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Cartels

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Germany

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Overview of the law and enforcement regime relating to cartels

Germany has a long tradition of rigorously and effectively enforcing the prohibition of cartels. The German Federal Cartel Office (FCO) regularly uncovers and investigates a large number of different competition law infringements in many different industries each year.

The competition act in Germany is the ARC, last amended on 19 January 2021 by the 10th amendment to the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition, or "ARC"), also known as the "ARC Digitalization Act". The major purpose of the ARC is to enable the FCO to effectively and proactively act against undertakings with importance for the competition in more than one market, especially with respect to data which they hold and use. Furthermore, there were some changes with respect to increasing the effectiveness of cartel enforcement and new provisions concerning fines against associations of undertakings. The Leniency Programme has been implemented in a statutory form and is not based only on administrative rules. Furthermore, there has been a new legal presumption concerning cartel damages claims with respect to purchasers affected by a cartel.

The prohibition of cartels is contained in section 1 *et seq.* ARC, which prohibits all agreements, concerted practices or decisions by associations of undertakings which have as their object or effect a restriction of competition. Since 2005, section 1 *et seq.* ARC has been largely aligned with article 101 TFEU. Cartels are not criminalised under German law. Rather, cartels generally qualify as an administrative offence, with one important exception: bid rigging constitutes a criminal offence under section 298 of the German Criminal Code and can be sanctioned with up to five years in prison.

The FCO has published the following guidelines in respect of important aspects of public cartel enforcement, which are available on the FCO's website (https://www.bundeskartellamt.de/EN/Banoncartels/Further%20documents/Further%20Documents_node.html) and are available in both German and English:

- Leniency Programme (*Bonusregelung*), Notice No. 9/2006, which entered into force on 15 March 2006 [no longer in force].
- Fining guidelines (*Bußgeldleitlinien*), which entered into force on 11 October 2021.
- *De minimis* guidelines (*Bagatellbekanntmachung*), Notice No. 18/2006, which entered into force on 13 March 2007. It should be noted that the FCO's *de minimis* guidelines do not apply to hardcore restrictions; however, other than the EU Commission, the FCO has not (yet) amended its *de minimis* guidelines following the ECJ's Expedia judgment of 13 December 2012 in order to explicitly clarify that "by object" restrictions are not caught by the FCO's *de minimis* guidelines.

The prohibitions laid down in the ARC are mainly enforced by the FCO, an independent higher federal authority assigned to the Federal Ministry of Economics and Energy. The FCO

is organised into 12 operative units, so-called "decision divisions". Nine of these decision divisions are responsible for the application of general antitrust rules and merger control provisions in specific industries and sectors. Three decision divisions deal exclusively with the cross-sector prosecution of cartels and hardcore restrictions. The decision divisions are independent bodies that take their decisions without any instructions from above. The three cartel enforcement decision divisions are supported by a special unit for combatting cartels, the main purpose of which is to assist during the investigative phase, in particular in preparing and executing dawn raids.

The FCO may impose monetary fines on undertakings or individuals for wilful or negligent infringements of the prohibition to restrict competition, pursuant to section 1 ARC. Fines levied on individuals for wilful participation in a cartel may not exceed €1 million. In cases of negligent infringements, the maximum fine is €500,000. Not all individuals may be fined, only directors, officers and certain senior employees. However, if lower-ranking employees have committed the cartel offence and cannot be held responsible, directors or officers can be sanctioned with a fine for breaching their duty to supervise. The FCO may impose fines on undertakings of up to 10% of the worldwide (group) turnover in the most recent fiscal year. There are as yet no criminal sanctions against individuals, nor are there any disqualifications of directors resulting from sanctions for participating in cartels.

In October 2021, the FCO published new guidelines on the Leniency Programme and for the imposition of fines in cartel proceedings. At the beginning of 2021, the Leniency Programme was anchored in the law for the first time in the course of the 10th ARC amendment and, in doing so, also implemented requirements of the European ECN+ Directive. These are essentially the same as the FCO's previous Leniency Programme. In the supplementary guidelines, as in the Leniency Programme, the FCO has provided specifics on the structure of the procedure and the exercise of discretion, including the amount of the reduction. As part of the amendment, a number of criteria for assessing the amount of fines were also enshrined in law. For example, the offence-related turnover, i.e. the turnover generated with the products or services affected by the agreements, is now enshrined in law as a criterion. In addition, precautions taken by a company before and after the offence to avoid and detect corresponding infringements (compliance) can be taken into account under certain conditions. With the revision of the guidelines, the FCO is also taking greater account of the practice of the German courts in addition to the amendments to the law, in that, in future, a starting point for the calculation of fines will be determined on the basis of the offence-related turnover and the size of the company. As a result, the amendments are expected to increase flexibility in individual cases, but not to significantly change the level of fines. The guidelines also explain the option introduced into the law by the 10th ARC amendment to take existing compliance measures into account in a mitigating manner, even though an infringement has occurred.

