THE CARTELS AND LENIENCY REVIEW

SEVENTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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CONTENTS

PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 28 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 28 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the seventh edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2019

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Chapter 9

GERMANY

Petra Linsmeier and Matthias Karl[1]

I ENFORCEMENT POLICIES AND GUIDANCE

Germany continues to be one of the hot spots for competition law. The Federal Cartel Office (FCO) is one of the most active competition authorities. In addition, a lot of damages claims are ongoing in Germany, the most prominent being the *Truck* cases. This trend for damages proceedings is further enhanced by the ninth amendment to the Act Against Restraints on Competition (ARC), which came into force on 9 June 2017 and has shown its first effects in the past few months. It not only implements the EU Directive on actions for damages for competition law infringements (the Damages Directive) but also introduced other significant changes (such as a new merger control threshold, special rules for market power in the digital economy and an extended parental liability). In its enforcement practice, the FCO focuses largely on 'classic' hard-core cartels but also on vertical restrictions. The internet economy continues to be high on the FCO's agenda, as reflected by an ongoing investigation against Facebook (for which the statement of objections was sent to Facebook in December 2017 and where the decision is expected in early 2019) and proceedings concerning the online booking portals HRS and Booking.com, as well as selective distribution systems (e.g., Asics). In addition, the FCO opened proceedings against Amazon because of an alleged abuse of its market position in 2018: the FCO is investigating liability rules, withheld payments, seller accounts being blocked without explanation, the use of sellers' information and other rules that seem to put sellers at a disadvantage. This investigation runs in parallel with the European Commission's investigation of Amazon's dual role as market place and reseller.

The FCO's competencies have been extended to include responsibility for consumer protection issues. Although its powers in this regard are currently limited to sector enquiries,[2] the FCO has already demonstrated that it intends to make use of these new powers intensively, having started two such enquiries within the first few months of practice and publishing the first results at the end of 2018

When enforcing its policies, the FCO can make use of its huge resources (approximately 345 employees and several specialised enforcement units). The FCO also has far-reaching powers when it comes to dawn raids. The Special Unit for Combating Cartels (SKK) has the task of assisting the relevant decision-making divisions in the FCO, which are competent for all antitrust and merger cases relating to specific industrial sectors, in uncovering cartel agreements by deploying specialised personnel.

1 Petra Linsmeier and Matthias Karl are partners at Gleiss Lutz.

2 Section 32e of the German Act against Restraints on Competition (ARC).

German competition law corresponds to EU competition law as far as anticompetitive agreements are concerned. Interpretation of the ARC must, in general, be in accordance with EU competition law.

The wilful or negligent violation of Section 1 of the ARC (and of Article 101 of the Treaty for the Functioning of the European Union (TFEU)) can be fined as an administrative offence. The amount of the fine may be up to €1 million;[3] beyond that, for each undertaking and association of undertakings participating in the infringement, the fine can be higher, but may not exceed 10 per cent of total turnover in the preceding business year.[4] Section 1 of the ARC is addressed to undertakings and associations of undertakings. These entities are subject to the ARC and can be fined for competition law infringements under Section 81. German law also provides for the possibility of fining certain natural persons (a legal representative or other person in a comparable position) if such a person has personally contributed to the infringement or has not taken appropriate measures to prevent the anticompetitive conduct.[5]

The FCO adopted formal guidelines on the calculation of fines on 15 September 2006, which, as a consequence of the *Grey cement* judgment of the Federal Court of Justice,[6] were amended on 25 June 2013.[7] In terms of policy and methodology, the initial notice followed the European Commission's guidelines regarding the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No. 1/2003. In particular, the provision in Section 81(4) of the ARC (10 per cent limit) was interpreted as a cap for fines in antitrust violations, while the amended notice, as a consequence of the Federal Court of Justice's *Grey cement* judgment, slightly deviates from this approach. However, the appeal court (Higher Regional Court of Düsseldorf) does not follow these guidelines, but often increases fines imposed by the FCO, using the 10 per cent limit as the highest amount possible when calculating a fine.[8]

In addition, the FCO adopted a notice containing leniency regulations on 7 March 2006 (the Leniency Notice).[9] The Leniency Notice takes account of both EU leniency policy and the model leniency programme developed by the European Competition Network (ECN). According to its wording, it only covers cartels. However, in practice, the FCO is prepared to take into account the cooperation of a participant in anticompetitive vertical behaviour and to grant significant reductions comparable to those under the Leniency Notice. This will most probably also be true for potential hub-and-spoke cases (but no case law exists at present).

