

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

**Working Party No. 3 on Co-operation and Enforcement**

**INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE RELATIONSHIP BETWEEN  
COMPETITION AUTHORITIES AND COURTS, AND UPDATE ON DEVELOPMENTS IN  
PROCEDURAL FAIRNESS AND TRANSPARENCY**

-- Germany --

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*The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 October 2011.*

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## **1. Introduction**

1. This submission seeks to start with a brief overview of the substantive competition provisions in the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter “ARC”)<sup>1</sup> (2.) and the different procedural rules that apply to public and private competition cases in Germany (3.) to provide a basis for an introduction into the relationship between the German competition authorities and the courts (4.). Finally, the submission will give an update on recent developments relating to issues of procedural fairness and transparency in the enforcement process (5.).

## **2. Substantive provisions of German competition law**

2. The German Competition Authority (hereinafter “*Bundeskartellamt*”) is competent for enforcing the ban on cartels (Section 1 and 2 ARC) and exercising abuse control (Section 19 and 20 ARC), if the anti-competitive effects of such practices extend beyond the territory of one federal *Land*.<sup>2</sup> Furthermore, the *Bundeskartellamt* has the exclusive competence for implementing merger control under the ARC in Germany (Section 35 to 43 ARC). Finally, if the anticompetitive agreements or abusive practices are likely to affect trade between the EU Member States, the *Bundeskartellamt* also applies the European competition law provisions (Articles 101 and 102 of the Treaty on the Functioning of the European Union – TFEU).

## **3. Procedural rules for public and private competition cases**

### **3.1. Merger control proceedings**

3. Merger control proceedings (Section 37 to 43 ARC) by the *Bundeskartellamt* are conducted as administrative proceedings in accordance with the special procedural rules in Section 54 to 62 ARC complemented by the more general rules of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*; hereinafter “VwVfG”<sup>3</sup>). The VwVfG and the ARC together form the framework for the *Bundeskartellamt*’s proceedings. Under the provisions of the ARC, the *Bundeskartellamt* has extensive investigatory powers in order to obtain comprehensive information on the market conditions (Section 57-59 ARC). At the end of merger control proceedings, the *Bundeskartellamt* may prohibit a merger project, clear it or clear it subject to conditions (Section 40 ARC).

### **3.2. Non-merger administrative proceedings**

4. Anticompetitive agreements (Section 1 and 2 ARC; Article 101 TFEU) as well as the abuse of a dominant or powerful position (Sections 19, 20 ARC, Article 102 TFEU) are prohibited by law. Violations of these provisions constitute administrative offences in Germany and may be fined if they have been committed intentionally or negligently (Section 81 ARC). Depending on the seriousness of the infringement, the complexity of the legal assessment and the likelihood of proving intention or negligence, the *Bundeskartellamt* as the competent authority has the discretion to decide on how to handle the case procedurally. It may either choose to initiate administrative offence proceedings (see c) below) or it may merely initiate administrative proceedings.

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<sup>1</sup> An English version of the ARC is available at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911\\_GWB\\_7\\_Novelle\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf).

<sup>2</sup> Violations of the ban on cartels or abusive practices, the effects of which are limited to one *Land*, are prosecuted by the competition authority of the respective *Land*.

<sup>3</sup> Available in German only at <http://www.gesetze-im-internet.de/vwvfg/index.html>.

5. Administrative proceedings with regard to anticompetitive agreements and abuses are governed by the special procedural rules as described in Section 54 to 62 ARC together with the more general rules of the VwVfG. According to Section 54 ARC the Bundeskartellamt can initiate such proceedings either on its own accord or following a complaint. The formal steps following the initiation of proceedings are modelled on judicial procedure. The ARC and the VwVfG therefore stipulate for the parties to the proceedings<sup>4</sup> the right to be heard<sup>5</sup> and further provisions ensuring fair proceedings.

6. The normal legal outcome of administrative proceedings is a cease and desist order, by which the respective anti-competitive behaviour has to be abandoned (Section 32 ARC). In excessive pricing cases the provision can also be invoked to impose payback orders. The *Bundeskartellamt* furthermore has the possibility to order interim measures in urgent cases if there is a danger of a serious, irreparable damage to competition (Section 32b ARC). The measure must however be limited and may not exceed one year. The *Bundeskartellamt* also has the possibility to issue commitment orders (Section 32b ARC). This enables companies to avoid a decision by the Bundeskartellamt by committing themselves to adopt a certain conduct.

### 3.3. *Administrative offence proceedings*

7. In cases of clear-cut and serious infringements, the *Bundeskartellamt* can also decide to initiate administrative offence proceedings. The *Bundeskartellamt* opens such proceedings in particular in cases of cartel agreements which lead to particularly severe distortions of competition. Such agreements will often take the form of agreements between competitors on prices, quantities, geographic areas or customer groups (“hard-core cartels”).

8. In administrative offences proceedings not only the provisions of the ARC apply, but also the provisions of the Federal Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*; hereinafter “OWiG”).<sup>6</sup> The OWiG contains the general provisions for most enforcement activities of the German Federal Government or *Länder* (federal states) against violations of public law (not including criminal law).

