

International **Comparative** Legal Guides



Cartels & Leniency **2021**

A practical cross-border insight into cartels & leniency

14th Edition

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Mathias Stöcker

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for cartel enforcement in Germany is the Act against Restrictions of Competition (ARC). Section 1 ARC corresponds to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and broadly prohibits agreements or concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition. The substantive law – which applies both to companies and individuals – can be enforced by the *Bundeskartellamt* (Federal Cartel Office, FCO) on the basis of two different proceedings. Infringements which are addressed merely by a cease and desist order are dealt with in administrative proceedings which are governed by the ARC. In cases where the authority intends to impose fines, the proceedings are governed by the Code on Administrative Offences (*Ordnungswidrigkeitengesetz*) and the Code on Criminal Procedure (*Strafprozessordnung*).

1.2 What are the specific substantive provisions for the cartel prohibition?

Practices that are prohibited under Section 1 ARC include (i) horizontal agreements (such as fixing prices or terms and conditions, allocating markets (territory, customers or quotas), bid rigging or exchanging sensitive market data (e.g. prices)), and (ii) vertical agreements (such as resale price maintenance).

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced primarily by the FCO in Bonn. The authority has nine independent divisions that are responsible for different industry sectors and product markets. Additionally, the FCO has three divisions which focus exclusively on the enforcement of the cartel prohibition as well as a special unit for combating cartels (SKK), which provides technical assistance to the special cartel divisions. In 2012, the FCO established an anonymous online whistleblowing system accessible through the FCO's website (<https://www.bundeskartellamt.de>) which allows the FCO to receive anonymous tip-offs of cartel law infringements.

Infringements with regional effects are dealt with by the State Cartel Offices (*Landeskartellbehörden*). However, the majority of

cartel cases are dealt with by the FCO, which is in charge of both the investigation of potential violations and the enforcement of the cartel prohibition.

In cases of bid rigging, the state prosecutor can open proceedings against individuals on the basis of the German Criminal Code (*Strafgesetzbuch*).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Where the FCO has indications of anti-competitive conduct through third-party complaints, a leniency application by one of the companies involved, or an anonymous whistle-blower, it normally gathers further information and evidence regarding the infringement. To collect this further information and evidence, the FCO has a broad range of investigative powers, which are described in more detail below.

Once the FCO has completed its fact-finding, it will issue a statement of objections setting out the underlying facts of the case, the alleged infringements and the FCO's preliminary legal assessment. Around the same time, those subject to the FCO's investigation will be given access to the FCO's file and will have the opportunity to comment on the allegations.

The final procedural step is the adoption of a formal decision by the FCO. In administrative proceedings, a non-confidential version of the decision will be published on the FCO's website in certain cases, even with an English language translation (<https://www.bundeskartellamt.de>). Fining decisions adopted under the Code on Administrative Offences are not normally published. However, the FCO will generally publish press releases and case reports which will describe the cases in some detail.

1.5 Are there any sector-specific offences or exemptions?

Section 1 ARC does not apply to certain restrictions of competition in the agricultural sector or in the water supply sector, or to resale price maintenance in the magazine and newspaper sector.

Moreover, there is an exemption from Section 1 ARC for publishing cooperations between newspaper or magazine publishers to the extent that such agreements enable the parties to strengthen their economic base for intermedia competition. Since the exemption only relates to Section 1 ARC but not to Article 101(1) TFEU, it does not apply to cooperations which may affect trade between Member States. As such, the exemption relates primarily to small and medium publishing houses.

The relevant exemption relates to agreements between newspaper or magazine publishing houses on publishing cooperation. It does not apply to editorial cooperations. Moreover, as the FCO pointed out in a report on a fine decision against a publishing house in 2018 (*DuMont/Bonner Generalanzeiger*), it takes the view that any hard core restrictions such as pure price or territorial cartels remain prohibited. The FCO stresses that the purpose of the exemption is not to eliminate competition but to strengthen the plurality of the press by strengthening competition between newspaper and magazine publishing houses and other media, in particular pure online media.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartel conduct outside of Germany is covered by the prohibition insofar as the conduct has an appreciable effect on Germany. The FCO tends to interpret this rule broadly and it asserts jurisdiction even in cases with little or only indirect effect on Germany. Agreements which are concluded in Germany but have an effect only outside of Germany are not covered. Depending on the individual facts, however, export cartels may have at least a potential effect on Germany and can in such cases be covered by the prohibition.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The FCO may generally collect any evidence. It may carry out unannounced searches of business premises and residential premises. In this context, it may seize physical and electronic documents. It also has the right to 'image' computer hard drives using forensic IT tools. As a general rule, such investigative measures require a search warrant by a judge. Further, the FCO may interview individuals; however, interviewees may refuse to answer questions to the extent that they might incriminate themselves. Companies are merely obliged to provide company-specific and market-specific information, in particular, information on company turnover. This requirement is meant to put the FCO in a position to calculate antitrust fines.

