of Interpretation of Market Dominance in German Merger Control” (*Auslegungsgrundsätze zur Prüfung von Marktbeherrschung in der deutschen Fusionskontrolle*)⁴ and its Leniency Programme, to name but two. These principles provide transparency and predictability in the Bundeskartellamt’s enforcement

¹ See <http://www.bundeskartellamt.de/wDeutsch/publikationen/Taetigkeitsbericht.php>. A short English version is available at <http://www.bundeskartellamt.de/wEnglisch/Publications/Report.php>.

² See – from a lawyer’s perspective –, e.g., *Bechtold*, *GWB*, 5th edition, 2008, § 53, para. 2.

³ Section 81 (7) ARC further states that the Bundeskartellamt may publish general administrative principles on the calculation of fines. In this context, the Bundeskartellamt has published the „Notice No. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the German Act against Restraints of Competition (GWB) against undertakings and associations of undertakings“ (English text available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf).

⁴ Please note that these Principles are currently under review and have been taken from the Bundeskartellamt’s website.

process, as they generally commit the relevant Decision Divisions to comply.⁵ They are also published on the Bundeskartellamt's website.

5. In addition to publishing the Activity Report and developing administrative principles, the Bundeskartellamt may – based on general statutory law – also conduct an independent information policy and thereby further increase the transparency of its enforcement practice. For example, the President of the Bundeskartellamt regularly participates in national and international conferences, workshops and other forums. Speeches held by the President – some of them in English – can be downloaded from the Bundeskartellamt's website.⁶ Furthermore, the Bundeskartellamt frequently issues press releases on its enforcement practice.⁷ The press policy of the Bundeskartellamt aims to satisfy the public's legitimate interest in being informed, while at the same time respecting the justified interests of confidentiality (esp. business secrets) of parties.

6. Transparency for third parties and the general public is further enhanced by the provisions of the Freedom of Information Act (*Informationsfreiheitsgesetz*), which gives every citizen the right to request information about proceedings of public authorities, including the Bundeskartellamt's proceedings. The right to information is subject to restrictions, however, among them interests of confidentiality.

2.2 *Merger investigations*

7. The degree of transparency in merger investigations depends on whether an investigation can be completed within the initial one-month review period (so-called "first phase") or whether it requires an in-depth review (so-called "main examination proceedings" (*Hauptprüfverfahren*)). Whereas there are no statutory transparency requirements with regard to the first kind of investigations, Section 43 (1) ARC sets forth certain requirements for the latter kind.

8. In particular, Section 43 (1) ARC states that the initiation of the main examination proceedings must be published without undue delay in either the paper or the electronic version of the Federal Gazette. Furthermore, Section 43 (3) stipulates that the announcement must – among information on the legal nature of the merger – include the name and the place of business of the relevant undertakings as well as the type of business they are active in. The publication in the Federal Gazette primarily serves to inform third parties that may – under certain circumstances – upon their request be admitted to the proceedings (*Beiladung*).⁸

9. Other information that has to be announced in the Federal Gazette includes the issuance of clearances or prohibition decisions in the course of main examination proceedings, Section 43 (2) no. 1 ARC. However, the announcement of these decisions need not necessarily include their full text, but only their operative provisions (*Tenor*).⁹ Further information that has to be announced includes: Ministerial

⁵ See, e.g., *Klaue*, in: Immenga/Mestmäcker, *GWB*, 4th edition, 2007, § 53, para. 4. This, of course, does not influence the independence of the Bundeskartellamt's Decision Divisions, as the administrative principles are published only with their consent.

⁶ See <http://www.bundeskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/Vortrag.php>.

⁷ Press releases can be downloaded from the Bundeskartellamt's website at <http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/PresseW3DnavidW2617.php>. Most of them are also available in English (see <http://www.bundeskartellamt.de/wEnglisch/News/press/press10W3DnavidW2612.php>).

