

German FCO publishes brochure “Successful cartel enforcement – benefits for the economy and consumers”

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On February 20, 2017, the Federal Cartel Office (“FCO”) has published a brochure outlining its cartel enforcement activities, roughly over the past ten years. The brochure aims at providing an insight into the FCO’s practice combatting cartels, including an overview of the FCO’s investigation proceedings and case studies.

The brochure explains the current leniency regime, the anonymous whistleblowing mechanism, the fining guidelines, the procedural set-up including the appeal process, international cooperation as well as chances and risks of private damages claims, and the importance of compliance programs. The brochure praises the FCO’s success and its cartel enforcement benefits for the economy and consumers, notably at a time when the FCO reportedly seeks further powers in the field of consumer protection. The brochure provides a useful comprehensive overview (not only for consumers), and contains some interesting facts and figures as well as policy positions some of which are highlighted below.

1. Anonymous whistleblowing mechanism

Since 2012, the FCO has installed a secure website via which anyone can anonymously contact the FCO and inform it about alleged cartel infringements, including secure ongoing electronic communications with the FCO. The brochure says that since the system’s installation the FCO has received more than 1,400 anonymous leads, “some of which” have led to proceedings. One recent example in which such a tip led to proceedings and fines concerns the 2015 case against acoustically effective components suppliers in the automotive industry (with total fines of €75 million).

2. Fines

On average the FCO’s fines have increased. In 2005, the fining framework has been more aligned with EU law and can amount to 10% of the company’s worldwide group turnover. In the beginning of the 2000s the overall fines imposed in a given years were often in the lower double-digit million range, whereas in recent years the total fines imposed *p.a.* often amounted to €200-300 million, with 2014 as a record year with €1.1 billion. Interestingly, however, the highest total fines are still those imposed against cement cartel participants in 2003, with a total of €398 million.

There is a broad range of individual fines for companies due to the specific circumstances of the case and the company concerned, including the cartelized product-related turnover. The highest individual fine so far amounted to €195 million in 2014 (sugar cartel). The brochure mentions that in the past five years, on average the fines imposed against companies amounted to €7 million. Unlike at EU level, individuals can be fined up to a maximum of €1 million.

3. Criminal sanctions

There are only criminal sanctions for certain cases of bid rigging in Germany at the moment. The FCO, the various German regional states cartel offices and public prosecutors collaborate in the network “bid rigging” in order to detect and sanction criminal cartels. The FCO has also published guidelines for public procurement entities aimed at helping these identify potential bid rigging practices.

The brochure reflects that in Germany – like in other jurisdictions – there have been calls for broader criminalization of cartels. The FCO’s view is that the current regime already has a sufficiently deterrent effect. It doubts that expanding criminal sanctions would add significant value, while at the same time it would render proceedings and in particular the treatment of leniency applicants much more complex.

4. Leniency program

The FCO’s leniency program is a very important source for initiating cartel proceedings. Since its last amendment in 2006, which brought it more in line with the program of the European Commission, the number of applications per year have increased and have reached a relatively high level by now, for example with 76 applications in 2015 and 59 in 2016.

5. International cooperation

The brochure describes the cooperation within the ECN (*i.e.*, the network of other EU national competition authorities and the Commission), based on EU law, as well as with third countries based on bilateral treaties. In the ECN, the NCAs can collaborate, *e.g.*, one NCA carries out a dawn raid in its territory in order to obtain evidence for another NCA, and exchange evidence. The FCO has so far transferred evidence it obtained in dawn raids to NCAs in Austria, Denmark, France and the Netherlands and has conversely received evidence obtained in dawn raids by other NCAs from Austria, France and Sweden.

6. Economic damages caused by cartels

The brochure refers to a 2015 “study” according to which on average cartels lead to 15% higher prices (13% in national and 18% in international cartels). The study is a publication by economists (Boyer und Kotchoni) and seems to be based on a well-known data set already used by US economist Connor for a study published in 2009. The brochure also highlights the findings of a court-appointed economic expert in the appeal proceedings before the Düsseldorf Court of Appeals on price effects of the cement cartel (he found on average an increase by 10%).

The brochure sets out the savings obtained through cartel enforcement, *i.e.*, the prevention of overall damages that would have occurred if the cartels detected by the FCO had continued. (There is a similar CMA analysis for the UK.) The FCO estimates that the total savings regarding cartels fined in Germany in 2009 – 2014 amounted to €2.75 billion or €460 million *p.a.*, and in 2003-2008 to €333 million *p.a.* The estimate is based on various assumptions, including that cartels led to price increases of 10% and that cartel would have continued for another three years without enforcement. Potential umbrella damages were not included. The brochure puts these figures in relation to the FCO’s annual budget of €27.6 million in 2014.

7. Private damages claims/access to file

The brochure stresses the increasing significance of private damages claims in Germany, noting that there are now claims in almost every cartel case. The brochure highlights that one important feature in preparing claims has been access to the FCO’s file granted to potential claimants. In the sugar cartel, so far more than 130 potential claimants requested access to file, as did more than 70 in the railway tracks cartel case. These are relatively high figures, and they show that access to file may bind quite some an authority’s resources. (Which is why following the implementation of the directive, access to file with the NCA may only play a secondary role.) The brochure stresses that leniency candidates should enjoy some protection in civil damages, as provided in the EU damages directive, so as not to undermine effective public enforcement.