

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

**ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL
COURTS AND COMPETITION AGENCIES**

-- Note by the Delegation of Germany --

This note is submitted by the delegation of Germany to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 February 2011.

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ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

-- Note by Germany --

1. Introduction

1. The quantification of harm and damages plays an increasing role in the enforcement of competition law. This applies both to fine procedures by the competition authorities and to civil damages claims. Focusing on cartel agreements, this submission seeks to provide an overview of the German law and practice regarding the quantification of harm in public (II.) and private (III.) enforcement.

2. Public enforcement of national antitrust regulations in Germany

2.1 *The role of the quantification of harm in public enforcement*

2. The *Bundeskartellamt* is competent to investigate and decide on collusive behaviour and to impose fines.¹ Fined parties may appeal the decision of the *Bundeskartellamt* to the Higher Regional Court of Düsseldorf which reviews the agency's decisions in their entirety. Decisions of the Higher Regional Court can be appealed to the Federal Court of Justice on points of law only. The quantification of harm has traditionally played a significant role in the practice of the competition authority and the courts in determining the level of fines.

2.1.1 *Current legal basis*

3. The legal basis for fining cartels was revised in 2005 with the 7th Amendment² of the ARC. According to the current Section 81 (4) ARC, the fines imposed must not exceed ten percent of the worldwide overall turnover of the fined company in the previous business year. The fining rules of German law correspond to European practice.³ Furthermore, the 7th Amendment aimed at attenuating the complex problem of estimating the additional earnings gained from a cartel agreement.⁴

4. With the 7th Amendment of the ARC the enforcement process of the *Bundeskartellamt* was further improved. The ARC now contains determining factors for calculating fines in a given case. According to Section 81 (4) ARC, the calculation of fines must be determined by the duration and severity

¹ Section 82 of the Act Against Restraints of Competition (ARC); for English version of the ARC see: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf

² Seventh Law Amending the Act Against Restraints of Competition, of 7 July 2005, Federal Gazette of 12 July 2005, p. 1954.

³ EG Council Regulation (EC) No 1/2003, Article 23.

⁴ *Beschlussempfehlung des Ausschusses für Wirtschaft zum Entwurf eines 7. Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* – Drucks 15/3640,- published in „Sonderveröffentlichung Wirtschaft und Wettbewerb, GWB Gesetz gegen Wettbewerbsbeschränkungen i.d.F. der 7. GWB-Novelle“, p. 72, 145.

of the infringement. A major indication of the severity is the volume of trade that has been affected by the infringement.⁵ The overall harm to competition may be estimated and used as one criterion in the fine-setting process but it is not a priority in and of itself. Other determining factors may include the position of the fined party within the cartel, cooperation with the antitrust authority, intent or negligence, etc., as laid down in the *Bundeskartellamt's* Guidelines on the Setting of Fines⁶ and in Section 17 of the German Administrative Offences Act.

5. Under the provisions of the 7th Amendment, additional earnings are, at least *a priori*, not a key factor in setting the fine. This is not to say that the additional earnings are of no relevance in the fining process. An estimate of the additional earnings can be helpful in determining the severity of the cartel. Thus, additional earnings are an indicator of the overall harm to competition.

6. With the 7th Amendment the legislator aimed at convergence with the European rules under which the fines imposed by the European Commission have a clearly punitive character. In addition to the imposition of a fine, the *Bundeskartellamt* may also skim off economic benefits achieved from the cartel.⁷ Here, the competition authority has the choice either to skim off benefits in the same proceeding in which fines are imposed or to initiate separate proceedings. Whichever method is chosen, the setting of the fine, as a punitive measure, has to be seen separately from the question of determining specific economic benefits.⁸ Economic benefits may be estimated, though only with regard to their amount, not with regard to the question whether an economic benefit has been gained at all.⁹

2.1.2 Legal basis prior to the 7th ARC Amendment

7. Only infringements committed or terminated after 1 July 2005 fall under the new regulation of the 7th Amendment. For all cases pending, the previous regulations are still of significance.¹⁰ For these cases it needs to be determined, in each case, which regulation is applicable and to what extent.¹¹

8. Before the 7th Amendment of the ARC entered into force, fines in cartel cases could amount to three times the additional earnings generated by the collusive behaviour. It is established law that the term “additional earnings” refers to the additional overall proceeds generated by the competition infringement. Thus, the term is not to be equated with additional profits.¹² The Federal Court of Justice defined the

⁵ *Raum* in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 81 para. 161.