⁸ See the official rationale for Section 43 ARC, BT-Drucks. 15/3640, page 59.

⁹ See *Ruppelt*, in: Langen/Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Band 1, 10th edition, 2006, § 43, para. 5.

authorizations, their refusal and modification; the withdrawal or revocation (*Rücknahme oder Widerruf*) of clearances or of ministerial authorizations, and the dissolution of a concentration (Section 43 (2) ARC numbers 2-4).

10. Although not required by law, the Bundeskartellamt has at its own discretion decided to publish certain additional information.¹⁰ This policy of informing the public has gained considerable significance, and the Bundeskartellamt's publications on its internet site have become a key source of information on the authority's proceedings for the general and the specialized public. An important case in point are the merger notifications that are posted on the Bundeskartellamt's website.¹¹ The announcement includes the date the notification is received, the names of the relevant undertakings as well as information on the possibly relevant markets. Furthermore, the Bundeskartellamt publishes – shortly after the relevant decisions have been taken¹² – the full text of clearances and of prohibition decisions on its website, as long as these decisions have been taken during the main examination proceedings.¹³ Of course, the published decisions are cleared of any business secrets they may contain.

11. In contrast, clearance decisions that are taken within the initial one-month review period are not posted on the Bundeskartellamt's website. These decisions – that account for roughly 95 percent of all merger control decisions¹⁴ – may, however, contain valuable information, e.g. on market definition and substantive analysis. Therefore, the Bundeskartellamt has decided to make information on selected cases publicly available in a timely fashion, namely by posting case summaries (*Fallberichterstattung*) on its website.¹⁵ Most of these summaries are available in English.¹⁶

2.3 *Non-merger investigations*

12. Transparency in non-merger investigations (cartels and single firm conduct) is governed by Section 62 ARC which states that certain decisions shall be published in either the paper or the electronic version of the Federal Gazette. Section 62 ARC is limited to decisions that are taken in administrative proceedings (*Verwaltungsverfahren*) and does not include decisions that are taken in administrative *fine* proceedings (*Bußgeldverfahren*).¹⁷ It primarily extends to injunctive relief and to commitment decisions

¹⁰ On the discretionary nature of these publications see *Ruppelt* (footnote 9), para. 5.

¹¹ See <http://www.bundeskartellamt.de/wDeutsch/zusammenschluesse/zusammenschluesse.php>.

¹² The decisions are published, even if the parties decide to challenge them in court. For a decision that has been published recently see, e.g. <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B9-84-09.pdf?navid=49>.

¹³ See <http://www.bundeskartellamt.de/wDeutsch/Fusionskontrolle/fusionskontrolleW3DnavidW2645.php>.

¹⁴ In 2008, 1.588 out of a total of 1.675 merger cases were cleared in the initial one-month period (see *Bundeskartellamt, Tätigkeitsbericht 2007/2008 (Report on its Activities)*, page 178).

¹⁵ Please note that some information on these cases will also be contained in the Bundeskartellamt's Tätigkeitsbericht (*Activity Report*) mentioned in Section 2. above; for case summaries (German) see: <http://www.bundeskartellamt.de/wDeutsch/Fusionskontrolle/fusionskontrolleW3DnavidW2645.php>.

¹⁶ See http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivKurzberFus2009/KurzberichteFusion_eW3DnavidW2639.php.

¹⁷ See, e.g., *Becker*, in: Loewenheim/Meessen/Riesenkampff, *Kartellrecht*, 2nd edition, 2009, § 62, para. 3 and *Kiecker*, in: Langen/Bunte (footnote 9), § 62.