In 2015, the FCO imposed a fine on a cartel for the first time (relating to car parts), which came to light through a tip-off via its whistle-blower hotline, which was established in 2012 and complements its leniency programme. Thanks to this hotline, interested parties may submit their information anonymously; according to the FCO, this has proven very effective. It is one of the reasons why the FCO claims that it has been less affected by the decline in leniency applications being felt at European level during the past few years. Another reason is that many investigations by the FCO were started because of complaints from competitors

3 Section 81(4)1 ARC.

4 Section 81(4)2 ARC.

5 Sections 130 and 30 of the Administrative Offences Act.

6 German Federal Court of Justice, decision of 26 February 2013, KRB 20/12 – *Grey cement* cartel.

7 Notice 38/2006 and Notice on calculation of fines in cartel cases, as amended on 25 June 2013.

8 See, for example, Higher Regional Court of Düsseldorf, decision of 12 October 2017, ECLI:DE:OLGD:2017:1012.2KART1.17OWI.00 – *Wallpaper* cartel.

9 Notice 9/2006 on the immunity from and reduction of fines in cartel cases (the Leniency Notice) – available in German, English and French on the FCO website (www.bundeskartellamt.de), as are all official legal texts and documents relating to German competition law.

and customers and the FCO's own initiative. According to statistics available on the FCO website, only around 50 per cent of cases were started because of leniency applications. Nevertheless, according to the latest FCO statistics (orally communicated), the number of leniency applications decreased from 76 in 2015 to 27 in 2017, and fewer again in 2018. Most likely, the huge claims for damages that cartel members face nowadays are the main cause of this decline.

In 2017, the Federal Court of Justice also rendered a noteworthy judgment on compliance programmes.[10] While this judgment focused on criminal and tax law, the part about compliance programmes, namely that the implementation of a compliance programme could lead to a reduction in the fine, is also important for other areas of law. Taking this judgment into consideration, the FCO intends to implement new guidelines. It feels forced to do so also because of the new competition registry that it has to implement by 2020, which will list companies that have violated competition law, among other things. Entries on the register for cartel violations may lead to exclusion from public procurement for up to three years. However, this period may be shortened if the company manages to prove that it 'cleaned itself', and the new guidelines will help companies to understand which criteria they need to fulfil to have their entry deleted.[11]

II COOPERATION WITH OTHER JURISDICTIONS

The FCO has signed the statement regarding the Commission Notice on cooperation within the Network of Competition Authorities. It has thereby agreed to the exchange of information, mutual consultation, coordination of investigations, inspections on behalf of other competition authorities and discussions on the proposed course of action among European competition authorities. Specifically, the FCO is obliged to inform and liaise with both the European Commission and other national competition authorities (NCAs) within the ECN. Regarding leniency applications, the FCO is only obliged to pass on leniency applications and related documents to other authorities of the ECN in the cases specified in the Commission Notice. The most important case in this respect is where the applicant has consented to the information being passed on to another authority.

The Leniency Notice allows for the fact that an applicant for leniency might also file an application to the European Commission. In order to be informed of such potentially concurrent proceedings, the Leniency Notice obliges the applicant to state whether, and to which other competition authority, an application for leniency has been, or will be, filed besides the application to the FCO. If the applicant has also applied, or intends to apply, to the European Commission, and if the Commission is the best-placed authority according to the criteria of the Commission Notice on cooperation within the Network of Competition Authorities, then the FCO may exempt an undertaking that has placed a marker (see Section IV) from submitting a complete application. Whether the FCO grants this exemption depends on whether the Commission actually picks up the case. This merely confirms that the FCO respects the priority of proceedings at EU level in accordance with Article 11(6) of Regulation (EC) No. 1/2003.

10 German Federal Court of Justice, decision of 9 May 2017, 1 StR 2651/16.

11 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/23_10_2017_Wettbewerbsregister.html.