⁶ Notice no. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the Act against Restraints of Competition (ARC) against undertakings and associations of undertakings of 15 September 2006, available under http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf; see also EU Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02).

⁷ *Raum* in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 81 para. 170.

⁸ *Raum* in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 81 para. 170.

⁹ *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler) Id. 11; *Bundesgerichtshof* (Federal Court of Justice), decision of 26 June 2005 - KRB 2/05, para. 18.

¹⁰ See below for a description of the legislation prior to the 7th ARC amendment.

¹¹ To mention one example, only for one company of the Cement Cartel the Higher Regional Court of Düsseldorf applied the new regulation, because that resulted in a milder fine in the given case.

¹² *Barth/Bongard*, Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung, WuW 2009, 30 (32).

additional earnings as the difference between actual earnings based on the collusive behavior and the earnings that would have been generated by the undertaking without the infringement,¹³ without deduction of tax and cost.¹⁴ Consequently, when applying the relevant fining provision, additional earnings derived from the cartel had to be quantified as part of the fining process. The amount of the fines imposed had to exceed the additional earnings, thereby skimming off the economic benefits derived from the offence within the process of setting the fine. The amount of the additional earnings could be estimated; in this respect the provisions have not changed.

2.2 *Assessment of effects and methods applied to estimate harm and damages*

9. The most important negative effects of collusive behaviour, from a customer's perspective, are inflated prices and the resulting reduction in quantities bought (quantity effect). While the price effect applies to actual customers, the quantity effect applies to both actual and potential customers. Both groups would have made purchases, or greater purchases, at a lower, competitive price.

10. There is a range of possible methods¹⁵ to estimate the additional earnings generated by a cartel agreement. In the practice of the *Bundeskartellamt*, the most relevant and preferable is the comparative market approach.¹⁶ The comparative market may differ from the market under review in terms of time, region or product. This approach needs to address the challenge of adequately delineating the market used for comparison. In addition, potential structural differences (i.e. differences affecting the level of prices) between the market affected by the cartel and the market(s) used for comparison must be properly taken into account. Another important method, though in general only the second-best and suitable if an adequate comparative market cannot be identified, is a cost-based approach. One of the difficulties of this method is the problem of determining relevant (i.e. competitive) cost estimates and deciding on a suitable profit margin ("mark-up").

2.3 *Economic expertise in the proceedings of the Bundeskartellamt and courts*

11. When it comes to the estimation of damages, in complicated cases there may arise the need, especially in court proceedings, for outside economic expertise. Courts may have to rely on quite complex econometric analyses and in this regard may want to call upon the assistance of (court-appointed) economic experts.

12. Economic analysis in antitrust cases needs to establish practically relevant results within a limited timeframe. Therefore a trade-off between accuracy and feasibility may be unavoidable.¹⁷ The empirical work needs to be conducted in a given timeframe and with limited resources, within the framework of procedural law. The results have to meet the requirements of procedural standards of proof.¹⁸

¹³ *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler) para. 10.

¹⁴ *Bundesgerichtshof* (Federal Court of Justice), decision of 24 April 1991- KRB 5/90 (Bußgeldbemessung).

¹⁵ *Barth/Bongard*, Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung, WuW 2009, 30 (32).

¹⁶ *Barth/Bongard*, Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung, WuW 2009, 30 (32).

