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Germany CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Germany.

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GERMANY

CARTELS



1. What is the relevant legislative framework?

Section 1 of the German Act against Restraints of Competition (GWB) essentially corresponds to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) in its wording and scope. It prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Section 2 GWB matches Article 101(3) TFEU and contains an exception to the general prohibition. It declares cartels legal if they:

- contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- do not grant such undertakings the possibility to eliminate competition for a substantial part of the products concerned.

Sector-specific regulations can be found in Sections 28 to 31b GWB with regard to agriculture, the energy industry, the press and water management contracts.

2. To establish an infringement, does there need to have been an effect on the market?

Cartel conduct can constitute an infringement irrespective of whether it had an anticompetitive effect on the market.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Pursuant to Section 185(2) GWB, the GWB applies to all

restrictions of competition that have an effect in Germany, irrespective of where an undertaking involved in an infringement has its registered office and whether the infringement was committed inside or outside Germany.

4. Which authorities can investigate cartels?

The relevant authority for the prosecution of cartels in Germany is the Bundeskartellamt (Federal Cartel Office, FCO). The FCO is an independent higher federal authority under responsibility of the Federal Ministry for Economic Affairs and Energy.

In addition, there are cartel offices in the individual federal states (Landeskartellbehörden). Their jurisdiction is given if the effect of the conduct in question does not extend beyond the territory of a federal state and neither the FCO nor the Federal Ministry for Economic Affairs and Energy is responsible.

5. What are the key steps in a cartel investigation?

The FCO's cartel investigations can initially be triggered by a leniency application. In the past, about half of all cartel investigations were triggered in this way. In the last years, the number of leniency applications has decreased significantly. Another way in which cartel proceedings are triggered regularly is through (anonymous) tips/complaints from affected companies/individuals or ex officio.

The FCO has set up a special whistleblowing tool through which anonymous information can be submitted. If the competition authority decides to pursue the case presented in a leniency application, by (anonymous) tips/complaints or ex officio, it will initiate formal proceedings and inform the accused parties thereof.

Formal proceedings include, the search of the premises of undertakings and/or persons involved in the alleged

conduct. Moreover, the competition authority may also investigate the facts in other ways, e.g. by sending requests for information or by interviewing persons involved in the alleged conduct. Such interviews are often also conducted after a search to further investigate the facts.

After a first review of the results of the investigation the FCO is regularly approaching the defendants, giving them a rough summary of the current state of the investigation and providing the possibility of a settlement to rapidly end up proceedings.

If such an early settlement is not reached, the competition authority will inform the defendants of its findings in a so-called "letter of accusation" after the preliminary investigations have been completed. The parties may then comment on this letter. The proceedings are concluded by the competition authority issuing a written fine notice or sending a letter of discontinuance. It can also simply close the investigation de facto. An appeal against the fine notice is possible before the Düsseldorf Higher Regional Court.

There is no specific time frame for a cartel investigation.

6. What are the key investigative powers that are available to the relevant authorities?

Request for information

The competition authority is entitled to demand that undertakings, i.e. their owners or representatives, provide information and hand over documents within a reasonable period of time. The obligation extends to all information and documents accessible to the undertaking.

The general right of individuals to refuse to provide information does not apply if the information only gives rise to the risk of prosecution in fine proceedings by the competition authority and the FCO issues a so-called non-prosecution commitment.

Dawn raids

In order to investigate a matter, the competition authority may also search business and private premises of suspects as well as suspects themselves if it is to be assumed that documents relevant to evidence are located there and a search warrant can be presented. The search of premises covers all books and business records regardless of the form in which they exist or are stored. The authority must be granted unrestricted access to all information accessible. In the course of the

search, information that could provide access to evidence, as well as explanations of facts or documents related to the subject matter and purpose of the search, shall be made available without restriction. The FCO is entitled to seize relevant documents and also digital evidence in due course. Again, the right to refuse to provide information does not apply if the information only gives rise to the risk of prosecution in fine proceedings by the competition authority and the FCO issues a non-prosecution commitment.

The competition authority is also entitled to inspect business documents of undertakings and associations of undertakings within normal business hours, even without a search warrant, on the basis of a decision of the FCO with its President's consent. The owners of the undertakings and their representatives are obliged to submit business documents for inspection and examination.