9. The legal outcome of administrative offence proceedings is the imposition of a fine by formal decision. Criminal sanctions, and in particular prison sentences cannot be imposed. The sole exception to this general rule has been provided for bid-rigging offences. These constitute criminal offences under German criminal law and are prosecuted by the public prosecutor. If the undertakings concerned agree, cases may also end by settlement.

### 3.4. *Private enforcement proceedings*

10. Private enforcement claims play an important role in Germany, especially in abuse and discrimination cases but also in cases of anticompetitive agreements. They are dealt with by specialized civil courts (Section 87 and 89 ARC). In cases where a party claims damages after the *Bundeskartellamt* or another European competition authority has issued a final decision that an infringement has occurred, such finding is binding on the court (Section 33 (4) ARC).

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<sup>4</sup> See Section 54 subsection 2 ARC for parties to the proceedings.

<sup>5</sup> See Section 56 ARC which provides that the competition authority shall give the parties an opportunity to comment.

<sup>6</sup> See Section 81 ARC and Section 46 of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*).

#### **4. Relationship between the competition authorities and the courts**

11. The relationship between the *Bundeskartellamt* and the courts differs according to the nature of the preceding proceedings. Because of the complex legal and economic nature of competition law, the competent courts are not administrative but specialised civil courts divisions.

##### **4.1. Administrative proceedings**

12. The relationship between the *Bundeskartellamt* and the respective courts is governed by the provisions of the ARC.

13. In the case of merger control proceedings, the companies can appeal against a decision by the *Bundeskartellamt* before the Düsseldorf Higher Regional Court (Section 63 ARC) where the *Bundeskartellamt* is party to the proceedings (Section 67 (1) (2) ARC). The appeal may be lodged on a factual and legal basis, providing the companies with a full factual and legal review of the *Bundeskartellamt's* decision (Section 70 ARC). The court is competent to fully investigate the facts itself and may even request the *Bundeskartellamt* to provide or collect further data to analyse the case in more detail or with a different focus.

14. There are four chambers specialized in competition matters at the Düsseldorf Higher Regional Court. Appeals only on points of law against decisions of the Düsseldorf Higher Regional Court can be lodged with the Federal Court of Justice in Karlsruhe (Section 74 and 75).

##### **4.2. Administrative offence proceedings**

15. In the case of administrative offence proceedings, the situation differs. If an order of the *Bundeskartellamt* imposing a fine in an antitrust or cartel case is appealed against, the *Bundeskartellamt* first examines whether the order must be changed or revoked (intermediate proceedings).

16. If the *Bundeskartellamt* decides not to change its decision and the complaints are substantiated, the *Bundeskartellamt's* decisions will again be subject to full review with regard to the factual and legal basis. This review, in the first place, is conducted by the Düsseldorf public prosecutor's office. After examination by this office the proceedings are referred to the Düsseldorf Higher Regional Court. At all hearings the *Bundeskartellamt* is represented in court, in addition to the public prosecutor's office. Thereby, the *Bundeskartellamt* is able to contribute its case knowledge to the proceedings and to support the public prosecutor's office. It is, however, not party to the proceedings before the court. The procedural law in these appeal cases is complemented by the German Code of Criminal Procedure (*Strafprozessordnung*; hereinafter "StPO"). The procedural rights and safeguards for the companies are thus more or less equivalent to criminal law.

##### **4.3. Private enforcement**

17. Finally, the *Bundeskartellamt* also has the opportunity to be involved in private enforcement proceedings. It is informed of such private antitrust proceedings by the respective courts. According to Section 90 ARC and Article 15 Council Regulation (EC) No 1/2003, the courts are required to give this information. The *Bundeskartellamt* can participate as *amicus curiae* in the civil proceedings resulting from private enforcement actions. This allows the *Bundeskartellamt* to help to safeguard a coherent development in the public and private enforcement of competition law. The *Bundeskartellamt* is to be informed of all private enforcement actions arising before courts and upon request can be sent all briefs, records, orders and decisions. Members of staff have a right to take an active part in the court proceedings by way of written or oral statements. In private antitrust proceedings the parties have the possibility to appeal the case in points of fact and law and finally to the Federal Court of Justice on points of law.

18. The *Bundeskartellamt* participates in every proceeding before the Federal Court of Justice by way of oral statement and before the courts of lower instance by way of written statements in leading cases, in cases linked to ongoing cases of the *Bundeskartellamt* and upon the request of the courts.

#### **4.4. *Non-case related interaction between competition authorities and courts***

19. The *Bundeskartellamt* participates in discussions with the judges of the specialized competition chambers on various occasions, such as national and international conferences. An example of such an occasion is the discussion in the framework of the Meeting of the Working Group on Competition Law. This Group meets once a year to discuss fundamental issues of competition policy.<sup>7</sup>

20. Furthermore, the *Bundeskartellamt* and inter alia members of the Düsseldorf Higher Regional Court and the Federal Court of Justice are members of a working group which discusses current issues and problems in the application of the ARC. These discussions contributed, amongst others, to the white paper of the competent Federal Ministry of Economics and Technology for the envisaged 8<sup>th</sup> amendment to the ARC.