However, the current principle that companies and individuals acting for companies are generally not required to provide information on the location and content of certain documents, let alone to provide incriminating documents or respond to questions of the FCO, will be abolished. The draft 10th Amendment to the ARC, based on requirements of Articles 6(1) sentence 2 e), 8 and 9 of Directive 2019/1, proposes to significantly extend the investigatory powers of the FCO by introducing far-reaching duties of cooperation for companies and individuals, including in fine proceedings. The draft Amendment stipulates that the FCO may request, also in fine proceedings, the provision of information and release of documents. Representatives of undertakings may be summoned by the FCO to appear for interviews. In addition, FCO officials may, in case of inspections of business premises or residential premises, request from all representatives or employees of the undertaking information which may enable access to evidence as well as explanations on facts or documents relating to the subject matter and purpose of the inspection. Individuals may not refuse to provide incriminating information or to release incriminating documents due to risk of personal prosecution if the information provided only creates the risk of prosecution for an administrative offence (but not

the risk of prosecution for a crime as for example in case of bid rigging) and the FCO committed to not prosecute.

The FCO has stated in its comments on the draft 10th Amendment to the ARC that it will need to be balanced in the future as to whether and to what extent the extended investigatory powers, including in fining proceedings, will need to be used and as a result the prosecution of individuals may potentially need to be waived. It may be derived from the comments by the FCO on the draft 10th Amendment to the ARC that it might currently intend to use the extended powers of investigation primarily in proceedings concerning abuse of market dominance where comprehensive investigations of market mechanisms and market conditions are required. However, this would of course remain to be seen.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The FCO may review and seize external counsel advice documents kept at the premises of the undertaking under investigation unless the relevant documents qualify as defence documents, which requires that (i) the documents were created after the formal initiation of proceedings relating to the conduct under investigation, (ii) the defence relationship between the undertaking under investigation (or its parent company) and external counsel already existed when the documents were created, and (iii) the documents specifically relate to the ongoing investigation. As such, the concept of legal privilege under the German rules is not as broad as under the EU rules as legal privilege under the EU rules may also cover documents which were created ahead of an antitrust proceeding.

2.3 Are there general surveillance powers (e.g. bugging)?

Competition authorities do not have general surveillance powers. Bugging is restricted to the most serious criminal offences only and the cartel prohibition does not fall into this category.

2.4 Are there any other significant powers of investigation?

FCO officials may seize electronic devices, such as laptops, tablet computers or smartphones, where the officials do not have access to the device (e.g. lack of password) or where the hard drive cannot be imaged.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The searches are carried out by FCO officials who are, as a general rule, accompanied by police staff and IT experts to support the FCO officials in their searches. The FCO will normally be prepared to wait for approximately 30–60 minutes for external legal counsel to arrive before starting the inspection.

2.6 Is in-house legal advice protected by the rules of privilege?

In-house legal advice is not protected by the German rules of privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

During the investigation, the company and the individuals concerned are protected by fundamental rights of defence. Individuals, therefore, currently do not have to respond to any questions asked by FCO officials if they have personally been accused of a violation of the competition rules or if the answer would expose themselves or a member of their family to the risk of criminal prosecution or prosecution for an administrative offence. The fundamental rights of defence also include the right to legal advice and to appoint a legal representative. Moreover, the investigatory powers are strictly limited to the object of the investigation. Officials are, therefore, not allowed to exceed this limitation (e.g. by searching files which do not fall within the object of the investigation).

To the extent that individuals acting for companies will in the future, including in fine proceedings, be in principle obliged in the context of requests for information, interviews or inspections to provide information or to release documents to the FCO, they may refuse to do so only if the disclosed information creates the risk of prosecution of the relevant individual or certain relatives of the individual for a crime (such as for example in case of bid rigging) or if the disclosed information creates the risk of prosecution for an administrative offence and the FCO does not commit to not prosecute.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Where the officials operate on the basis of administrative offence proceedings, no fines can be imposed for obstructing the search. However, individuals disturbing the search can be arrested by the officials until the termination of the search. Suspects are not obliged to submit documents or answer questions, whereas other individuals (who are not accused and not under investigation) are obliged to do so or otherwise expose themselves to the risk of prosecution. Sanctions for not providing information are fines or detention.

Within the scope of fine proceedings, the FCO can impose fines if formal requests for information are not answered, answered incorrectly, the answers are misleading or not submitted within the time limit set. The same applies if formal requests for documents are not complied with or complied with late or the submissions are incomplete.

So far, the FCO has not used these powers in cartel investigations.