On 9 March 2017, the German Parliament adopted the 9th ARC amendment, which became effective on 9 June 2017. It introduced a number of changes in different areas of competition law. The majority of new provisions implemented Directive 2014/104/EU through certain rules concerning private enforcement of cartel damages claims under national law (for details, see below). In addition, the 9th ARC amendment introduced new rules on corporate liability. First, the reform established liability for fines for any company that had "decisive influence" over a company found guilty of a cartel infringement. This is likely to capture parent companies in most cases. Second, the liability of successor companies has been extended. This means that the legal successor of an addressee of a fine can in all cases also be held liable for the addressee's conduct. In addition, the economic successor of the

infringing entity shall be liable for the conduct. The provision on economic successors specifically aims to address restructuring cases in which the infringing business is transferred by way of an asset deal and the acquirer continues the business following the transaction. Thus, a loophole that was commonly referred to as the "sausage gap" was closed. This loophole became part of the political agenda after a sausage producer successfully escaped a fine liability through an internal corporate restructuring.

Overview of investigative powers in Germany

In order to fully investigate a suspected infringement, the FCO may use all the evidence that is generally available in criminal proceedings. In particular, the FCO may take testimonies from witnesses and accused suspects, and it may address information requests to undertakings. However, witnesses can refuse to testify to the extent that they might incriminate themselves. Accused suspects generally have the right to remain silent on the allegations that form the subject matter of the investigation, and do not have to provide any assistance or information whatsoever to the FCO. In case they do agree to be heard, they are not obliged to make accurate or complete statements. Interrogated witnesses and accused suspects must generally be instructed about their rights to remain silent/not to incriminate themselves.

The FCO may furthermore carry out dawn raids at offices and search private premises and objects. As a general rule, any such searches have to be ordered by a judge. Only in exigent circumstances may the FCO conduct these searches without a judicial warrant. In addition, the FCO may seize objects which could be of importance as evidence in the investigation, and make copies of any relevant documents. Again, a seizure order by a court is required if the material is not handed over voluntarily, and only in cases of exigent circumstances may the FCO itself order the seizure of objects or documents. The investigative powers in respect of search and seizure also apply to material in electronic form. Computers and company servers may be searched and relevant files may be copied. Also, private locations, such as residences, automobiles, briefcases and persons can be searched.

If necessary, the FCO may use the coercive force as laid down in the Code of Criminal Procedure in order to enforce its investigative powers.

Accused undertakings and natural persons have a right to be heard, which comprises, in particular, the possibility to submit statements to the FCO. The right to be heard also encompasses a right of access to documents in the possession of the FCO. Such access to documents is, however, only granted to the lawyer of the accused suspect, not to the suspect itself. Access to the documents can be denied if the investigation has not been formally completed and if full access would endanger the objective of the investigation.

The parties have a right to legal representation throughout the entire proceedings. Whilst in theory, when conducting dawn raids, the investigators of the FCO do not have to await the arrival of the defence counsel, in practice they normally do consent to wait up to one hour.

The ECN+ Directive, aiming at a more effective cartel prosecution, was implemented by the 10th ARC amendment, which came into force on 19 January 2021. In line with the system in place at EU level, companies and their employees will in future be obliged to cooperate to a certain extent in the clarification of the facts.

Overview of cartel enforcement activity during the last 12 months

In 2020, the FCO imposed fines of around €349 million on a total of 19 companies or associations and 24 individuals. Compared to previous years, the fines were relatively

low. The sectors affected included steel and aluminium forging, the production of road gully castings and the wholesale of crop protection products. As a result of the impact of the COVID-19 pandemic, searches of companies in 2020 had to be temporarily suspended. Following the implementation of a comprehensive protection concept, searches took place again, but in reduced numbers. This, however, does by no means indicate that public enforcement is declining in Germany. Quite the contrary: the FCO repeatedly announced that, despite COVID-19, cartel enforcement will continue to be a top priority on its enforcement agenda. On the other hand, according to presentations made by FCO officials, there is a decrease in leniency applications. One of the essential reasons for this decrease is said to be that cartelists are cautious in filing leniency applications even though they will be exempted from fines but not from claims for damages brought by their customers.