The Leniency Notice contains no indication that an application in another EU Member State will have an effect on the applicant's position in the proceedings in Germany, nor in what other way the FCO will interpret the relationship between the German proceedings and the others. An applicant will therefore have to file its application in any Member State in which it can expect to be liable to a fine.[12] The FCO can be expected to apply the Commission Notice on cooperation within the Network of Competition Authorities in that respect. It also seems as if the new Directive of the European Parliament and European Council to empower the competition authorities of the Member States to be cost-effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive) will not result in much change to the FCO's enforcement practice.

The applicant must expect the FCO to share the information contained in the application with other competition authorities; however, the FCO will treat the identity of the applicant and its trade and business secrets as confidential, but only until a statement of objections has been issued to a cartel participant.

Besides the cooperation within the ECN, the US and German governments concluded an agreement on mutual cooperation regarding restrictive business practices on 23 June 1976. On the basis of this agreement, the FCO, the US Department of Justice and the Federal Trade Commission may exchange information, encompassing documents, memoranda and other materials, with regard to anticompetitive practices that have an effect on trade in the respective authority's jurisdiction. What is more, the cooperation encompasses the right to send requests for information by one authority to undertakings domiciled within the other authority's jurisdiction. Most importantly, the authorities will consult each other with respect to investigations relating to the same cartel activity having effects in both jurisdictions.

It must be stressed that pursuant to Section 50(b) of the ARC, the FCO is generally entitled to cooperate with NCAs of other EU Member States, and with other competition authorities outside the European Union; however, it has to observe certain limitations on the exchange of information containing confidential data, business secrets, and the like.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The FCO is entitled to investigate any agreement or conduct that raises concerns regarding its compatibility with German and EU competition rules.[13] As a consequence, companies that are domiciled outside Germany may be investigated if they have engaged in anticompetitive behaviour that might have an effect on the German market.

The FCO's investigative powers are fairly broad, but it is not authorised to execute investigative measures outside Germany; rather, the FCO has to rely upon legal and administrative assistance from other authorities, particularly within the framework of the ECN. In this context, the FCO might not be regarded as the best-placed authority to investigate a matter on the basis of joint conclusions among the ECN authorities as to the allocation of cases among the competition authorities within the ECN (see Section II).

However, during dawn raids the FCO feels competent to look into and to ask for IT data located on servers outside Germany as long as the company under investigation, the servers of which are based abroad, can access these data.

12 Confirmed by European Court of Justice, C-428/14, ECLI:EU:C:2016:27.

13 Section 185(2) ARC.

IV LENIENCY PROGRAMMES

According to the FCO's Leniency Notice, cartel members can receive (complete) immunity from fines or a reduction in fines of up to 50 per cent. As mentioned in Section II, according to the wording of the Leniency Notice, this only applies to cartels, not to vertical infringements or cases of unilateral abuse of market power. And yet, in practice, the FCO is prepared to take into account the cooperation of a participant in anticompetitive vertical behaviour and to grant significant reductions comparable to those under the Leniency Notice. For example, in the *Lego* case, cooperation with the FCO was one of the reasons for Lego's small fine (only €130,000). A similar approach will most probably be taken in potential hub-and-spoke cases (which have not yet been explicitly fined, but more often declared to be vertical cases) and in unilateral conduct cases. However, there are no formal, specified rules in that respect, only the FCO's statement on its website, according to which a cooperation may be taken into account when assessing the fine even though the Leniency Notice only applies in cases of horizontal agreements and concerted practices among competitors. The question of whether a leniency applicant qualifies for one of these options is particularly dependent upon the timing of the leniency application, the role the applicant played in the cartel, and the extent and nature of its contribution during the infringement proceedings.

Full immunity will be granted only to the first-in applicant and only under certain circumstances. The first applicant may be granted full immunity even after the FCO has learned of the cartel infringement and even if it was already in a position to obtain a search warrant. Subsequent applicants, or applicants not fulfilling the preconditions for full immunity, may receive a reduction of up to 50 per cent. If the applicant played a decisive role in the cartel, it cannot receive full immunity but is not generally excluded from being granted a reduction in the fine. As a further important condition, cooperation with the enforcement authority must be continuous and without reservation.