Whereas violations of procedural provisions may currently be fined by up to EUR 100,000, this upper limit shall according to the draft 10th Amendment to the ARC, based on a requirement of Article 13(2) sentence 2 of Directive 2019/1, in the future be set at 1% of the total turnover of the undertaking concerned in the financial year preceding the decision of the FCO. This applies also to violations of the above-mentioned far-reaching duties of cooperation of companies and individuals to be introduced by the 10th Amendment to the ARC through the implementation of the respective requirements of Directive 2019/1. As such, a company is subject to a fine of up to 1% of total turnover, for example, if a representative of the company fails to respond correctly to a request for information by the FCO, or fails to appear for an interview after having been summoned by the FCO, or in the context of an inspection fails to respond correctly to requests from FCO staff for explanations on facts or documents relating to the subject matter and purpose of the inspection.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Fines can be imposed on companies up to a maximum of 10% of worldwide turnover in the last completed business year. Unlike on the EU level, the 10% threshold is interpreted by the Federal Court of Justice (*Bundesgerichtshof*) and consequently also by the FCO as the upper limit of any fine, not as a cap on an otherwise unlimited fine. The FCO can also take into account the proceeds gained from the infringement when determining the level of the fine.

Under its Fining Guidelines of 2013 (available on the FCO's website: <https://www.bundeskartellamt.de>), the FCO uses a two-step procedure to calculate fines. First, it defines the statutory framework of fines, and second, the FCO sets the fine within this framework.

In a first step, the FCO defines the statutory framework of the fine. As mentioned, the upper limit of the framework of fines for serious intentional cartel administrative offences amounts to 10% of the total turnover achieved in the business year preceding the authority's decision. For negligent offences, the maximum fine amounts to 5% of the total turnover achieved.

In a second step, the FCO sets the fine within the statutory framework of fines. The scope for setting a fine in a specific case is determined with consideration to the so-called gain and harm potential (i.e. competitive gains achieved or achievable by the infringement and the harm caused to third parties or to the national economy) on the one hand and the total turnover of the entity which infringed competition rules on the other. The FCO generally assumes a gain and harm potential of 10% of the domestic turnover to which the infringement relates during the entire period of the infringement. A multiplication factor is then applied to the established gain and harm potential to account for the size of the respective group of companies. In cases in which the value calculated is below the legal upper limit, this value will represent the upper limit for the further assessment of the fine. Where the value determined is obviously too low in a specific case on account of a significantly higher gain and harm potential, this value can exceptionally be exceeded in order to set an adequate fine. Finally, aggravating and mitigating factors are taken into account in order to set the final amount of the fine, including offence-related criteria (e.g. the type and duration of the infringement and its qualitative effects) and offender-related criteria (e.g. the role of the company within the cartel and its position on the market affected). Hard-core cartels are typically rated in the upper range of the fining framework.

Interest is payable on the fine, commencing four weeks from the date of the formal notification of the FCO's decision, even where the decision is being appealed.

There are no additional sanctions on companies (e.g. no blacklisting from bidding for government contracts or similar measures).

Importantly, the Higher Regional Court (*Oberlandesgericht*) of Düsseldorf, which is the court of appeal for fine decisions of the FCO, is not bound by and does not apply the methodology for the calculation of fines according to the FCO Fining Guidelines. As a result, the Higher Regional Court will determine the amount of the fine in cartel cases on appeal within its sole discretion irrespective of the affected turnover, taking into account the 10% threshold as the upper limit of the fine framework. The practical consequence is that undertakings which appeal a fine decision of the FCO run a considerable risk that the fine imposed by the FCO will eventually be (significantly) increased on appeal, even if the appeal is partially successful.

with respect to some infringements determined by the FCO in its fine decision. Since the court, unlike the FCO, determines the amount of the fine within the framework of up to 10% of worldwide group turnover irrespective of the cartel affected turnover, the risk of an increase of the fine is particularly high for multi-product companies and large groups of undertakings.

Such (considerable) increase of fines occurred several times in recent years, which has provoked much criticism in the legal community as companies may be deterred from appealing fine decisions and rather choose a settlement with the FCO.

While Article 14(1) of Directive 2019/1 merely requires that the amount of fines shall be determined in regard both to the gravity and to the duration of the infringement, the draft 10th Amendment to the ARC stipulates in a non-exhaustive list additional factors that may be taken into account for the determination of the amount of the fine. These factors largely reflect the existing practice.