Witness Testimonies

The competition authority is also entitled to question witnesses. Witnesses are in principle obliged to testify. There is no right to refuse to provide information if obtaining the information by other means is significantly more difficult or cannot be expected. However, a witness can refuse to testify to questions if the testimony puts him or a relative at risk of criminal prosecution. False testimony by a witness may constitute a criminal offence.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

Records of the defence lawyer as well as written communication between him and the accused are legally privileged and may not be seized by the competition authorities as long as they are in the possession of the defence lawyer. However, this does not apply to in-house lawyers. It should also be noted that the German lawyer's privilege generally only applies in a situation where the lawyer, who must be admitted to the German bar, has (already) been mandated to defend the client in the competition law proceedings concerning the specific investigative measure. It therefore does not apply to the case where the legal counsel is only generally mandated to conduct internal investigations or to consultations that took place before proceedings are initiated.

8. What are the conditions for a granting of

full immunity? What evidence does the applicant need to provide? Is a formal admission required?

A cartel participant is granted full immunity under the leniency rules laid down in sections 81h to 81n GWB if it is the first to submit evidence that enables the competition authority to obtain a search warrant for the first time. According to section 81j GWB the applicant must

- disclose its knowledge of the cartel and its participation in it and cooperate fully in the clarification of the facts;
- terminate its participation in the cartel immediately after filing the leniency application, unless the competition authority orders otherwise;
- comply with the duty to cooperate seriously, continuously and expeditiously vis-à-vis all cartel participants; this includes in particular that it
 1. promptly provides all information about and evidence of the cartel to which it has access,
 2. answer any question which may help to establish the facts,
 3. ensure that members of the supervisory and management bodies and other employees are available for questioning;
 4. does not destroy, falsify or suppress information about and evidence of the cartel; and
 5. does not disclose the fact of making a leniency application or its content;
- while considering making the leniency application,
 1. not destroy, falsify or suppress information about or evidence of the cartel; and
 2. not disclose the intended leniency application or its intended content, except of disclosure to other competition authorities.

Full immunity from fines is not granted to those companies that coerced others to participate in the cartel.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

With regard to a leniency applicant who does not meet the criteria for full immunity (see above), pursuant to section 81l GWB the FCO may reduce the fine if the

applicant

1. fulfils the requirements mentioned under 8.1. to 4. above and
2. submits evidence of the cartel which, with regard to the proof of the offence, has a significant added value compared to the information and evidence already available to the competition authority.

The actual amount of the reduction in fines depends on the order of the applications and on the value of the contributions to the investigation.

10. Are markers available and, if so, in what circumstances?

A cartel participant may approach the FCO to first declare its willingness to cooperate (marker) in order to be ranked in the order in which leniency applications are received. A marker shall contain at least the following information:

1. the name and address of the applicant,
2. the names of the other cartel participants,
3. the products and areas affected,
4. the duration and the nature of the offence, and
5. information on any previous or any future leniency applications in connection with the cartel to other competition authorities, other European competition authorities or other foreign competition authorities.

A marker can be set verbally or in writing, in German or English.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

The ongoing cooperation requires that the leniency applicant provides further information on the alleged infringement if this information comes to his knowledge during the FCO's investigation. The applicant should also provide further documents or statements if requested by the FCO.

In the context of cooperation, the applicant must keep its cooperation with the FCO confidential until the authority releases it from this obligation.

In addition, the applicant must terminate its participation in the cartel upon request by the FCO.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Cartel infringements are generally not criminalised unless they fulfil the requirements for bid rigging, section 298 of the German Criminal Code. Provided that the cartel infringement also constitutes a bid rigging relevant under section 298 of the German Criminal Code, Immunity granted to a company under the FCO's leniency programme does not result in immunity from prosecution for a criminal or regulatory offence for the company's employees and directors.

The FCO is not authorised to make any commitments with regard to possible criminal prosecution. However, in most cases, the prosecuting authorities refrain from further prosecution if the position as a state witness or leniency applicant is disclosed.

13. Is there an 'amnesty plus' programme?

An "amnesty plus" programme does not exist in Germany. The only relief for a leniency applicant who has been offered full immunity from fines is that there is limited joint and several liability with other cartel participants in any subsequent damages proceedings. This means that this person is in principle only liable to his own customers or suppliers for the damages they suffered as a result of the cartel (but not limited to his own supplies).

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The FCO can conclude settlements for the amicable termination of cartel proceedings. There is no statutory regulation for this. The authority decides at its own discretion which cases are suitable for settlement and whether or not to conclude a settlement.