The Leniency Notice provides for the possibility of placing a marker (i.e., a cartel member's declaration of its willingness to cooperate). The FCO will acknowledge receipt of the marker but will generally not decide on the extent of the reduction in the fine until the final decision is adopted. Only if the marker refers to an application for complete immunity will the FCO issue an assurance during the course of the proceedings that the applicant will be granted full immunity, provided that it was not the only ringleader of the cartel and did not coerce other undertakings into participating in the cartel.

There are no clear-cut requirements for a successful leniency application. The Leniency Notice requires any applicant to cooperate fully and continuously. The applicant is expected to provide all verbal and written information available to it, including documents and evidence relating to the cartel. In particular, all information necessary for calculating the fine must be handed over. Furthermore, the identity of all employees involved in the cartel agreement must be disclosed. If the application is intended to be filed for more than one legal entity belonging to the same group, the respective affiliated companies must be named in the application. The duty to hand over information, in whatever form, does not end with filing the application but continues throughout the proceedings. The FCO will not consider the cooperation as fulfilling the aforementioned requirements if the leniency applicant merely submits information or documents without any further explanation. In particular, the cooperation requires an oral or written description of the relevant cartel behaviour, including the time and place of meetings, details of the illegal behaviour and the identities of the companies involved.

To receive full immunity, the leniency application must enable the FCO to initiate further investigatory measures. Full immunity will be granted only if the application enables

the FCO to obtain a search warrant. If the FCO has already been able to obtain a search warrant with the information available to it, the applicant will be granted full immunity only if the information in the application enables the FCO to prove the offence. Consequently, the leniency applicant is required to gather and present the documents and the factual background of the relevant cartel behaviour to increase its chances of meeting these thresholds.

On the basis of the Leniency Notice, the conditions for full immunity depend on whether the FCO already has sufficient evidence to obtain a search warrant. If this is not the case at the time the application is filed, the applicant will automatically receive full immunity if it:

a is the first participant in a cartel to contact the FCO before it has obtained sufficient evidence to obtain a search warrant;
b provides the FCO with verbal and written information and, where available, evidence that enables it to obtain a search warrant;
c ends its involvement in the cartel immediately on request by the FCO;
d was not the only ringleader of the cartel and did not coerce others into participating in the cartel; and
e cooperates fully and continuously with the FCO.

If, at the time the application is filed, the FCO is already able to obtain a search warrant, full immunity will be granted, as a rule, if:

a the applicant is the first participant in the cartel to contact the FCO before it has sufficient evidence to prove the offence;
b the applicant provides the FCO with verbal and written information and, where available, evidence that enables it to prove the offence;
c the applicant ends its involvement in the cartel immediately on request by the FCO;
d the applicant was not the only ringleader of the cartel and did not coerce others into participating in the cartel;
e the applicant cooperates fully and continuously with the FCO; and
f no cartel participant has been granted immunity before this applicant.

A sole ringleader of a cartel or an undertaking that has coerced other undertakings into participating in a cartel will not be eligible for full immunity under any circumstances. The Leniency Notice requires that the applicant ceases its participation in the cartel on request by the FCO.

With regard to the reduction in the fine, the Leniency Notice requires the applicant to hand over all the information and evidence it has available that makes a significant contribution to proving the offence. The value of the contributions to uncovering the illegal agreement is one decisive aspect in the amount of the reduction granted to the applicant. This provision proves to be problematic in practice. Companies that do not have particularly incriminating documents or information may be provoked into exaggerating the information in their possession and the facts that can be proved thereby.

Leniency applicants subsequent to the first-in, or not qualifying for full immunity under the first-in rule, may receive reduced fines. The maximum reduction that can be granted is 50 per cent. Applicants may receive full immunity even if they are not the first-in. The Leniency Notice does not exclude the possibility of the second applicant moving into the position of the first applicant. This might be the case if the first applicant is the sole ringleader or does not fulfil its obligation to cooperate. The prospect of overtaking the first applicant intensifies competition between applicants to offer the most value.

To qualify for a reduction, the applicant must adhere to the following obligations:

a It must cooperate fully and continuously for the entire duration of the proceedings.

b It must hand over all the information and evidence available to it that is likely to make a significant contribution.[14]

c It must end its involvement in the cartel immediately on request by the FCO.

d It must maintain confidentiality regarding its cooperation with the FCO until explicitly relieved thereof.

e It must name all employees involved in the cartel and ensure that they all adhere to the cooperation obligation.