One of the factors is the magnitude of the turnover having a direct or indirect connection with the infringement. The comments to the draft Amendment note that account may be taken both of the magnitude of the affected turnover generated individually by an undertaking concerned as well as of the magnitude of the affected turnover relating to the entire infringement and their relationship to each other. As such, the draft Amendment does not require that the affected turnover shall form the basis for the determination of the fine, as within the methodology applied by the FCO. It is therefore uncertain whether the methodology for the determination of the amount of the fine applied by the FCO on the one hand and by the Higher Regional Court of Düsseldorf on the other hand will become more aligned as a result.

Another factor that may be taken into account for the determination of the amount of the fine shall be the effort by the undertaking to uncover the infringement and to remedy the damage as well as precautions taken after the infringement to prevent and discover infringements. The explanations to the draft Amendment note that the behaviour after the infringement may become relevant in the context of the overall assessment regarding the determination of the amount of the fine. Positive behaviour after the infringement may be a mitigating factor leading to a decrease of the fine. The relevant draft provision allows for the consideration of compliance measures taken after the infringement, in particular to remedy compliance deficits indicated by the infringement. At the same time, it shall be possible to take into account the remedy of damages and measures of the undertaking to investigate the infringement. According to the explanations to the draft Amendment, the active cooperation of an undertaking may be an indication of the seriousness of such efforts.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The level of fines for individuals amounts up to €1 million for participation in serious infringements (i.e. hard core cartel activity such as price-fixing, bid rigging, allocation of quotas, customers or territories) and up to €100,000 for less serious infringements.

Under the FCO's leniency programme, individuals will not be subject to individual fines if the company immediately and unreservedly cooperates with the FCO and contributes to uncovering cartel activities.

It should be noted that German law generally does not provide for criminal sanctions for violations of the ARC, except for Section 298 of the German Criminal Code, which provides for a prison sentence of up to five years for bid rigging

in tender proceedings. According to a Federal Court of Justice (*Bundesgerichtshof*) decision, bid rigging could, depending on the circumstances of the individual case, also be regarded as a particular form of fraud (warranting a prison sentence of up to five years). If the FCO discovers cases involving bid rigging, it must refer the proceedings against individuals to the state prosecutor. The corresponding proceedings against companies stay with the FCO.

There are no additional sanctions for individuals (e.g. director disqualification).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Fines are only reduced by the FCO in exceptional cases, where a company proves that it cannot pay the FCO's fine in the long-run without endangering its very existence. In cases where a company proves that it cannot pay the FCO's fine in the short-to medium-term, the FCO can agree to issue a debtor warrant (repayable as soon as the company's finances improve) or it can agree to otherwise defer the fine.

3.4 What are the applicable limitation periods?

In general, serious infringements become time-barred five years after termination of the infringement, whereas less serious infringements become time-barred three years after termination of the infringement. According to a recent decision by the Federal Court of Justice, the statute of limitations in case of coordinated price increases by the members of a price cartel starts to run only when there are no goods affected by the price cartel on the market anymore.

However, investigations by the FCO, the European Commission or competition authorities of other Member States will suspend the limitation period.

That being said, infringements currently become definitely time-barred after the end of the double statutory limitation period if by then there is no final fine decision or in any event a decision in the first instance if a fine decision is appealed. As a result, hard core cartel infringements currently become time-barred after 10 years unless by then there is a final FCO fine decision, or in case of a contested fine decision a decision by the Higher Regional Court of Düsseldorf confirming a fine. As explained below, this became relevant in an annulment decision by the Higher Regional Court in 2018. Obviously in reaction to this annulment decision, the Federal Ministry for Economic Affairs proposed in the draft 10th Amendment to the ARC published in January 2020 to introduce a provision to the effect that the absolute 10-year limitation period for cartel infringements is prolonged by the time period during which a fine decision of the FCO is the subject of a pending court proceeding.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

In the past, companies have frequently covered the legal costs and fines imposed on company employees or directors (including former employees and directors). However, this has been seen more critically in recent years and, in addition to potential tax implications, it could well be possible that courts will prohibit such conduct in the future.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Under German employment law, legal costs and/or cartel fines can be recovered from an employee if the employee acted intentionally. If the employee was merely grossly negligent in his conduct, recovery is more difficult.

It is, however, currently unclear whether competition law prevents an undertaking from holding an implicated employee liable for a cartel fine imposed on the undertaking. A case concerning this question is currently pending at the District Court of Dortmund. It might be argued that German law provides for the personal liability of the acting individuals on the one hand and the corporate liability of undertakings on the other hand and that a fine imposed on an undertaking for its cartel participation must not be 'shifted' to the acting individual (or ultimately to the individual's D&O insurer). In any case, it remains to be seen how the District Court, and subsequently probably the higher courts up to the Federal Court of Justice, will decide.