¹⁷ *Friederiszick/Röller*, Quantification of Harm in damages actions for antitrust infringements: Insight from German cartel cases, *Journal of Competition Law & Economic*, 6 (3), 595-618 (608).

¹⁸ *Bundesgerichtshof* (Federal Court), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), para. 12.

13. In its decision on the *Paper Wholesaler Cartel*¹⁹ the Federal Court of Justice stated that the courts have broad discretion with regard to the quantification of additional earnings. The courts are free to choose the methodology best suited to approximate reality, leading to an estimate which is conclusive and yields economically plausible results.²⁰ However, the Federal Court of Justice also stated that the comparative market approach, i.e. comparing cartelised prices to prices in other, unaffected markets (in terms of region or time), has to be the preferred method to quantify additional earnings. A different approach should only be used if an estimate based on a comparison with competitive markets is not feasible.²¹

14. In the *Cement Cartel Case*²² the *Bundeskartellamt* fined the six largest companies involved a total of €660 million. It found that the cartel lasted from 1997 to 2001 and covered certain regions within Germany. To estimate the additional earnings the *time-based comparative market approach* was used. Quantity effects were not considered due to the very low short-term elasticity. In the subsequent appeal of several companies to the Higher Regional Court of Düsseldorf, the court confirmed the infringement, extending the duration of the cartel to the period of 1991 to 2001 and the geographic scope to all regions in Germany.

15. The Court appointed an economic expert to support it in its estimation of the additional earnings. In a first step, different methodologies were discussed in court hearings, followed by the issue of the expert mandate. Ultimately, an approach for estimating the harm was chosen where the prices charged during the cartel period were compared to the post-cartel prices (comparative market on a time basis). The expert appointed by the Court used the methodology of a time-series regression analysis to estimate the effect of the cartel on the level of market prices. Besides establishing the cartel infringement by using the dummy-variable technique, the time-series analysis incorporated different cost-related (e.g. labor-cost, cost of energy) as well as structural (e.g. HHI) exogenous variables. In addition the expert also considered a “price war period” following the detection and breakdown of the cartel was not a suitable benchmark for estimating the overcharge. All involved parties had the opportunity to pose questions to the expert and comment on the details of the quantitative analysis as well as its results. The *Bundeskartellamt* thoroughly analysed and replicated the quantitative analysis, discussed several technical deficiencies and also proposed refinements to the expert’s estimate. In its decision the Court largely followed the expert’s estimate and made, *in dubio pro reo*, an additional “tentative deduction” of 25% of the estimated additional earnings. The Court considered quantity effects in its estimation of the additional earnings,²³ which the *Bundeskartellamt* had refrained from doing. Following the expert’s estimate it came to different conclusions than the *Bundeskartellamt* concerning the overcharge. Ultimately the court imposed fines totalling €330 million. The decision has been appealed, the final decision by the Federal Court of Justice is still pending.

16. The consideration of quantity effects in estimating additional earnings poses some conceptual and methodological problems. The debate on what should be the adequate approach continues. An important

¹⁹ *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), available in German only at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2007-6-19&nr=41404&pos=9&anz=26>

²⁰ *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), para. 12.

²¹ *Bundesgerichtshof* (Federal Court of Justice), decision of 19 June 2007 – KRB 12/07 (Paper Wholesaler), para. 19.

²² See press release by the *Bundeskartellamt* of 14 April, 2003, available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_04_14.php

²³ *Oberlandesgericht* (Higher Regional Court) *Düsseldorf*, June 26, 2009 – VI-2a Kart 2-6/08, para. 525; *Bongard*, *Mehrerlöse*, *Mengeneffekte* und *volkswirtschaftliche Kartellschäden*, *WuW* 2010, 762-772.

argument against considering quantity effects is that fines might lose their deterrent character if the quantity effect leads to the reduction of fines.²⁴

3. Civil Damages Actions

17. Private enforcement of competition law plays an important role in Germany.²⁵ In the past, the focus was mostly on cease-and-desist proceedings in abuse of dominance cases. However, private damages claims have gained ground in recent years. In this respect, a number of legal provisions introduced with the 7th Amendment of the ARC in 2005 are of relevance, most notably: competitors as well as customers are entitled to claim damages; the decision of the competition authority on the matter of a case establishes facts that are to be taken as given in any ensuing damages proceedings; the judge, in a private damages action, has the power to estimate the actual harm caused by the cartel.