In December 2020, the FCO imposed fines of around €175 million on aluminium forging companies and 10 employees responsible for prohibited agreements restricting competition. From April 2006 to April 2018 the companies pursued the common goal of passing on rising costs to customers in the so-called "Aluminium Forging Group". The investigation by the FCO was triggered by a leniency application.

In February 2021, the FCO imposed fines on three steel forging companies and two responsible employees, amounting to around €35 million. The companies are accused of having regularly participated in an exchange of information in violation of antitrust law in the period from October 2002 to December 2016. The investigation was triggered by a leniency application from another forging company, which was not fined under the FCO's Leniency Programme.

In January 2021, the FCO imposed fines of around €6 million against two manufacturers of road sewer castings and those responsible for them on account of price and discount agreements and an agreement to divide up two major orders. The two leading manufacturers in Germany engaged in prohibited price fixing at the expense of their customers. According to the FCO's investigations, there had been an agreement between the two companies from 16 May 2018 until the search on 14 November 2018. The infringements were uncovered with the help of the FCO's anonymous whistleblower system.

The FCO also reports that the number of actions for damages following completed cartel proceedings by the FCO or the European Commission (follow-on damages claims) have increased significantly in recent years. The industries are diverse: sugar; trucks; rails; bathroom fittings; electronic cash; chipboard; detergents; monitor tubes; packaging; cement; steel abrasives; wallpaper; gas-insulated switchgear; drugstore articles; flour (mill cartel); or confectionery. The FCO expects a further increase in the enforcement of claims for damages from the fact that conditions for such claims have been further improved with the implementation of the EU Antitrust Damages Directive 2014/104/EU and the 9th ARC amendment.

Key issues in relation to enforcement policy

Particular enforcement priorities for the FCO do not seem to exist. Rather, the FCO's most recent activities seem to reflect an overall balanced approach which equally tackles different types of infringements.

The FCO has sanctioned various types of horizontal anti-competitive arrangements including price-fixing cartels, customer/market allocation schemes, bid rigging, and the exchange of commercially sensitive information. As regards the latter, somewhat disappointingly, the FCO seems to increasingly employ the concept of "exchange of commercially sensitive

information" as a fallback argument in case it cannot prove the existence of an agreement or concerted action. This is even more worrying, given that the FCO generally considers exchanges of commercial information to imply anti-competitive purposes, and thus shifts the burden of proof towards the undertakings involved in any such information exchange. This seems problematic not just from an *in dubio*/fair trial perspective; it has also led to significant legal uncertainty for companies.

Key issues in relation to investigation and decision-making procedures

As in many other jurisdictions, the FCO does not operate with different bodies for the investigation and decision of its cases, respectively. Rather, the same decision body that investigates a potential competition law infringement is also competent to decide the case and – where applicable – to impose administrative fines. Here lies a significant structural shortcoming in the public enforcement proceedings, the downsides of which can be observed in many cases. Even though in theory the FCO is obliged to conduct its investigations in an unbiased and objective manner, in practice the FCO officials who decide to open an investigation do show a strong commitment to close any such case with a decision finding a competition law infringement.

The only type of "peer review" that exists is a review by the FCO's litigation division. Such review, however, only focuses on whether or not the envisaged decision would stand in court. It does not, in turn, question the quality or completeness of the investigative process, or the evidence on which the decision is based.

The FCO does not have to investigate or decide cases in a specific time frame. Rather, the length and depth of an investigation can be adapted to the individual circumstances of the case. In practice, this can lead to lengthy proceedings which can easily go on for several years. On average, investigations by the FCO take some 20 months between the first investigative measure and the final decision.

German law protects correspondence with defence counsel from seizure and review by the FCO. However, the law only protects correspondence between an outside counsel and his client that directly relates to the investigation at hand and which was created after the opening of the proceeding. All correspondence dating from before the opening of the proceeding is not protected, nor is internal correspondence by in-house counsel, regardless of when it was created. In order to obtain access to non-privileged documentary evidence, the FCO has in the past even carried out dawn raids at law firms.