In any event, an employer should consider that the cooperation of an employee in a cartel investigation will usually require an indemnification of the employee, to the extent legally possible, from any damage claims of the employer *vis-à-vis* the employee. Refusal to grant such indemnification will usually lead to the loss of cooperation of that individual with the company. This may adversely affect the company's ability to obtain reductions of the fine under the FCO's leniency policy, which requires full cooperation with the FCO's investigation by the company and its employees.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company is subject to sanctions if it directly or indirectly exerted decisive influence on a subsidiary which participated in a cartel, irrespective of whether management of the parent company participated in the cartel or failed to properly supervise the subsidiary. While German administrative offence law does not allow for a rebuttable presumption to this effect in cases of (almost) wholly owned subsidiaries – as applied by the European Commission – but requires proof to the free conviction of the judge, there may be in practice not much difference to the results at the European level. Legislative materials state that in cases where a clear majority of shares is held, a high probability militates for the assumption that the business policy of the relevant entity is actually determined by the majority shareholder.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

In order to provide companies engaged in cartel activity with an incentive to end their involvement and to inform the FCO about the infringement, the FCO introduced a leniency programme in 2000, which was revised in 2006. The current programme largely reflects the European Commission's 2002 leniency notice. However, due to the liability of individuals, the FCO's leniency programme is available both to companies and individuals.

According to the FCO's leniency programme, companies involved in an illegal agreement can be entirely or partly exempted from a fine if they make a decisive contribution to uncovering a cartel and cease their anti-competitive behaviour.

In particular, a fine will according to the current version of the FCO leniency programme not be imposed if the offender:

- is the first applicant to contact the FCO before it has sufficient evidence to obtain a search warrant;
- provides the FCO with verbal and written information and, where available, evidence that enables it to obtain a search warrant;
- was not the only ringleader of the cartel and did not coerce others to participate in the cartel; and
- cooperates fully and on a continuous basis with the FCO.

At the point at which it is in a position to obtain a search warrant, the FCO will according to the current version of the FCO leniency programme still grant a cartel participant immunity from a fine if it:

- is the first applicant to contact the FCO before it has sufficient evidence to prove the offence;
- provides the FCO with verbal and written information and, where available, evidence which enables it to prove the offence;
- was not the only ringleader of the cartel and did not coerce others to participate in the cartel; and
- cooperates fully and on a continuous basis with the FCO.

Even where the conditions for full immunity are not fulfilled, the fine may be reduced if the offender discontinues its participation in the cartel and makes a significant contribution to proving the offence by voluntarily revealing its knowledge. The FCO will take such conditions into account when setting the amount of the fine.

The submission of all relevant documents, together with an explanation of the information given, is deemed to aid the investigation. Undertakings are expected to encourage their members of staff to cooperate. Individual employees will not be subject to individual fines if the company immediately and unreservedly cooperates with the FCO and, together with its employees, contributes to uncovering cartel activity.

It should be noted that the FCO's leniency programme has no effect on civil cartel damages claims or on criminal investigations conducted by the public prosecution. Whistle-blowers can therefore still be subject to follow-on damages claims and individuals could face criminal prosecution where the case involves bid rigging.

The draft 10th Amendment to the ARC codifies, based on requirements of Articles 17–19 of Directive 2019/1, statutory conditions for granting undertakings immunity from fines or reduction of fines. The relevant statutory provisions are largely in line with the existing leniency programme of the FCO. However, it will no longer be a requirement for immunity from fines that the leniency applicant was not the only ringleader of the cartel. Article 17(3) of Directive 2019/1 does not rule out immunity in such a case but only in case an undertaking has taken steps to coerce other undertakings to join a secret cartel or to remain in it.

The FCO shall according to the draft Amendment to the ARC continue to be entitled to determine general administrative principles regarding the exercise of its discretion with respect to the application of the leniency programme and the design of the procedure. Such administrative principles may contain, for example, information regarding the determination of a fine reduction for which the draft statutory leniency provisions do not indicate a particular amount.

The draft Amendment does not stipulate a specific protection for representatives of a leniency applicant against prosecution for a crime, for example in case of bid rigging. It therefore remains within the general discretion of the public prosecutor and the criminal court to dispense with prosecution. In the view of the FCO, such lack of specific protection may decrease

incentives for leniency applications in cases where there may be a risk of prosecution of individuals for a crime.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The revised 2006 leniency programme introduced a marker system, under which applicants can place a marker with the FCO by declaring their willingness to cooperate. The timing of the placement of the marker is decisive for the status of the application and the marker must contain basic information on the cartel. After having placed the marker, the FCO will set the applicant a time limit of up to eight weeks for the submission of a complete leniency application.

The FCO will confirm immediately that a marker has been placed and that the application has been received. Once the application has been filed and the requirements for immunity are satisfied, the FCO will assure the applicant in writing that he will be granted conditional immunity.