Provided that the applicant fulfils these obligations, the FCO will determine the reduction in the fine on the basis of the value of the contribution and the order of applications.

No rules exist regarding immunity plus or amnesty plus. In addition, no rules exist as regards cooperation with the criminal prosecutors. In bid rigging cases for which criminal sanctions apply,[15] this can create major issues for natural persons. They may be prosecuted even if they are granted full immunity by the FCO. In addition, the approach of the criminal prosecutors is hard to predict since there is not just one criminal prosecution office in Germany responsible for these kinds of offences; each competent local criminal prosecutor may take up such cases.

An application can be made as long as the FCO has not concluded the proceedings by way of a formal decision. In particular, a reduction is not excluded because the initiation of the investigation has become known; however, the later the applicant decides to file an application and the more information the FCO has already collected, the less significant the applicant's information will be. On the other hand, the order of applications is not the only factor used in determining the amount by which a fine is reduced. If an early applicant is not able to present valuable information, then a later applicant will be able to achieve a more significant reduction by presenting data of greater value.

The applicant may initiate the leniency proceedings by contacting the special unit for combating cartels or the chairman of the competent decision-making division of the FCO.[16]

The applicant, as already mentioned, may place a marker by announcing its unreserved willingness to cooperate with the FCO. Placing the marker does not require the undertaking to submit a complete application; it only has to contain a summary of the most important identifying features of the cartel, including details of the type and duration of the infringement, the product and geographical market affected, the identity of those involved and the other competition authorities to which applications have been, or are intended to be, filed. If the marker is intended to be placed for more than one legal entity belonging to the same group, the respective affiliated companies must be included in the marker. The marker may be placed verbally or in writing, and may be in English or German.

The FCO will then confirm that a marker has been placed and will set a time limit of not more than eight weeks for filing the complete application for leniency, containing all the necessary information. The application may be filed in written or verbal form and either in

14 There is no explicit definition of significant contribution in the Leniency Notice. The FCO has a very broad discretion as to whether it grants any reduction at all.

15 Section 298 of the Criminal Code.

16 Contact details are: Bundeskartellamt, Dr Katrin Roesen, Kaiser-Friedrich-Strasse 16, 53113 Bonn, Germany; Tel: +49 228 9499 386; Fax: +49 228 9499 560.

German or in English. In the latter case, a written German translation must also be provided. An application submitted by an undertaking will also be treated by the FCO as an application for its current and former employees, unless otherwise indicated. The FCO may exempt the applicant from filing a complete application if the European Commission is the best-placed authority to decide on the case and if the applicant intends to file, or has already filed, an application to the Commission.

Generally speaking, the FCO is an authority with a pragmatic and not very formalistic approach. This is also true when it comes to cooperation under the Leniency Notice.

V PENALTIES

A violation of ARC provisions is not in itself a criminal offence, but if the antitrust behaviour includes criminal offences such as bid rigging, the FCO must refer proceedings against any natural person to the public prosecutor under Section 41 Administrative Offences Act. As mentioned in Section IV, cooperation with the FCO may be relevant as a mitigating factor in any criminal proceedings, but generally does not prevent them.

If the FCO establishes an infringement of Section 1 of the ARC (or Article 101 of the TFEU), it might impose administrative fines against both the acting employees and the undertaking. The fine might be as much as €1 million or up to 10 per cent of the total turnover generated by the undertaking and its affiliates worldwide in the preceding business year. As mentioned in Section I, the FCO calculates fines on the basis of guidelines that were initially adopted in 2006 and amended as a consequence of the Federal Court of Justice's *Grey cement* decision. The FCO's method differs from the approach taken by the European Commission. First, it is important to note that the FCO, pursuant to the *Grey cement* decision, does not treat the 10 per cent threshold regarding the cartelist's worldwide group turnover as a cap, but rather as the maximum for a framework within which each fine must be calculated. Generally, the FCO takes account of 10 per cent of the turnover achieved from sales of the cartelised products or services during the existence of the cartel. The established amount will be multiplied by a factor that is dependent on the total turnover of the undertaking belonging to the investigated cartel. The factor ranges between two (for undertakings with an annual aggregate worldwide turnover of up to €100 million) and six (for undertakings with an annual aggregate worldwide turnover of more than €100 billion). This amount will be adjusted by specific circumstances relating to either the undertaking (e.g., level of activity in the cartel infringement, market position in the affected market) or the specific character of the cartel infringement (e.g., effects on the market, significance of the market, organisation of the cartel). Thus, the FCO must take into account both aggravating and mitigating factors. However, as mentioned above, the competent appeal court, the Higher Regional Court of Düsseldorf, interprets the rules resulting from the *Grey cement* decision more strictly. As a result, the Court often increases fines significantly during proceedings against FCO fines. This leaves companies in the uncomfortable situation of only challenging fines imposed by the FCO if they are willing to take the risk that the court may increase the fine significantly.