In general, any investigative measures undertaken by the FCO can be appealed by the companies concerned. The competent court for hearing any such appeals is the local court in Bonn, the seat of the FCO. In practice, however, appealing investigative measures undertaken by the FCO is normally in vain. The local court in Bonn has conceded to the FCO's broad discretionary powers when it comes to determining whether and how to investigate a given case.

As mentioned above, some investigative measures – such as dawn raids – require prior approval by the local court in Bonn, which is normally granted if the FCO can substantiate that the respective investigative measure might yield relevant evidence in relation to a suspected competition law infringement. The standards of substantiation that the FCO must meet in its application for the relevant court warrant are rather low.

With the 10th ARC amendment, the position of the cartel authorities in judicial fine proceedings has been strengthened, as the FCO will remain the competent prosecution authority even after an appeal against a fine decision – instead of the General Public

Prosecutor's Office as was previously the case – and will in future have the same rights in judicial fine proceedings as the Public Prosecutor's Office.

Leniency/amnesty regime

The FCO operates a Leniency Programme broadly similar to that used by the EU Commission. The leniency notice is also available in English on the FCO's webpage (https://www.bundeskartellamt.de/DE/Home/home_node.html).

The notice sets out the conditions for immunity from, or reduction of, fines for leniency applicants in cartel procedures. The conditions for full immunity differ depending on whether the FCO already has sufficient knowledge of a cartel. A leniency applicant is guaranteed full immunity if it reports a cartel to the FCO of which the latter had no prior knowledge, provided that the applicant submits sufficient information and evidence that enables the FCO to obtain a search warrant. If the FCO already has sufficient evidence at its disposal to obtain a search warrant, it will grant immunity from a fine to the first applicant, unless the available evidence already allows the FCO to prove its case, and provided that no other cartel participant has received full immunity under the first alternative. Full immunity is not available for undertakings that were the ringleaders of the cartel, or that have coerced others to participate in the cartel. Full immunity always requires that the applicant cooperates fully and on a continuous basis with the FCO.

Cartel participants who are not eligible for full immunity may still obtain a significant reduction of the fine by up to 50%, provided that they provide the FCO with verbal or written information and, where available, evidence that represents a significant contribution to proving the offence, and provided that the applicant cooperates fully and on a continuous basis with the FCO. The amount of the reduction will be based on the value of the contributions to uncovering and proving the infringement and the sequence of the applications.

A cartel participant can contact the head of the special unit for combatting cartels or the chairman of the competent decision division to declare his willingness to cooperate (marker). The marker can be placed verbally or in writing in German or English. The timing of the placement of the marker determines the rank of the application. If the FCO accepts an application in English, the applicant is obliged to provide a written German translation without undue delay. A leniency application filed by an undertaking is also considered by the FCO as one made on behalf of individuals participating in the cartel as current or former employees of the undertaking. Joint applications by cartel participants are inadmissible.

The FCO asks for basic information on the cartel when the marker is placed, such as the type and duration of the infringement, the product and geographic markets affected, and the identity of those involved. The FCO also asks for clarification as to whether and – where applicable – with which other competition authorities leniency applications have been, or are intended to be filed. Upon placement of the marker, the FCO grants a time period of up to eight weeks within which a full leniency application must be submitted.

The FCO confirms in writing that a marker has been placed and that a leniency application has been submitted, including date and time of receipt. In case of an application for full immunity where the FCO does not have sufficient evidence to obtain a search warrant, the FCO will confirm that the applicant will be granted full immunity, provided that the applicant continues to fully cooperate with the FCO. In all other cases, the FCO will inform the applicant of his provisional position in the ranking order and that he is in principle eligible for immunity or a reduction. A final decision as to whether a possible reduction in

the fine will be granted and – where applicable – to what extent, will only be taken by the FCO at the very end of the investigative phase, i.e. once the FCO is in a position to evaluate the received input in view of the established infringement.

The FCO endeavours to assure the confidentiality of the process and will seek to avoid revealing the identity of leniency applicants. However, once the FCO issues a statement of objections, the addressees of such statements of objections have the right to fully access the case file, including all confidential information, and in particular all and any leniency applications. If the FCO has to rely on statements of a leniency applicant as evidence to prove its case, it also has to disclose the identity of the leniency applicant in its decision.