In line with the requirements of Article 21 of Directive 2019/1, the marker system will according to the draft 10th Amendment to the ARC be codified by law in the future.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Marker and leniency applications can be made orally. Marker and leniency applications in English are accepted, provided that a German convenience translation is submitted shortly afterwards.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The FCO may (and will in practice) infinitely refuse to disclose leniency statements contained in its file, a leniency statement being legally defined as a voluntary statement of a company *vis-à-vis* a competition authority in which the company describes its knowledge of a cartel and its participation in the cartel and which was produced specifically for the purpose of gaining waiver or reduction of a fine in the framework of a leniency programme of the competition authority.

The so protected leniency statement does not cover evidence which exists irrespective of an investigation of the FCO. Upon application by private litigants, the competent court may ask the FCO to disclose such evidence. For its decision in this respect, the court must take into account the efficiency of public competition law enforcement, in particular the impact of the disclosure on pending proceedings and on the functioning of leniency programmes.

Until the complete termination of the procedure of the FCO *vis-à-vis* all parties, disclosure of evidence is ruled out to the extent that it contains information which was produced by a legal entity or a natural person specifically for the proceedings of the FCO.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The applicant is required to cooperate with the FCO throughout the entire duration of the proceedings, i.e. until a formal decision has been adopted. The obligation of the applicant to keep

its cooperation with the FCO confidential applies until the FCO relieves the applicant of this obligation (normally after dawn raids have been conducted).

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no 'leniency plus' or 'penalty plus' policy in Germany.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Leniency applications can be made by individuals independently of their employers. However, there is no need for a separate application by an individual if the company has applied for leniency. The application for leniency of a company automatically covers all of its employees involved in the reported conduct. However, an independent leniency application by an employee can compromise the position of its employer, as even in the best possible scenario for the employer, the company can only come second in its application, in which case immunity is no longer available. There are no financial rewards to incentivise whistle-blowing by individuals.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Unlike the European Commission, the FCO does not have formal settlement or plea bargaining procedures outside of the leniency process. However, the FCO has adopted informal settlement rules and the termination of cartel proceedings, by way of settlement, has become the rule. The FCO has set out the basic principles of its informal 'settlement procedure' in its 'Information Leaflet on the settlement procedure used by the FCO in fine proceedings' (current version of February 2016), which is available on the FCO's website (<https://www.bundeskartellamt.de>). The main characteristics are that the companies concerned confess their participation in the anti-competitive conduct and accept the fine imposed by way of a 'settlement declaration'. Such declaration is considered by the FCO as a mitigating circumstance, leading to a reduction of the fine in the form of a 'settlement discount' of up to 10%. While the settlement does not include a waiver to file an appeal, negotiated decisions imposing fines have usually not been appealed so far. Half of the settlements are so-called 'hybrid' settlements, where a settlement is agreed with some of the companies concerned whereas the other companies refuse to settle and go through the normal proceedings. Settlements are regularly used by the companies concerned in cases where leniency is no longer available to the parties.

7 Appeal Process

7.1 What is the appeal process?

As mentioned before, the FCO's decisions are subject to appeal to the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf. A

further appeal against the decision of the Higher Regional Court is only permitted on questions of law to the Federal Court of Justice (*Bundesgerichtshof*).

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, if the FCO's decision is appealed, the fine will only become payable following the judgment of the court. However, where the court confirms the fine set by the FCO, interest is payable on the fine, commencing four weeks from the date of the formal notification of the FCO's decision, even where the decision is being appealed.

7.3 Does the appeal process allow for the cross-examination of witnesses?

German procedural rules do not allow for the cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Under German procedural law, designated courts have jurisdiction to rule on damages actions for the compensation of loss suffered as a result of cartel conduct.

Legal basis for damages actions

Damages claims are based on Section 33a ARC. In addition, claims for damages may, under certain circumstances, be based on Section 8 and Section 9, respectively, of the German Act against Unfair Competition. A further legal basis can be found in general tort law, Section 823 *et seq.* of the German Civil Code.

Parties entitled to claim

An action for civil damages can be brought by both direct and indirect purchasers to the extent they are concerned by the cartel infringement.

Where the direct purchaser brings an action for civil damages against the cartel members, they can in turn raise the defence and counter-argument that the direct purchaser passed the effect of the increased cartel price on to its customers ('passing on' defence). However, proof of passing on of increased cartel prices can be difficult in particular if there are many indirect purchasers or if the cartelised products were not only resold but processed or otherwise converted.

In cases where the indirect purchaser has suffered direct loss through the cartel's activity, it has previously been established that an action for damages can be brought (i.e. in cases where the indirect purchaser of goods, which were the subject of a cartel on the level of production, purchases these goods from a wholesaler which is a wholly owned subsidiary of an undertaking involved in the cartel, the indirect purchaser can bring a claim for damages).