(*Abstellungsverfügungen und Verpflichtungszusagen*). Again, the announcement of these decisions need not necessarily include the full text of the decision, solely the operative provisions (*Tenor*).¹⁸

13. Although not required by law, the Bundeskartellamt has – as in the merger area – at its own discretion decided to publish certain additional information.¹⁹ In administrative proceedings, the Bundeskartellamt regularly posts the relevant decisions on its website.²⁰ Of course, the published decisions are cleared of any business secrets they may contain. By contrast, decisions that are taken in administrative *fine* proceedings are generally not posted on the website. Nevertheless, should the Bundeskartellamt decide to publish an individual decision, the names of the relevant undertakings and persons – as well as business secrets – are deleted.²¹

14. As decisions issued in administrative fine proceedings are generally not published, the Bundeskartellamt has – in an effort to increase the transparency and predictability of its enforcement practice – decided to post case summaries of selected cases on its website in a timely fashion.²² Most summaries are available in English.²³ These summaries generally contain background information on the facts of the case, on the substantive analysis and possibly also on the level of the fines imposed. The names of the relevant undertakings are usually revealed in the case summary, whereas the names of individual persons are typically not mentioned.

15. Should a non-merger investigation be closed without an enforcement decision being taken, the Bundeskartellamt may issue a formal non-infringement decision in accordance with Section 32c ARC (*kein Anlass zum Tätigwerden*) or mention the case in its biennial report. Further, it may decide at its own discretion on whether to post a case summary on its website. A case summary may also be posted should an investigation be concluded by a settlement.²⁴

3. Procedural fairness in the enforcement process

16. The central provision regarding procedural fairness in German competition law enforcement is Section 56 ARC that governs the procedure for all types of investigations, i.e. for merger investigations as

¹⁸ See, e.g. *Becker* (footnote 17) and *Kiecker* (footnote 17).

¹⁹ On the discretionary nature of these publications see *Kiecker* (footnote 17).

²⁰ For a recent decision see, e.g., <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell08/B2-100-08.pdf?navid=43> and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell08/B10-21-08_32b_RheinEnergie.pdf?navid=43 (both available in German only).

²¹ For decisions in administrative fine proceedings that have been posted on the website see, e.g., <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-69-08.pdf?navid=37> and <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-123-08.pdf?navid=37> (both available in German only).

²² For a recent case summary concerning administrative fine proceedings see, e.g., <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B11-018-08-Fallbeschreibung.pdf> (available in German only).

²³ See, e.g., <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B1-200-06-E.pdf?navid=30>.

²⁴ For a case summary describing a case in which a settlement was concluded see, e.g., <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B11-018-08-Fallbeschreibung.pdf> (available in German only).

well as for non-merger investigations (cartels and single-firm conduct).²⁵ Section 56 (1) ARC stipulates that the Bundeskartellamt shall grant any party with the right to be heard (*Stellungnahmerecht*). According to Section 56 (3) sentence 1 ARC the Bundeskartellamt may, acting ex officio or upon the request of a party, hold a public hearing.

17. The right to be heard does, as a necessary precondition, include the right to be informed about details of the ongoing investigation.²⁶ The parties to the investigation must in particular be informed about the relevant facts of the case, but the information must also include the economic theories and legal doctrines relevant to the allegations.²⁷ Consequently, the Bundeskartellamt will, before issuing an (adverse) decision, regularly inform the parties to the respective investigation by submitting a so-called “statement of objections” (“*Abmahnschreiben*”).

18. This statement will usually contain the anticipated reasons for the decision and set a certain time frame for comments. The particular circumstances of the information provided by the Bundeskartellamt – as well as the length of the time period granted for comments – will generally depend upon the complexity as well as the timing of the case at hand. Of course, it must always be ensured that the extent of the information provided and the length of the time frame granted do not preclude the notifying parties from submitting substantial comments. In addition to submitting a written statement of objections, the Bundeskartellamt and the notifying parties will usually also be engaged in an ongoing dialogue.