As mentioned before, leniency applicants must cooperate fully and continuously with the FCO. Unless requested otherwise by the FCO, they must end their involvement in the infringement immediately, and they must hand over to the FCO all information and evidence available to them. They must also name all the current and former employees involved in the cartel agreement, and take the necessary measures that all employees, from whom information and evidence can be requested, cooperate fully and on a continuous basis with the FCO during the proceedings. Leniency applicants are also required to keep their leniency application confidential.

With the 10th ARC amendment, which came into force on 19 January 2021, the Leniency Programme has now been enshrined in law. The FCO will adapt its notices in this regard. In any case, leniency applications can still be filed at any time.

Administrative settlement of cases

In recent years, an informal practice has evolved that provides the possibility for companies under investigation to enter into a settlement with the FCO. However, other than the EU Commission, the FCO has not published formal settlement guidelines. Even though there is no formal settlement procedure in place, there are a number of general principles that govern the settlement process. A settlement requires in the first place a guilty plea on the part of the undertaking that wishes to settle the case. In return, the FCO grants a reduction of a potential fine of up to 10%, in addition to any reductions granted under the leniency notice. The companies concerned usually also waive their rights for complete access to the file and for a complete statement of objections. However, the Federal Court of Justice has held that a waiver to appeal the final decision by the FCO may never be a part of a settlement agreement. The final decision of the FCO in settlement cases would normally only contain a short summary of the relevant facts, which makes it more difficult for third parties to extract from the decision any information that may be relevant for the preparation of follow-on actions. Settlements are always individual in character. Nothing prevents the FCO from settling a case with one company but ending settlement discussions with another. The FCO is principally bound by the settlement, unless new facts arise *ex post* which would justify re-opening the case.

Third-party complaints

Complaints can be lodged by anyone in any form: orally; by fax; by email; by phone; or in writing. There are no legal requirements for lodging a complaint, as it is only regarded as an incitement for the FCO to open a formal proceeding. Even anonymous complaints are acceptable. However, in practice, a complaint is unlikely to trigger an investigation if it lacks details and exact determinations regarding the alleged infringement. Thus a written complaint, with enclosed copies of all documents/files with potential relevance, increases the chances of success significantly.

The FCO is not obliged to take action on each complaint that it receives. Rather, it has wide discretionary powers in this respect. It is only required to exercise the said power in an objective, thorough and dutiful manner.

In June 2012, the FCO launched an online whistleblower system which allowed it to receive anonymous tip-offs of cartel law infringements. The system guaranteed the anonymity of informers, while still allowing for continual reciprocal communication with FCO investigators via a secure electronic mailbox. The FCO's new whistleblowing hotline has been criticised for lacking a sound legal basis, and for incentivising false accusations by competitors, customers or even frustrated employees.

Civil penalties and sanctions

Infringements of competition law can be sanctioned with administrative fines of up to 10% of the total group turnover. In contrast to European law, according to a February 2013 court order issued by the German Federal Court of Justice, this 10% limit is not a cap but, interpreting it in conformity with German constitutional law, the upper limit of the fining range. As a reaction to this judgment by the German Federal Court, the FCO has issued the new fining guidelines of June 2013, which have been dealt with in detail above.

An issue which is, to a certain extent still open at the moment, is the issue of liability of parent companies to their subsidiaries' infringement of cartel rules. Even though it seems to be generally accepted that a parent is liable for violations by a wholly owned subsidiary, the courts still must deal with individual aspects, in particular with respect to 50:50 joint ventures, and on the precise reconciliation of the European notion of an "undertaking" which, in this field, is still foreign to the German substantive and procedural rules of law.

Right of appeal against civil liability and penalties

Decisions of the FCO can be appealed before the Higher Regional Court in Düsseldorf, which is exclusively competent. An appeal against a decision imposing a fine produces suspensory effects. During the appeal procedure, it is possible to introduce new facts and evidence. In general, the court is also open to the introduction of economic expert evidence, whilst in some cases the court has claimed sufficient knowledge to assess important economic aspects of the case on its own.

Given that the Higher Regional Court in Düsseldorf is exclusively competent for hearing appeals against decisions by the FCO, the court is highly specialised and its decisions reflect profound competition law knowledge and expertise. Whilst the appeal procedure is generally highly effective and straightforward, it can also entail significant efforts and costs for the parties involved. In a recent case (*Flüssiggas*, LPG), the oral hearing before the Higher Regional Court in Düsseldorf took almost three years, and more than 130 sessions.