Burden of proof

In principle, the claimant has to demonstrate and provide evidence for the facts forming the basis of the competition law infringement, as well as of the loss incurred.

However, since 2017 there has been a statutory (rebuttable) presumption in the ARC that a cartel causes damage. The legal presumption relates to the existence of damage and the causal link between the cartel infringement and the damage. By contrast, there is currently no legal presumption that the claimant was affected by the cartel infringement. Consequently, the claimant currently has to prove that he purchased affected products or services.

With respect to damage claims of indirect purchasers against cartel members, there has been, since 2017, a statutory (rebuttable) presumption in the ARC to the benefit of indirect purchasers that a price increase was passed on by the direct purchaser.

The draft 10th Amendment to the ARC proposes to introduce a statutory rebuttable presumption that contracts relating to goods or services with undertakings involved in a cartel which fall factually, temporally and geographically in the scope of the cartel were affected by the cartel. A respective statutory rebuttable presumption shall be introduced with respect to indirect purchasers.

Binding effect

Final decisions adopted by the FCO (i.e. after the conclusion of any appeals), the European Commission or by competition authorities of other EU Member States have a binding effect on the German civil courts both regarding facts and liability. This is intended to facilitate private follow-on actions, as national courts will not hear further evidence on the competition law infringement after a final formal decision has been made by a competition authority.

Determination of damages

Under the German Civil Code (Section 249), damages are calculated on the basis of the difference between the financial position of the claimant after the loss has occurred and the financial position that the claimant would have been in had the loss not occurred. The damage to be compensated also includes lost profits.

Estimation of the loss incurred

Section 287 of the German Code of Civil Procedure entitles the judge to determine whether damages are to be awarded and estimate the amount of damages on the basis of certain facts, thereby reducing the standard of proof required. It is sufficient for the claimant to provide a reliable factual basis for such an estimate. In cartel cases, the court can base its estimate of the loss incurred on the basis of the profit made through the illegal cartel activities by the defendants.

Access to records

Private claimants may (independent from cartel damage litigation) claim from cartel members the delivery of evidence which is necessary for the assertion of cartel damage claims, provided claimants describe the evidence as precisely as possible on the basis of facts accessible with reasonable efforts. The claim does not relate to leniency statements. If cartel members refuse to disclose evidence, claimants may ask a court to order disclosure. For its decision, the court must take into account the efficiency of public competition law enforcement.

In a legal proceeding concerning a private cartel damage claim or a claim for disclosure of evidence, the court may call upon the application of a party to ask the FCO to provide documents from its file if the applicant demonstrates that he has damage claims *vis-à-vis* another party and that he cannot get the documents suspected in the file with reasonable efforts from another party or a third party. For its decision, the court must take into account the efficiency of public competition law enforcement, in

particular the impact of the disclosure on ongoing proceedings and on the functioning of leniency programmes. The FCO may (and will) refuse to disclose leniency statements.

The draft 10th Amendment to the ARC proposes to clarify that the existence of claims of private claimants against cartel members for delivery of evidence necessary for the assertion of cartel damage claims is independent from the point in time when the relevant damage claims arose.

8.2 Do your procedural rules allow for class-action or representative claims?

In Germany, collective proceedings or class actions are not available. However, customers can submit damages claims via third parties by assigning their claims to them. This is of particular interest for smaller companies that do not otherwise have the financial resources to enforce their legal rights through litigation, as well as for larger companies facing a significant absolute cost risk in case of high amounts of damage claims.

If cartel damage claims are assigned to a third party which brings the claims through a vehicle that has been merely founded to claim customers' damages on its own behalf, it must be made sure that such vehicle is properly funded. Otherwise courts will consider the claim to be *contra bonos mores* (immoral) and void as a major part of the procedural risks is shifted to the defendant, thereby circumventing the defendant's legal rights.

Following legislative measures to promote private competition law enforcement, there is today considerable activity in the German market of litigation law firms cooperating with process financiers. Several cases are currently pending before German courts which involve numerous damage claims bundled by way of assignment to the claimant.

8.3 What are the applicable limitation periods?

Since a change in the law in 2017, the limitation period for damage claims based on a violation of Section 1 ARC is five years.

The limitation period starts to run at the end of the year in which the claim arose; and the claimant became aware, or should have become aware in the absence of gross negligence, of the relevant circumstances and of the identity of the defendant; and the infringement was terminated.

Investigations by the FCO, the European Commission or competition authorities of other Member States will suspend the limitation period. The limitation period will also be suspended if a cartel damage claimant files suit against the defendant for information or delivery of evidence based on the respective substantive claim.