A mandatory part of a settlement with the FCO is the description of the offence as well as information on circumstances relevant for the assessment of the fine. In addition, the facts of the case must be acknowledged as true and the fine must be accepted up to the amount of the proposed fine. This does not constitute a confession, as the legal assessment of the facts to be admitted does not have to be confirmed. With the declaration, the person making the declaration also does not waive his right to object.

In the absence of legal regulations, there are no formal requirements for the settlement procedure. Both the authority and the accused can initiate settlement talks. They begin regularly after the competition authority has viewed the evidence and obtained at least a rough overview of the case. Provided the accused is prepared to settle, the FCO informs the accused of the facts of the case, grants (at least partial) access to the file, hears him and offers the prospect of a maximum fine. As a rule, the authority will not exceed the maximum fine, even if the settlement is not reached and the proceedings end with a comprehensive fine notice. Experience shows that the accused has the greatest influence on the amount of the fine at this point in the proceedings.

Once an agreement on the facts of the case and an appropriate fine has been found, a proposal for a settlement statement is submitted with a summary of the results of the investigation. Changes to the content of the settlement statement are only possible with difficulty. The settlement negotiations are recorded in the FCO's file. The defendant's settlement declaration must be signed by the defendant or the defendant's legal representative. No court approval is required for it to enter into force.

Finally, the settlement procedure is officially concluded with the issuing of a so-called summary notice, only containing brief information about the case. Since the summary notice is not very informative with regard to the details of the infringement, potential plaintiffs for damages can only gather little information from this notice.

Hybrid settlements are also possible in principle in Germany. However, experience shows that the FCO often strives to coordinate settlement proceedings in terms of time.

15. What are the key pros and cons for a party that is considering entering into settlement?

A settlement agreement can make sense for various reasons:

It leads to a reduction of the fine by up to 10%. If the fine is also reduced due to a leniency application, the settlement reduction is deducted from the amount of the reduced fine. Furthermore, own costs can be saved due to a faster termination of proceedings. Finally, a settlement can also be advantageous with regard to possible damage claims by third parties, as the summary notice contains significantly less information than the

comprehensive fine notice.

Next to that, a settlement creates legal certainty for the accused. Furthermore, it can also make sense for reasons of negotiation tactics: within the talks with the authority, the amount of the fine or the scope of the accusation might be reduced.

A settlement does not restrict the accused's right to appeal. In the event of an appeal, however, the FCO will withdraw the summary notice and issue a comprehensive fine notice instead.

But, there are also some major disadvantages to be considered when concluding a settlement: With a settlement the accused waives essential procedural and defence rights (e.g. inspection of the complete investigation file). The admission of the facts substantiating the cartel offence may have a negative impact on existing business contacts. Furthermore, since the settlement usually ends the cartel proceedings more quickly, it is conceivable that third parties will primarily direct their claims arising from the cartel violation against the settling cartel members, while other cartel members await the conclusion of the ordinary fine proceedings.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

In Europe, the most important cooperation between competition authorities is the European Competition Network ("ECN"). As a result of the transposition of Directive (EU) 2019/1 ("ECN+ Directive") into the GWB in January 2021, the FCO's possibilities to cooperate with other competition authorities of EU member states were expanded. In the meantime, the FCO can carry out investigative acts for other EU competition authorities (Section 50a GWB), serve certain documents on undertakings established in Germany (Section 50b GWB), transmit information (including confidential information) to other EU competition authorities (Section 50d GWB) or, at the request of an EU competition authority, enforce its decisions (Section 50c GWB).

Although the ECN+ Directive has created a framework for ECN members to align their respective programmes, leniency programmes are not yet fully harmonised at the European level. Affected undertakings should therefore file leniency applications simultaneously with all national competition authorities whose territory may be affected by the infringement. If necessary, such an application should also be made to the Commission.

The most important bilateral agreement is the one between the Government of the United States of America and the Government of the Federal Republic of Germany relating to mutual cooperation regarding restrictive business practices of 23 June 1976. This agreement contains regulations on various aspects of cooperation between authorities, especially with regard to the exchange of information, cooperation in antitrust investigations and proceedings, and the exchange on competition policy.

In addition, there are formalised international cooperations (e.g. the International Competition Network, one of the most important associations of competition authorities, that was founded in 2001 and now has more than 140 members).

17. What are the potential civil and criminal sanctions if cartel activity is established?

Civil sanctions

Any agreement that violates the prohibition of restraint of competition is void. In addition, anyone who violates an antitrust regulation is liable to pay damages. Those affected must be compensated for the damage caused by the infringement. If there is a risk of recurrence, those affected can also demand the cartel members to further desist from infringements.