In the case of a leniency application, the exact amount of the reduction will be decided in the FCO's final decision. Generally, after receiving a leniency application, the FCO will only confirm receipt of the complete application; it will not decide whether and to what extent immunity or a reduction will be granted. The FCO will state only how the applicant is ranked and whether it fulfils its cooperation duties. Only if the undertaking fulfils the conditions for automatic full immunity (i.e., it applies for leniency before the FCO has sufficient information

to obtain a search warrant) will the FCO 'assure the applicant in writing that it will be granted immunity from the fine subject to the conditions that it was neither the only ringleader of the cartel nor coerced others into participating in the cartel and fulfils its obligations to cooperate'.

As to the sanctioning of individuals, it is important to distinguish between employees entitled to represent the undertaking or to exercise managerial functions on the one hand, and those who are not entitled to do so on the other. If the latter engage in antitrust behaviour, they do not violate ARC provisions as their actions cannot be attributed directly to their employer. However, if their behaviour is facilitated by a lack of internal supervision, the people entitled to represent the undertaking or to exercise managerial functions will have violated their duty to supervise the undertaking within the meaning of Section 130 of the Administrative Offences Act, and can therefore be fined. The violation of this duty is an administrative offence that is imputed to the relevant undertaking under Section 30 of the Administrative Offences Act, which may then also lead to fines.

The Leniency Notice explicitly states that a leniency application filed on behalf of an undertaking will also be rated by the FCO as made on behalf of the natural persons participating in the cartel as former or current employees of the undertaking in question. However, an undertaking may declare that the application shall not be treated as representing its employees. The FCO leaves open the question of whether an application by a natural person on his or her own behalf will also be treated as representing the undertaking in question; it is generally assumed that this is not the case.

If the undertakings that are the subject of a fine have agreed to settle with the FCO, the FCO generally grants an extra bonus of 10 per cent of the initial fine.

VI 'DAY ONE' RESPONSE

Like the European Commission, the FCO is entitled to conduct inspections (dawn raids) of not only the premises of an undertaking but also private homes and cars, *inter alia*. In the event of a dawn raid, immediate action is required. It is advisable for an undertaking to have dawn-raid guidelines in place and properly implemented. It is of the utmost importance that an undertaking's personnel are well aware of the steps that must be taken immediately after the FCO requests access to the premises.

First, it is crucial that the legal department and the responsible board members are informed immediately. Second, the legal representative should carefully review the search warrant that must be disclosed by the FCO's officials. Third, the undertaking's employees must not interfere with any investigative activities, otherwise the undertaking runs the risk that obstruction might be taken into account as an aggravating factor for the purposes of calculating the fine. Fourth, it is important to retain copies of the documents seized by the FCO officials. While the European Commission is only allowed to take copies of the original documents, the FCO usually insists on seizing the originals. It is therefore essential that the undertaking is in possession of copies of such documents to prepare a meaningful defence. The FCO is also authorised to seize electronic data; however, it is obliged to review the seized data within a reasonable period of two to three weeks to determine whether it might be used as evidence for the purposes of the investigation. If the seized data is not to be used for that purpose, it must be returned to the undertaking without delay. Finally, it is important to have a debriefing meeting with FCO officials, and advisable to have minutes taken directly at this meeting. Usually the FCO officials have a template available that can be used for this purpose.