The suspension of the limitation period ends one year after termination of the proceedings through a final and conclusive decision or otherwise. This is meant to ensure that claimants have enough time to collect relevant information for the assertion of civil damage claims.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes, there is a statutory 'passing on' defence in civil damages claims according to which the loss of the purchaser is compensated to the extent the purchaser passes on a price increase caused by a cartel infringement to his purchasers (indirect purchasers). If a product or service was purchased for an inflated price, the existence of a loss is, however, not excluded because the product or service was resold.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

When submitting an action, the claimant must render an advance payment to cover court fees. With the formal decision, the court allocates the legal costs of the proceedings, i.e. the court fees and expenses, as well as the statutory attorney fees, on a *pro rata* basis in relation to the outcome of the case. As a general rule, the legal costs must be borne by the unsuccessful party.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There have been a number of successful damages claims in Germany, with participants of the vitamins cartel and participants of the cement cartel ordered to pay compensation to their respective customers, participants of the ready-mix concrete cartel ordered to pay damages to direct customers and a participant of the carbonless paper cartel ordered to compensate an indirect customer (due to the wholesaler being a wholly owned subsidiary of the producer who had participated in a cartel). There are numerous pending damages proceedings against cartel members before German courts. For instance, members of the truck cartel were sued for damages. Furthermore, settlements have been agreed while court proceedings were pending, i.e. in the rail cartel. Additionally, it is understood that there have been a number of out-of-court settlements in cartel damages cases. In most cases, these settlements were entered into shortly before judgment was due to be passed by a court, to prevent a precedent being created. In their nature, these settlements are highly confidential and the details, or even the existence, of a settlement are not disclosed.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

With respect to damage claims dating from a time prior to the coming into force in 2017 of the above-mentioned statutory (rebuttable) presumption in the ARC that a cartel causes damage, the Federal Court of Justice in December 2018 handed down a key decision with respect to the standard of the burden of proof. The Federal Court ruled that in case of a quota and customer allocation cartel, there is no *prima facie* evidence (*Anscheinsbeweis*) either with respect to the existence of damage or with respect to whether specific orders were affected by the cartel. Consequently, claimants bear the full burden of proof. At the same time, the Federal Court of Justice noted there is a factual presumption that prices generated in the context of a cartel on average exceed those which would have existed without the cartel agreement, and that this presumption becomes more relevant the longer and the more sustainably a cartel is exercised.

In response to the Federal Court of Justice decision, the draft 10th Amendment to the ARC proposes to introduce a statutory rebuttable presumption that contracts relating to goods or services with undertakings involved in a cartel which fall factually, temporally and geographically in the scope of the cartel were affected by the cartel. Such rebuttable presumption would lead to a reversal of the burden of proof, requiring the defendant to prove that contracts caught by the presumption

were not affected by the cartel. A respective statutory rebuttable presumption shall be introduced with respect to indirect purchasers. The statutory rebuttable presumptions would apply with respect to damage claims arising after the entry into force of the 10th Amendment.

In the beer cartel, the fine decision against one of the undertakings concerned was annulled on appeal by the Higher Regional Court of Düsseldorf in April 2019. The only involvement of the undertaking concerned that could be proven was the participation in an attempt to increase prices in 2007. This infringement had become time-barred in 2017 according to the above-mentioned absolute 10-year limitation period since by the time the double statutory limitation period ended there was no final fine decision and no decision on appeal in the first instance.

Obviously in response to the annulment decision, the draft Amendment to the ARC proposes to introduce a provision to the effect that the absolute 10-year limitation period for cartel infringements is prolonged by the time period during which a fine decision of the FCO is the subject of a pending court proceeding. As a result, a cartel infringement which was not time-barred when the fine decision relating to such infringement became the subject of a court proceeding, notably upon appeal by an undertaking concerned, could no longer become time-barred due to the expiration of the absolute 10-year limitation period during the pending court proceeding.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

The Federal Ministry for Economic Affairs in January 2020 published the draft 10th Amendment to the ARC (*Referentenentwurf*), including certain above-mentioned proposed changes relating to public and private cartel enforcement. While the draft Amendment according to press reports is generally not controversial within the government, the adoption of a draft by the government which would then be the basis of the parliamentary process is according to such reports currently blocked for political reasons. The coming into force of the 10th Amendment is anticipated at the latest by the beginning of 2021 as it contains various provisions implementing Directive 2019/1 which is to be implemented by February 4, 2021.

The FCO in its comments on the draft 10th Amendment noted that the number of leniency applications to the FCO is strikingly declining (2016: 59, 2017: 37, 2018: 24, 2019: 16). In the view of the FCO, this may be explained by the facilitation of enforcement of private cartel damage claims and warrants consideration of means to increase the power of the statutory leniency programme, for example through the better protection of representatives of leniency applicants against criminal prosecution, in particular in case of bid rigging.



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