Administrative sanctions

German competition authorities may oblige undertakings and associations of undertakings to put an end to infringements of competition law rules and may, under certain circumstances, order the disgorgement of economic advantages gained from such an infringement. In addition, German competition authorities can impose fines on natural and legal persons. The fine for a natural person is limited to €1 million. Fines of up to 10% of the worldwide turnover can be imposed on undertakings and associations of undertakings. The turnover is calculated on the basis of the turnover of the "economic unit", i.e. the entire group of companies behind the infringing company.

Criminal sanctions

Apart from special criminal provisions for bid rigging and fraud (Sections 298 and 263 German Criminal Code, both only for natural persons), there are no criminal sanctions for cartel activities in Germany.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The range of fines is generally determined taking into account the gain and harm potential of the alleged cartel violation on the one hand and the economic circumstances of the offender or the total turnover of the undertaking on the other hand.

Section 81d GWB contains a non-exhaustive list of criteria for the calculating of fines. The type, extent and duration of the infringement, the economic situation of the undertaking, the role of the undertaking or its representatives in the infringement, the degree of intent/negligence, previous infringements and the conduct after the infringement play a role in the specific assessment of the fine. The maximum amount of fines imposed in recent domestic cartels totalled in the mid-triple-digit millions of Euros.

However, the FCO can also completely waive or at least reduce the fine within the framework of the leniency programme. A settlement with the FCO can also lead to a reduction of the fine (in horizontal cartel cases by up to 10%).

The FCO has published new guidelines for the imposition of fines in cartel proceedings in 2021. In addition to minor adjustments to details, the new guidelines on fines in any case bring about a significant change in the calculation methodology. It now starts with the initially relatively static determination of the so-called turnover size. This is a percentage of the offence-related turnover fixed within certain ranges; this percentage is determined on the basis of the total turnover of the economic group.

The amount determined in this way is then modified by additions or deductions within the framework of an overall assessment. Deductions may be made, for example, for compliance measures. The FCO itself emphasises that this can lead to a significant deviation from the initial value, either upwards or downwards.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

In addition to the company that committed the infringement, its parent company can also be fined, if it directly or indirectly exercised a decisive influence on the subsidiary at the time of the infringement. In the

event that both the subsidiary and the parent company are fined, both companies are jointly and severally liable vis-à-vis the competition authority.

20. Are private actions and/or class actions available for infringement of the cartel rules?

The German legal system stipulates that the person injured by a cartel can claim compensation for the damage caused. The claims for damages are to be enforced by the respective parties affected themselves. Per section 33b GWB the aggrieved party can refer to the factual findings of the final administrative order imposing a fine and does not have to prove them himself. Furthermore, the aggrieved party is entitled to the surrender of evidence and information by the infringer/cartel participant.

Class actions are generally not available. Although it is possible in principle to assert claims for damages bundled through third parties, it is advisable to check carefully whether the third party acting as plaintiff complies with the rules of the law on the extrajudicial administration of justice.

21. What type of damages can be recovered by claimants and how are they quantified?

Pursuant to Sections 249 et seq German Civil Code, damage claims are restricted to the compensation of actual loss including lost profits. Punitive or exemplary damages cannot be recovered.

Generally, cartel damages are calculated by comparing the financial situation of the claimant during the cartel period, and the hypothetical situation in which it would have been without the infringement, i. e. under competitive conditions. However, the claimant does not have to specifically quantify the amount of damages in order to be granted the claim. The court may estimate the amount based on an overall assessment and taking into account all relevant factors (Section 287 Code of Civil Procedure). In this context, the court can consult independent experts in order to quantify the amount of damages.

22. On what grounds can a decision of the relevant authority be appealed?

An appeal against a fine imposed by the FCO may be lodged with the Düsseldorf Higher Regional Court. The

Higher Regional Court must reassess the facts of the case on the basis of its own taking of evidence and the evidence gathered by the competition authority. The Higher Regional Court may discontinue the proceedings, issue its own fine decision or acquit the accused undertakings/individuals.

23. What is the process for filing an appeal?

The appeal process is laid down in section 82a GWB. Within two weeks from service of the decision, an appeal can be filed with the competition authority that issued the fine notice. The competition authority then re-examines the administrative order imposing the fine for legality and – if it confirms the legality – hands it over to the prosecutor general's office, which sends the appeal together with the case file to the Düsseldorf Higher Regional Court.