19. The right to be heard is closely linked to the right of access to the files of the Bundeskartellamt (*Akteneinsichtsrecht*) as the subjects of enforcement proceedings can only substantially respond to the Bundeskartellamt’s enforcement concerns if they have full knowledge of the case. The right of access to the file is stipulated by Section 29 of the German Administrative Procedures Act (*Verwaltungsverfahrensgesetz*) which states in Section 29 (1) that any agency must grant the parties of a particular investigation access to a file, as long as knowledge of the file at hand is required to assert and defend the parties’ legal interests. However, the right of access to the file does not include access to third parties’ business secrets (*Geschäftsgeheimnisse*). The Bundeskartellamt has to delete these from the file before access is granted.

20. As far as the format for the response to the statement of objections is concerned, the ARC does not make any particular specifications. Consequently, parties to an investigation may not only submit written responses, but may also choose to respond orally (in hearings or informal meetings), by telephone or not respond at all. For the purpose of responding to and discussing the case, they may also request a hearing – either public or non-public – or an informal meeting, a request with which the Bundeskartellamt is not legally obliged to comply. Rather, the decision on whether to hold a hearing (or an informal discussion) or not falls within the full discretionary powers of the Bundeskartellamt.²⁸ This decision will generally depend upon the complexity of the case at hand.

²⁵ Additional rules apply for administrative fine proceedings (see Sec. 81 ARC, the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*) and the Code of Criminal Procedure (*Strafprozessordnung*)). These rules contain specific rules on transparency to be granted to third parties concerned which go beyond the transparency to be granted in administrative proceedings (however, vis-à-vis third parties, transparency in administrative fine proceedings is more restricted to protect the interests of the parties that are, potentially, subject to a fine). Please note that these rules are not covered by this submission.

²⁶ See e.g., *Schmidt/Bach*, in: Immenga/Mestmäcker (footnote 5), § 56, para. 5 and *Kiecker*, in: Langen/Bunte (footnote 9), § 56, para. 1.

²⁷ See e.g., *Kiecker* (footnote 26), para. 1, *Becker* (footnote 17), § 56, para. 1 and *Bechtold* (footnote 2), § 56, para. 2.

²⁸ See, e.g. *Becker* (footnote 17), para. 19 and *Schmidt/Bach* (footnote 26), § 56, para. 15.

21. In practice, the Bundeskartellamt will – at least in complex cases – usually decide to hold non-public or informal meetings. These meetings are usually attended by the decisional body (consisting of the Chairman of the relevant Decision Division as well as two Rapporteurs) which represents the Bundeskartellamt. Case Officers may also be present. In contrast, the leadership of the Bundeskartellamt (President, Vice President) will – in order to preserve the independence of the Decision Divisions – not hold talks on ongoing cases with the parties concerned. As mentioned above, the Bundeskartellamt and the notifying parties will usually also be engaged in an ongoing dialogue.

22. The timing of a particular investigation greatly depends on whether it is a merger or a non-merger investigation. Whereas merger investigations by statutory law follow a strict time schedule, this does not hold true for non-merger proceedings. For merger proceedings, an initial one-month review period applies, Section 40 (1) sentence 1 ARC. In complex cases, the Bundeskartellamt may decide to open a four-month in-depth investigation (main examination proceedings), Section 40 (2) sentence 2 ARC. This four-month review period may be extended if the notifying parties have given their consent, Section 40 (2) sentence 3 no. 1 ARC.

4. Conclusion

23. As described at the outset, procedural fairness plays a crucial role in the German competition law regime. Consequently, several rules that deal with procedural fairness have been integrated into the German ARC. As far as transparency issues in administrative enforcement proceedings are concerned, the most important ones are Sections 43, 53 (1), 56 (1) and 62 ARC. Moreover, on its own initiative and by using its discretionary powers, the Bundeskartellamt has initiated certain measures to further increase transparency in enforcement proceedings. In particular, it has recently begun to publish case summaries on investigations in which no formal decisions are published. These measures will help to further enhance the overall legitimacy and predictability of the German competition law regime.