The Higher Regional Court in Düsseldorf is, in practice, not shy in overturning or rectifying FCO decisions. In a ruling of 26 June 2009 in relation to the cement cartel case, for instance, the court reduced the FCO's original fine of €660 million to €328.5 million. On the other hand, the court is also entitled to increase the level of the fine, and has not hesitated to do so. In the LPG case mentioned above, the court increased some of the fines that were originally imposed by the FCO by 80%. It should be noted, however, that the legality of such *reformatio in peius* is highly questionable. However, the Higher Regional Court in Düsseldorf, in essentially all cases in the last two to three years, has increased the fines as compared to the fines issued by the FCO.

Under certain circumstances, the decisions of the Higher Regional Court in Düsseldorf can be appealed – confined to points of law – before the German Federal Court of Justice. The

long duration of the appeal proceedings before the Higher Regional Court in Düsseldorf, and the "openness" of the decisions, have largely contributed to the significant increase in settlement proceedings before the FCO.

In recent months, the German Federal Court of Justice overturned quite a number of decisions by the Higher Regional Court of Düsseldorf. By decision of 9 October 2018 (KRB 51/16, KRB 58/16, KRB 60/17), the Federal Court of Justice overturned a judgment of the Higher Regional Court for a miscalculation of the fine (*Flüssiggas*, LPG) and for not having properly taken evidence. In the confectionery cartel by decision of 21 June 2019, the Federal Court of Justice overturned a judgment (KRB 10/18) of the Higher Regional Court for lack of proper assessment of evidence.

The 10th ARC amendment has strengthened the role of the FCO. The FCO now has the same position and the same procedural rights as the attorney general who used to represent the FCO before the Higher Regional Court in Düsseldorf and the FCO only could accompany and follow and, if permitted by the court, ask questions to witnesses.

Criminal sanctions

Cartels are not criminalised under German law. Rather, cartels generally qualify as an administrative offence, with one important exception: bid rigging constitutes a criminal offence under section 298 of the German Criminal Code and can be sanctioned with up to five years in prison.

Cooperation with other antitrust agencies

The FCO traditionally cooperates rather closely with US and European Competition Network (ECN) authorities. It is to a certain extent remarkable that this cooperation has not yet triggered major complaints by undertakings in cartel cases. On the other hand, there are no noteworthy examples of cartels of an international character sanctioned by the FCO.

Cross-border issues

The FCO is also part of the network of ECNs, providing an institutional framework for cooperation amongst the national authorities and between the national authorities and the European Commission. With the 10th ARC amendment, which came into force on 19 January 2021, the ECN+ Directive was implemented, aiming at a more effective cartel prosecution.

In the past, the FCO has requested other national competition authorities, among them the Austrian, Swedish and French authorities, to carry out dawn raids in their countries and to secure evidence on behalf of the FCO. Likewise, the FCO has conducted investigations on behalf of other national competition authorities.

Apart from the formal investigative requests, the FCO itself reports that many contacts take place between European and non-European competition authorities to allow for an informal exchange of general information or experience relating to specific proceedings.

Developments in private enforcement of antitrust laws

In June 2017, the 9th ARC amendment entered into force and implemented the EU Antitrust Damages Directive 2014/104/EU. The following changes are of particular relevance:

(1) it is now presumed that a cartel infringement leads to damages. However, the cartel defendant has the right to rebut this presumption;

(2) it is now expressly stipulated that the defendant (cartel member) may invoke the passing-on defence against (direct) customers. For the benefit of any claimant that is an indirect purchaser, there is a rebuttable presumption that the damage was passed on;
(3) for (potential) claimants, as well as for defendants, the new law provides tools to require the other party to disclose some of its internal information or documents. Third parties can also be required to disclose certain evidence. The claim is, however, limited by the principle of proportionality. Also, leniency applications and settlement documents are not captured by the disclosure provisions;
(4) whereas leniency applicants thus far only benefitted in relation to the imposition of fines, applicants will now also benefit from restricted civil damages liability. In this regard, they only have to compensate for damages incurred by their direct or indirect purchasers. In relation to other damaged parties, leniency applicants are liable only if these parties cannot obtain full compensation from the other cartelist;
(5) the 9th ARC amendment also intends to make settlements more attractive. The settlement of one cartel member with a damaged party will now prevent not only the damaged party from bringing further claims concerning the damage caused, but will also prevent the other cartel members from recourse in terms of their contribution claims regarding damages covered by the settlement. Consequently, the liability of the other cartel members is reduced by the damage caused by a settling cartel member;
(6) the regular limitation period for cartel damages claims is extended from three to five years after the end of the year in which the claim arose and the claimant gained knowledge; and
(7) in Germany, the losing party generally bears all court costs, including those incurred by the counterparty. This approach led in the past to a relatively high financial risk exposure, given the fact that frequently participating cartel members join the defendant (third-party intervention). Thus, the imminent costs of bringing a claim are often unforeseeable for the claimant. To reduce this risk, the reform introduces a limitation: a claimant is now only liable for the cost of one additional intervening third party.

