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Increasing trend in cartel cases in Germany: settlements

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany) · Wednesday, July 21st, 2010

The FCO issued three cartel decisions in June 2010: it imposed a (second) fine on coffee roasters on June 9 (€ 30 million), on manufacturers of ophthalmic lenses on June 10 (€ 115 million), and on a manufacturer of cable fillings on June 24 (€0.4 million). All of these decisions involved settlements (and the ophthalmic lenses case seems to be a “hybrid” settlement, *i.e.*, not all addressees settled). This is in line with the increasing trend of settlements in Germany.

The FCO has been terminating cartel cases through settlements since 2008 (while the Commission only recently issued the first settlement decision in May 2010). The FCO’s settlement proceedings are faster than at Commission level. Typically it only takes (and the companies only have) several weeks once the FCO has indicated the possibility to settle (the FCO aims to have only two settlement meetings). The FCO has issued no settlement notice and has no “fixed” proceedings, but started settling on a case-by-case basis. The FCO takes the position that it is empowered to do so based on its discretion whether to pursue infringements and its discretion in setting the fines.

There are no published guidelines on the process, but the FCO provided an overview of its practice in its Annual Report 2007/2008 (p. 35) and is generally open to provide informal guidance. The parties need to admit the infringement, which will be considered as a mitigating element in setting the fine. The reduction can amount to a maximum of 10% of the overall fine and can be combined with leniency (but leniency is no precondition). The real benefit for the addressees is derived less from the 10% reduction, but rather from the possibility to limit the scope of the conduct to be covered by the settlement (both with respect to the products as well as the duration). The scope determines the product-related turnover to serve as the basis for setting the fine. The FCO’s benefits: it only needs to grant limited access to file, can limit the S/O or send no S/O at all, and only needs to issue a short decision.

The upside of the FCO’s approach: there is a lot of flexibility. The downside: little transparency and the lack or at least perceived lack of procedural safeguards for the enterprises concerned, which often feel “blackmailed”. The FCO typically responds by pointing out that under German law, the administrative proceedings in cartel cases are merely of a preliminary character, whereas the “main” proceedings take place in court upon appeal, which leads to a full review and during which the parties have (again) all procedural rights. The appeal possibility does not, however, seem to adequately address the concerns of companies during the settlement process with the FCO.

Despite the pitfalls, settlements seem to become the norm rather than the exception. One possible explanation: the approach of the Düsseldorf Court of Appeals (the court to review FCO fines) on

the relatively new law on setting fines is not entirely clear yet, including whether the Court will accept and apply the FCO's new fining guidelines. So in light of an unpredictable outcome in burdensome appeal proceedings (during which the acting individuals typically need to appear as witness), settlement may still seem the better deal. (By the way, the Court of Appeals has equally not yet decided on the FCO's settlement practice.) Nevertheless, it is desirable that the FCO, like the Commission, would publish a settlement notice (or amend its fining guidelines), so that the parties could rely on equal treatment under such notice in the administrative proceedings.

Finally, the coffee roasters and ophthalmic lenses decisions illustrate a further trend: the FCO increasingly fines associations for having supported or participated in cartel infringements – let's see whether the Commission aims to catch up on this point as well.

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