21. The *Bundeskartellamt* may also decide to communicate its views on aspects of law and its own procedures by issuing guidance papers.<sup>8</sup>

### **5. Update on issues of procedural fairness in the enforcement process**

#### **5.1. *White paper on the 8<sup>th</sup> amendment to the ARC***

22. Procedural fairness and transparency are fundamental constitutional principles in the German legal system and therefore play a key role in German administrative law and in the German competition law regime.<sup>9</sup> As mentioned above and described in more detail in our previous submissions, these principles are safeguarded by the complementing rules of the ARC and for administrative offence proceedings the OWiG and the StPO. In view of higher fines in competition law cases in recent years, the courts have been more and more stringent in applying the provisions on procedural fairness and transparency.

23. In practice, these principles may however lead to a considerable burden not only on the courts but also on the undertakings concerned, the competition authority and the public prosecutor's office. A single case may occupy one specialized chamber of the Düsseldorf Higher Regional Court for several months. The result of ensuring the principle of oral presentation and public hearing involves that the court is particularly reluctant to base its decision on written witness depositions and instead has the witnesses heard again in the proceedings.

<sup>7</sup> Another example is the International Conference on Competition organized by the *Bundeskartellamt* biennially. The most recent International Conference on Competition was organized in April 2011 and was dedicated to the topic "A spotlight on cartel prosecution". It was attended by representatives from academia and national and international courts. For more information see [http://www.ikk2011.de/Seiten/index\\_e.html](http://www.ikk2011.de/Seiten/index_e.html).

<sup>8</sup> See for example the guidelines on the setting of fines that have been posted on the website at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf).

<sup>9</sup> See Germany's contributions to the February 2010 Roundtable on "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings", OECD Doc. [DAF/COMP/WP3/WD\(2010\)6](#) and to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. [DAF/COMP/WP3/WD\(2010\)35](#).

24. In more recent cases both the Courts and the *Bundeskartellamt* were further slowed down in the proceedings by the fact that complex and extensive data files could not be introduced into the procedure in digital form, but that the procedural rules required the *Bundeskartellamt* to print out the files, which does not necessarily mean they can be read and understood in printed form. Furthermore, the principle of oral presentations may lead to the reading out of extensive documents and thus prolong the proceedings. Proceedings may then easily continue for a vast number of days.

25. To improve the effectiveness of administrative offence proceedings in view of the economic complexity of these cases, the white paper on the 8<sup>th</sup> amendment to the ARC proposes a number of changes to the procedure. These include in particular: legal entities should be obliged to provide specific data relevant to the amount of the fine, in particular information regarding the entity's economic capacity or its conceivable affiliation to an economic unit consisting of several legal entities; furthermore, loopholes in the current legislation that provide undertakings with opportunities to circumvent a fine by means of restructuring should be closed.

### 5.1. Access to leniency applications (*Pfleiderer case*)

26. On 14 June 2011, the European Court of Justice (ECJ) issued a preliminary ruling in the case *Pfleiderer vs. Bundeskartellamt*.<sup>10</sup> The preliminary question was asked by the Local Court of Bonn and related to an administrative fines procedure at the *Bundeskartellamt*.<sup>11</sup>

27. On 21 January 2008, the *Bundeskartellamt* had imposed fines pursuant to national law and inter alia Article 81 EC (now Article 101 TFEU) on European manufacturers of decor paper. A customer of these decor paper manufacturers applied for access to the file under the German Code of Criminal Procedure in order to prepare a claim for damages. He, in particular, requested access to the leniency applications and all documents the leniency applicants had handed over to the *Bundeskartellamt*. The *Bundeskartellamt* denied access to these leniency documents in view of the potential negative effects on future leniency applications. The customer appealed against this decision to the Local Court of Bonn and the Court decided to stay the proceedings and to refer the question to the ECJ of whether Articles 11 and 12 of Regulation 1/2003 exclude access to leniency documents.

28. The ECJ outlined the importance of leniency programmes for the effective enforcement of competition law and acknowledged the possibility that extensive access to file can endanger the efficiency of leniency programmes as such as well as the efficiency of the implementation of EU competition law. On the other hand, the ECJ points out that it is settled case law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition and that this right cannot be rendered practically impossible or excessively difficult by national rules.

29. The ECJ has ruled that it is for the national courts, on the basis of their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected by EU law (right to claim damages vs. effectiveness of enforcement of competition law). The local Court of Bonn has yet to adopt a final decision on this case.

<sup>10</sup> The decision is available at <http://curia.europa.eu/juris/cgi-bin/gettext.pl?where=&lang=en&num=79889385C19090360&doc=T&ouvert=T&seance=ARRET>

<sup>11</sup> See Germany's contributions to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. [DAF/COMP/WP3/WD\(2010\)35](#).