Lottoblock II

On 12 July 2016, the German Federal Court of Justice delivered its judgment in the *Lottoblock II* case. With this judgment, the court has further clarified the scope of the binding effect of decisions by the competition authorities, as well as the requirements for subsequent follow-on actions. The underlying case concerned a follow-on action in a boycott/refusal to deal case. The defendants had on one single occasion taken the joint decision not to deal with the claimant in the future. This decision was later found to be in violation of the applicable German and European competition rules. The claimant lodged an action for damages in respect of the *lucrum cessans* that it had allegedly suffered as a result of the boycott. In the first place, the German Federal Court of Justice held that the binding effect of a competition authority's decision is not confined to the operative provisions of the decision but rather also comprises the factual and legal findings contained in the body of the decision. The court then clarified that the mere existence of a prohibition decision does not as such in every single case imply that the infringement had actually been put in practice and executed for a certain time period. The court recalled in this respect that under the applicable laws, a prohibition decision could even be issued in order to prevent a future restriction of competition.

However, the Federal Court of Justice held that there exists a general legal presumption that anti-competitive agreements which are aimed at permanently restricting competition are indeed executed by the cartelists for as long as the cartelists do not take action, which clearly

evidences that they stopped acting in line with the cartel arrangement. On this basis, the court rejected the defendants' argument that the single agreement not to deal with the claimant had ceased at the latest on the day when the German cartel office issued its prohibition decision. Rather, the court found that the mere issuance of the prohibition decision was not sufficient to assume that the joint boycott had indeed stopped. In order to rebut the legal presumption that the anti-competitive boycott was permanently executed, the defendants would rather have been required to explicitly and undoubtedly distance themselves from the cartel arrangement, which had not happened in the case at stake. The practical relevance and importance of this judgment cannot be overestimated. It basically opens the door for the recovery of so-called "post cartel" damages claims. Whereas until today the general view had been that cartel infringements and their respective anti-competitive effects would normally cease on the day of the dawn raids and that cartel damages claims going beyond this point of time would be limited to a rather short "cartel shadow" period, this will no longer apply in the future. Rather, claimants will in the future regularly be able to recover damages for longer time periods after the cartel activity has ceased.

Grey Cement II

On 12 June 2018, the Federal Court of Justice rendered a landmark judgment with respect to the statute of limitations of cartel damages claims (*Grey Cement II*). The Court ruled, in deciding controversies among various Higher Regional Courts, that the rules on the tolling of the statute of limitations by investigations of the EU Commission or any national competition authority, which were introduced on 1 July 2015, would also apply to any and all claims which had come into existence before that date. This judgment is in favour of plaintiffs since in this way quite a number of claims which had come into existence in many larger cartels, in particular in the trucks cartel, may still be successfully brought.

Schienenkartell I and *II*

On 11 December 2018 (KZR 26/17 – *Schienenkartell I*), the Federal Court of Justice, again in a landmark judgment, ruled that there was no *prima facie* evidence in the sense of a presumption that a transaction within the framework of a cartel as decided with binding effect would be affected by the cartel and that damage resulted from such a transaction. Following this judgment, the lower courts have taken the approach that there was a factual presumption for a transaction being affected by the cartel and damage resulting from such transaction, if it were covered by the authority's decision on the cartel.

With its ruling on 28 January 2020 (KZR 24/17 – *Schienenkartell II*), the Federal Court of Justice clarified its 11 December 2018 judgment to the effect that there is a presumption in fact that the prices of cartelised products were higher than they had been without the cartel ("affected by the cartel"), if the products or services provided by the claimant are the subject matter of the cartel and fall within the scope of such cartel as far as time and geographic scope are concerned. The ruling of the Federal Court of Justice is in line with the case law of the European Court of Justice in the *Otis* case.