If the FCO does not conduct a dawn raid but instead sends out a request for information, it is important that the request is answered by the undertaking within the set time frame (subject to a potential extension of the deadline) and that the response is correct and comprehensive, otherwise the undertaking runs the risk of being fined for non-compliance with the FCO's investigation.

VII PRIVATE ENFORCEMENT

Germany is one of the jurisdictions within Europe where many follow-on damage actions are filed. Many legal issues relating to damages claims have already been clarified by the German courts (such as the standing of indirect customers, and the possibility of the pass-on defence). In addition, many topics within the Damages Directive have already been part of German law since the sixth amendment to the Act against Restraints on Competition in 2005. Nevertheless, the implementation of the Damages Directive by way of the ninth amendment to the Act has led to significant changes in German law: the amended ARC provides for the following.

i Standing of indirect purchasers and passing-on defence

Under German law, both direct and indirect customers have standing and may claim damages. The Federal Court of Justice confirmed the right of indirect purchasers to claim damages because of anticompetitive conduct in the *ORWI* judgment of 2013,[17] and that defendants may raise the passing-on defence. Under the amended ARC, indirect purchasers (but not the cartel members) benefit from a rebuttable presumption that cartel overcharges are at least partially passed on to indirect purchasers.[18]

ii Calculation of damages

German law is particularly plaintiff-friendly with respect to the calculation of damages. A judge might invoke Section 287 of the Code of Civil Procedure, thereby estimating the exact amount of the damages to be awarded. This provision is widely used by German courts and was also confirmed in the *ORWI* judgment. The Federal Court of Justice decided only three years ago in the *Lottoblock II* judgment that Section 287 of the Code of Civil Procedure may also help to establish whether any damage has been suffered at all.[19] In that regard, the amended ARC has introduced a simplified form of a rebuttable presumption stating that a cartel causes harm.[20] However, the presumption does not cover the amount of damage caused and whether the plaintiff was affected by the cartel. Here, the Federal Court of Justice rendered a landmark decision at the end of 2018, limiting the scope of these presumptions considerably.[21]

iii Rules on disclosure of evidence

The rules on disclosure of evidence have changed considerably because of the amended ARC. These amendments are probably the most significant changes to German law resulting from

17 German Federal Court of Justice, decision of 28 June 2011, KZR 75/10 – *ORWI*.

18 Section 33c(2) ARC.

19 German Federal Court of Justice, decision of 12 July 2016, KZR 25/14 – *Lottoblock II*.

20 Section 33a(2) ARC.

21 See German Federal Court of Justice, decision of 11 December 2018, KZR 16/17 – *Rail* cartel.

the Damages Directive. *Inter alia*, the most important former provision on access to files, Section 406e of the Code of Criminal Procedure, no longer applies when bringing actions for damages, and has thus lost much of its importance.[22]

German civil procedure law does not provide for rules comparable to those in the United States or the United Kingdom that enable a court to issue discovery or disclosure orders that oblige a party to disclose certain documents or a certain category of documents for use in civil proceedings. Although some commentators have claimed that Section 142 of the Code of Civil Procedure offers similar options, its scope is limited and this provision has not often been used.

The amended ARC includes very detailed provisions on disclosure, and introduces a completely new approach, which goes beyond the Damages Directive.

For example, the ARC foresees a new substantive claim for disclosure. Such a claim may be addressed to the defendants (i.e., the cartel members). However, it may also be addressed to third parties who were not involved in the cartel but may have substantial market knowledge. In addition, disclosure can be requested in proceedings before damages claims were filed. The ARC even foresees the possibility of using preliminary injunctions to get access to the requested information[23] – a plan that has been especially criticised by the defendants' side. However, in a first decision in 2018, the rule was interpreted narrowly, limiting the scope of this provision considerably.[24] The most recent practice shows that such tools are being used, not only on the plaintiffs' side, but also on the defendants' side to get access to information about a potential pass-on.[25]

Potential plaintiffs, however, mainly criticise the provision according to which the costs for such information gathering need to be borne by the plaintiffs' side.[26] In the legislative process, they unsuccessfully argued that this provision violates the Damages Directive since it may create an enormous hurdle for plaintiffs, especially where e-searching tools are used to gather information.

