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German Federal Cartel Office Publishes Sector Inquiry in Cement and Ready-Mix Concrete

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The German Federal Cartel Office ("FCO") has published its sector inquiry report in cement and ready-mix concrete (link to English press release).

While the report targets the cement and ready-mix concrete sector and its particularities (e.g., cartel history, oligopolistic markets, vertical integration, homogenous products), it may provide some insights into the FCO's approach in general, notably on when it views JVs as anticompetitive and towards joint bidding.

The FCO's sector inquiry deals with four main topics: divestitures of existing JVs in the market and the applicable criteria, joint bidding, potential price signaling and abusive practices.

Divestiture of JVs

As a result of the sector inquiry, the FCO has announced to investigate approx. 60 JVs with a view to dissolving these and, if necessary, to commence separate divestiture proceedings. (N.B. that many of the JVs concerned were founded decades ago, merger control did often not apply due to low revenues involved, and in some cases, JVs had been exempted under former cartel exemptions for small and medium-sized companies or so-called crisis cartels.)

The FCO has classified JVs into different groups, and found two groups are critical:

JVs are considered prima facie as anti-competitive if at least two shareholders are active in the same product and geographical market as the JV. In the FCO's view, these JVs require dissolution.

If only one shareholder is active in the same market as the JV and the other shareholder or all shareholders are active in neighboring markets, the JVs need to be reviewed on a case-by-case basis whether they restrict competition between shareholders, e.g., through spill-over effects. Depending on the outcome, a dissolution may be required.

Consortia Arrangements and Joint Bids

The FCO takes a critical stance towards consortia arrangements and joint bids in the cement and ready-mix concrete sector.

The FCO explains that the critical question is whether the supplier is capable to submit an

individual bid, which has to be assessed on a case-by-case basis. The FCO states that *inter alia* the following facts would not qualify for a valid justification under Article 101 TFEU: long-term or standard consortia arrangements based on abstract capacity thresholds; or lack of objective comprehensible and verifiable reasons that each supplier is capable to deliver the products independently.

That a consortium would be in the position to submit a "better offer" alone shall not be sufficient. For example, the FCO says that suppliers would need to consider the possibility to increase capacity in order to be able to compete for an individual bid. In addition, the FCO points out less restrictive measures, such as sourcing supplies from competitors (colleague deliveries) or the appointment of replacement delivery facilities.

The need to consider a capacity increase seems to go beyond the European Commission guidelines on horizontal cooperation in this respect.

The FCO thus seems trying to tighten the belt on the assessment of joint bids, at least in the cement and ready-mix concrete industry. Other competition authorities within the ECN are currently also assessing the topic more generally. The Danish competition authority, for instance, has recently published general draft guidelines for the assessment of joint bids. It will be interesting to see how this discussion further develops.

In practical terms, the FCO advises suppliers to document in detail why a consortia arrangement or joint bid is necessary and objectively justified on a case-by-case basis.

Price Signaling

The FCO report highlights an actual case on price signaling in the industry. A corporate executive of the cement industry had announced a price increase in a newspaper interview. Afterwards the biggest cement suppliers sent general price increase announcement letters to customers.

The FCO explains that unilaterally communicated information related to pricing in newspaper interviews or through general price increase announcement letters could lead to a concerted practice between suppliers which, if followed by other suppliers, could restrict competition by object or at least by effect. Generally, the FCO rejected that this practice generates efficiencies to outweigh the anti-competitive effects in the relevant markets. The practice was said to increase the already high level of transparency regarding strategically important information, such as the size and timing of a price increase. One important aspect is that many suppliers are vertically integrated, i.e., by sending out general price increase letters to customers resulted in directly informing competitors' subsidiaries.

Against this background and citing the cartel history in the sector and its oligopolistic market structure, the FCO sees general price increase announcement letters, i.e., comprising general price increases of list prices to be effective on certain dates, in the industry as critical. The FCO also refers to the UK CMA's cement and ready-mix concrete sector inquiry published in 2014 and the European Commission's container shipping case which ended with commitments in 2013. Both cases *inter alia* also dealt with general price increase announcements, but with very industry and case-specific facts.

The FCO advises suppliers to send customer-specific price increase announcement letters instead. These should comprise the following information: (i) customer name; (ii) for each product, for

which the terms and conditions shall be adapted, the current and the new price; and (iii) the date on which the new price shall be applicable.

The FCO announced that it will provide cement and ready-mix concrete suppliers its legal assessment and further guidance with respect to price signaling in due course. It remains unclear whether the FCO's view regarding general price increase announcements letters – not uncommon in many industries – would also apply to other sectors. Arguably it should not unless these sectors have similar market characteristics.

Abusive Practices

The FCO reviewed several scenarios and theories of harm, including predatory pricing, input or customer foreclosure, price margin squeeze, boycotts and other disciplinary measures, and excessive pricing. The FCO finally concluded that there are signs of predatory pricing as well as excessive pricing practices, and indicates that it may well open individual cases in the near future.

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