LKW Kartell I

On 23 September 2020 (KZR 35/19 – *LKW Kartell I*), the Federal Court of Justice issued its first ruling in the trucks cartel case, a further landmark judgment for cartel damages claims. By confirming a broad binding effect of the European Commission's decision's factual and legal findings, the Court pointed out that the infringement established by the Commission did not only constitute an exchange of information but in fact concerned agreements on list prices and the transfer of costs for the EURO standard technologies. The Court once again confirmed that whether truck customers are affected by the cartel is to be seen separately

from the issue of the actual impact of the cartel. Furthermore, the Court clarified that the statute of limitations was halted since the Commission's raids.

Rail tracks cartel – passing-on defence

In some cases concerning the cartel on rail tracks, the Federal Court of Justice gave some rules of principle with respect to the passing-on defence. The Court confirmed prior jurisprudence by other German courts according to which a defendant must meet very high standards if it wishes to raise a passing-on defence successfully. The Court emphasised in this respect that the defendant has to substantiate and prove all relevant market parameters such as, in particular, demand elasticity, price developments, and product specifications in order to show that the passing on of the cartel overcharge is more than just a hypothetical theory but rather a likely scenario. The defendants are also required to show that the passing on of the cartel overcharge has not resulted in other types of damages for the direct purchasers, such as, for instance, volume effects. The Federal Court of Justice has also decided to be rather reluctant in shifting the burden of proof to the direct purchaser to show that such purchaser has not passed on any cartel overcharge to its customers.

Schienenkartell V

On 23 September 2020 (KZR 4/19 – *Schienenkartell V*), the Federal Court of Justice issued another ruling, particularly referring to constellations of scattered damages. The Court ruled that in cases where only a relatively small claim can be considered for the individual indirectly injured party, it must be considered particularly carefully, taking into account all circumstances of the individual case, whether the application of the principles of adjustment of profit leads to an unfair relief of the cartel participants. In particular, it must be taken into account whether claims by indirect customers against the cartel participants are to be expected or not. Furthermore, it may be relevant whether the primary injured parties have lost profits due to volume effects, the compensation of which they may claim in addition to any price level damage.

LKW Kartell II

On 13 April 2021 (KZR 19/20 – *LKW Kartell II*), the Federal Court of Justice issued its second ruling in the trucks cartel case. The Court ruled that even in the case of investigations by the European Commission, the suspension of the statute of limitations requires no more than the initiation of investigative measures. Moreover, the Court found that it is one argument for the passing on of costs if most of the customers acting as suppliers at the next market level have to pay the cartel price and competition on the aftermarket is otherwise functional. In the trucks cartel case, the Court believed that the described clear separation of different market levels is already not present. In contrast to the facts underlying the ORWI decision, the independent truck dealers do not represent a strictly separate market level between the manufacturer and the "end buyer". Rather, they are integrated into the distribution structure of the manufacturers, who themselves distribute their products in part directly or indirectly through dependent dealers. Accordingly, the Court found that the lower court had considered the conditions formulated in the ORWI decision for an expected passing on of damage to be fulfilled, also irrespective of whether the independent truck dealers are to be classified as a "real" market level between manufacturers and end customers, without any error of law, primarily because the extremely high market coverage of the cartel meant that the dealers were almost without exception customers of the cartelists and the opposite side of the market had practically no alternative. Under such conditions, the Court found it would in any case be completely implausible to assume that price increases brought about by the manufacturers would regularly and completely "stick" at the level of the (independent) dealers.

Reform proposals

As discussed above, on 19 January 2021, the 10th ARC amendment came into force under the name "ARC Digitalization Act", addressing issues raised by the digital economy. The law focuses on the modernisation of the law on abuse of market power by strengthening the position of the FCO and the Federal Court of Justice with regard to large digital groups, the intermediation power of online platforms and tipping.

In addition to the topics referred to above, the amendment also contains various innovations in the area of fine regulations. For example, new rules are provided with regard to fines against associations of undertakings. In addition, the Leniency Programme has now been enshrined in law. The FCO will adapt its notices in this regard. In any case, leniency applications can still be filed at any time.

Given that the reform which had been considered to be necessary has just been implemented, there are no urgent reform proposals at the moment in which the legislator is expected to engage.

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