v Statute of limitations

Another hotly debated topic has been the statute of limitations, owing to the lack of transitional provisions in the sixth amendment of 2005. A recent landmark decision by the Federal Court of Justice (*Grey cement II*) has brought some clarity in deciding that the provisions on suspension that were included in the sixth amendment to the ARC also apply to 'old' damage cases (i.e., cases in which the infringement had been terminated prior to July 2005).[27]

The implementation of the Damages Directive led to an extension of the statute of limitations from three to five years.[28] The suspensive effect of an ongoing investigation by the European Commission, the FCO or another national authority was confirmed, and the suspensive effect of the filing of an action for information or for the production of evidence

22 Section 89c(5) ARC.

23 See Section 89b(5) ARC.

24 See Higher Regional Court of Düsseldorf, decision of 3 April 2018, VI-W (Kart) 2/18, ECLI:DE:OLGD:2018:0403.VI.W.KART2.18.00 – *Truck* cartel.

25 See, e.g., Hanover District Court, decision of 18 December 2017, 18 O 8/17 – *Truck* cartel.

26 See Section 33g(7) ARC.

27 See German Federal Court of Justice, decision of 12 June 2018, KZR 56/12 – *Grey cement II*.

28 See Section 33h(1) ARC.

was introduced.[29] In addition, the statute of limitations for contribution claims among cartel members will be changed: it shall only start to run when the plaintiff has been paid damages.[30] Detailed transition provisions apply.[31] In this regard, the *Grey cement II* decision does not bring clarity, and new questions have already been raised.

vi Other relevant topics

The amended ARC grants privileges to immunity recipients insofar as it limits their liability to that for their direct or indirect purchases or providers.[32] To other injured parties, immunity recipients are only liable if full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. However, this only applies to cases of full immunity.

Another topic with particular importance for proceedings in Germany relates to statutory lawyers' fees in the case of interventions. Under current case law, the cost risk increases by every intervening party that decides to join the proceedings. As a result, a plaintiff needs to reimburse the costs not only of the defendant but also of all intervening parties if the plaintiff loses the proceedings. Under the new rules,[33] this cost risk is being limited: regardless of the number of intervening parties, the legal fees to be reimbursed may not be higher than the legal fees that need to be reimbursed to the defendant.

vii Assessment

Many of the new provisions will be tested and interpreted in the numerous damages claim proceedings that are under way (such as the follow-on claims in the *Sugar* cartel or the *Truck* cartel). Current practice shows that Germany remains one of the hot spots for damage claims.

VIII CURRENT DEVELOPMENTS

While the main purpose of the ninth amendment to the ARC was to implement the provisions of the Damages Directive, the revised Act also changed some other aspects of German competition law. In particular, when it comes to fine proceedings, the amended Act defines 'undertaking' more or less in the same way as 'single economic entity' is defined under EU competition law (i.e., the FCO will also be able to fine a controlling parent company for violations committed by a subsidiary). Previously, imposing fines on the parent company was only possible when a representative of the parent company had committed a competition law violation or if the management of the parent company had been unable to supervise the actions of its subsidiaries sufficiently. However, the legislative refrained from including a provision according to which parent companies may be faced with damages claims because of a competition law violation committed by their subsidiaries. It shall be up to the courts to decide upon this still hotly debated matter.

The tenth amendment to the ARC is currently in preparation, albeit at a very early stage. It is most likely to focus mainly on new provisions regarding dominance in the internet economy.

29 See Section 33h(6) ARC.
30 See Section 33h(7) ARC.
31 See Section 186(3) ARC.
32 See Section 33e ARC.
33 See Section 89a(3) ARC.

Appendix 1

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Petra Linsmeier advises and represents clients in German and European competition law. Her practice encompasses merger control, cartel fine proceedings, civil antitrust litigation and compliance measures. One main focus of her work concerns multi-jurisdictional internal investigations and audits, as well as subsequent leniency filings. Dr Linsmeier studied at the universities of Passau, Munich (*Dr iur*, 2001) and Prague. She was admitted in 2001 and has been a partner at Gleiss Lutz since 2007. Dr Linsmeier is a member of the German Association for the Study of Antitrust Law, the American Bar Association, the International Bar Association and the German Bar Association. She has been a lecturer at the University of Passau since 2013.

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