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FCO fines cartelists and independent accountant - the fire-fighting vehicles decision

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The German Federal Cartel Office (“FCO”) fined three manufacturers of fire-fighting vehicles on February 10, 2011, imposing € 20.5 million in total. The FCO found that the companies had engaged in bid rigging since 2001 (price-fixing, quota agreements and market sharing). As usual, the FCO did not only fine the companies, but also the individuals acting on behalf of the companies. It seems that there were cartel meetings at different levels of the hierarchy, both at top level as well as at sales manager level. The FCO thus fined CEOs and directors as well as sales managers.

Interesting: the FCO also fined an independent accountant based in Switzerland for having supported the cartel arrangements. It is not entirely clear from the press release, but the FCO seems to have fined the accountant as an individual. The companies involved used to notify their orders to the accountant, who compiled lists for the purpose of monitoring adherence to the agreed quotas.

In the past, the FCO has already fined company associations that supported cartel infringements of their members, but rarely independent third parties or individuals. Fining the independent accountant now follows a trend in the European Commission’s recent practice (*e.g.*, in *AC Treuhand*). Conceptually, it is even “easier” under German law, because the applicable law on administrative offences does not distinguish between a main offender and an aide - any person that contributed to the infringement may be fined (“*Einheitstäter*”). The amount of the accountant’s fine is not published. The case is another example for a settlement - at least as far as the companies and their representatives are concerned. It is unclear whether the accountant also settled with the FCO.

The infringement qualifies as bid rigging (municipalities mainly purchased these vehicles through public tenders), and therefore the FCO has transferred the matter to the prosecutor (after having imposed the fines). Bid rigging (at least as far public tenders are concerned) is a criminal offence under German law, which means that the individuals involved may in addition be subject to criminal prosecution. (Any fine imposed on the individual in the FCO proceedings would be lifted or taken into account should the individual be sanctioned for the same infringement in the criminal proceedings, see Section 86 Administrative Offence Law.) The FCO does not have the power to settle criminal offences, which means that a settlement does not help the

individuals in possible criminal prosecution.

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