18. Those who have standing to claim damages due to an antitrust violation are competitors or other market participants impaired by the infringement²⁶. This also encompasses end-consumers.²⁷ The related question of how to deal with the alleged passing-on of overcharges is not addressed in the statutes. The question of whether indirect purchasers should be able to claim damages if overcharges were passed on to them has not yet been settled by the Federal Court of Justice. So far, there have been two decisions from higher regional courts, one granting the indirect purchaser the right to sue²⁸ and the other denying it.²⁹

19. Class action suits are generally not provided for in German law. Although, under certain circumstances, some associations may seek an injunction on behalf of their members, this does not apply to damages claims. A way of compensating the lack of class action suits is a concept according to which a company purchases damage claims from a multitude of companies damaged by the same cartel infringement, and then sues the cartel members for the damages.³⁰ The first cases in which this concept was applied are currently still pending.

20. The overall assessment of the harm resulting from an infringement usually does not indicate the damages suffered by an individual plaintiff. The specific damage incurred by a plaintiff in civil damages proceedings is determined by comparing the actual financial situation of the plaintiff with the hypothetical financial situation that would have existed in the absence of the infringement.³¹ In cartel cases, the damage incurred by the plaintiff is usually the difference between the (higher) cartel price and the price that would have prevailed in a competitive market. Further damage may consist in potential gains that could not be realised. This refers to the scenario that in a competitive market, the customer would have purchased and

²⁴ *Bongard*, Mehrerlöse, Mengeneffekte und volkswirtschaftliche Kartellschäden, WuW 2010, 762-772.

²⁵ It can be estimated that competition law was an issue in private law claims in more than 1300 cases in 2004 – 2009 (based on notifications by civil courts to the Bundeskartellamt).

²⁶ Section 33 (1) ARC.

²⁷ *Bornkamm* in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 33 para. 21.

²⁸ *Kammergericht Berlin* (Higher Regional Court of Berlin), decision of 1st October 2009 – 2 U 10/03 Kart.

²⁹ *Oberlandesgericht (Higher Regional Court) Karlsruhe*, decision of 11th June 2010 – 6 U 118/05 Kart.

³⁰ In a pending case the Belgian Company Cartel Damage Claims (CDC) sued Dyckerhoff, Lafarge and the former Readymix Group for the damage caused by the German cement cartel. CDC had purchased the claims from about 30 harmed companies. The case was first filed in August 2005 at the Regional Court of Düsseldorf – 34 O (Kart) 147/05. The German Federal Court of Justice confirmed in the meantime that the damage action of CDC and this concept is admissible – decision of 17 April 2009 – KZR 42/08.

³¹ Section 249 Civil Code.

resold more goods than he actually did due to the cartelised price. In determining the damage the court may estimate the concrete sum based on certain indicators, in particular the additional earnings the cartel participant has obtained (Section 33 (3) ARC, Section 287 Code of Civil Procedure).³²

21. The quantification of harm that may have been established in a previous administrative fine proceeding is of indicative relevance for the civil proceeding. Decisions reached in proceedings by enforcement agencies are even binding with regard to the determination of the infringement itself. This is true not only for decisions by the *Bundeskartellamt* but also by other competition authorities, particularly the European Commission or the authority of another member state.³³

22. Private damages actions have become increasingly important in recent years. These days, according to information available to the *Bundeskartellamt*, most enforcement authority decisions against hard-core cartels are followed by private damages proceedings.

³² *Bornkamm* in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edition, Section 33 para. 99.

³³ Section 33 (4) ARC.