A further appeal on points of law to the Federal Court of Justice is admissible against the judgment of the Higher Regional Court.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

In March 2023 the Düsseldorf Higher Regional Court significantly reduced a fine imposed on a wholesaler in the sanitation industry from €1,4 million to €250,000. The company was one of ten wholesalers investigated and fined by the FCO for agreements on price calculations. The FCO alleged that the companies exchanged information on their list prices, internal costs and rebates and used this information to calculate a common gross price for their yearly sales catalogues. This behavior dates back to the seventies, the FCO imposed a total of €23 million in fines for the period from 2005 to 2013. The decision by the Court to reduce a fine imposed by the FCO is a rare deviation from their more common practice of calculating higher fines than the FCO.

In September 2021 the Düsseldorf Higher Regional Court acquitted three breweries in the "Kölsch cartel" due to insufficient evidence of the price fixing agreements alleged by the FCO. Initially part of a larger investigation into the behaviour of fourteen breweries, against which the FCO imposed fines totalling €338 million, the Court separated the procedures due to differences in the facts. In this separate procedure, the only remaining allegation concerned a meeting of the regional brewing association

in 2007. Only two of the fourteen witnesses claimed to remember price fixing agreements being discussed at this meeting and their testimonies were considered by the Court to be "too vague to justify a conviction for illegal behaviour" and "chaotic, filled with bizarre mistakes and partially wrong".

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

In 2022, the FCO imposed fines of around €24 million on a total of 20 companies and 7 natural persons. The sectors affected included industrial construction and the manufacture of bridge expansion joints. This confirms the trend of drastically declining fines seen in the last years. Whereas in the years 2018-2020 the FCO imposed yearly fine totals between €358-848 million, the level in the last two years has been significantly lower with €24-105 million.

A similar trend can be seen in the number of leniency applications. In 2022 thirteen companies provided the FCO with information in their sector through the Leniency Programme. In the years 2016-2018, this number was between 21 and 59 applicants per year, whereas it has hovered around the low double-digits since then. The background to this development is seen in the increasing number of private cartel damages proceedings, to which even a leniency applicant is exposed without protection under German law.

Due to the decline in leniency applications, fewer and fewer new cartel investigations are being initiated. In addition, the COVID-19 pandemic has also slowed antitrust prosecutions over the past years. It is expected that due to the increasing prevalence of remote working, the FCO will conduct more raids of domestic premises in the future. Companies will have to adapt to this by training their employees on the handling of sensitive data, especially in the homes of board members, and incorporating remote working in their dawn raid guidelines. Additionally, companies will need to focus on providing an efficient IT infrastructure and training in order to grant the FCO the necessary access during virtual raids.

Besides that, the FCO is currently developing new investigation methods such as the algorithm-based "screening" of markets and is expanding the possibilities of the anonymous whistleblower system.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

The controversial 11th amendment to the GWB is scheduled to enter into force in 2023 and brings two important changes in cartel regulation:

The draft version of section 34 GWB aims to facilitate the disgorgement of benefits derived from antitrust violations. The current version of section 34 GWB already allowed German competition authorities since 1999 to order the disgorgement of the economic benefit gained by breaching competition law. The provision intends to ensure that no economic advantages remain with the perpetrator. This has however never been applied in practice, in large parts due to the difficulties of determining the economic benefit gained. The draft version of section 34 GWB introduces a refutable assumption that a competition law infringement caused an economic benefit of at least 1% of the turnover in Germany from products or services related to the

infringement. Additionally, the draft version provides that the FCO is no longer required to prove that the competition law infringement has been carried out intentionally or negligently.

The second major change concerns sector inquiries, which the FCO can already carry out under the current section 32e GWB. The draft version of section 32e GWB sets the FCO a limit of 18 months to carry out and publish the results of a sector inquiry. This limit can only be exceeded if the FCO justifies a longer duration and aims to ensure that findings are up to date. Furthermore, the draft version of section 32f GWB introduces remedial powers for the FCO in reaction to their findings in a sector inquiry. The FCO can order undertakings to notify mergers and acquisitions regardless of whether it meets the regular notification thresholds. Where the FCO finds a “significant, continued or repeated disturbance of competition in a market” it can impose behavioural or structural measures to strengthen effective competition. As a last resort and if necessary to “eliminate or significantly reduce” an above-mentioned disturbance of competition, the FCO can order an undertaking to divest parts of the company or its assets, subject to an extensive proportionality test.

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