Leniency and Cartel Detection

German Experience
Overview

- INTRODUCTION
- LENIENCY
  - German guidelines on leniency
  - Development of leniency in practice
  - Possible Reasons for development
  - Outlook
- QUESTIONS
SEC 1 ACT AGAINST RESTRAINTS OF COMPETITION (“ARC”)

- Prohibition of horizontal and vertical restraints of competition
- Harmonized with EU law (Art 101 TFEU)
- Violation = Administrative offence

SEC 298 CRIMINAL CODE (“CC”)

- Prohibition of bid rigging in public procurement
- Violation = Criminal Offence
- Public prosecutors competent for natural persons (no leniency), BKARTA for companies – parallel proceedings

LIABILITY OF NATURAL PERSONS AND UNDERTAKINGS
Introduction

- Fines for natural persons:
  - Sec. 1 ARC (administrative offence): 5 € to 1 mio. €
  - Sec. 298 CC (bid rigging= criminal offence):
    Prison sentence up to 5 years or fine

- Fines for undertakings and associations of undertakings:
  - 5 € to 10% of the total turnover achieved by the group in the previous business year

- Obligation to pay interest rates with regard to the fines imposed on legal persons: 5% above the prime lending rate
## Introduction

<table>
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<tr>
<th>Year</th>
<th>Case</th>
<th>Sum</th>
<th>Single</th>
</tr>
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<tbody>
<tr>
<td>2007</td>
<td>Advertising time</td>
<td>216.0 m €</td>
<td>120.0 m €</td>
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<tr>
<td>2008</td>
<td>Roof tiles</td>
<td>188.1 m €</td>
<td>66.3 m €</td>
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<td>2009</td>
<td>Coffee</td>
<td>159.0 m €</td>
<td>83.0 m €</td>
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<td>2010</td>
<td>Glasses</td>
<td>115.0 m €</td>
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<td>2011</td>
<td>Fire engines</td>
<td>50.0 m €</td>
<td>30.0 m €</td>
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<tr>
<td>2012/13</td>
<td>Railway tracks</td>
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<td>103.0 m €</td>
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<td>2013</td>
<td>Flour</td>
<td>65.0 m €</td>
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<td>2014</td>
<td>Sugar</td>
<td>280.0 m €</td>
<td>195.0 m €</td>
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Leniency

- EFFECTIVE LENIENCY PROGRAMME VITAL FOR DETERRENCE

- EFFECTIVE LENIENCY PROGRAMME VITAL FOR INVESTIGATION AND SANCTIONING
  - Right to silence under German procedural law.

- MORE THAN 50% OF OUR CASES WOULD NOT BE DETECTED AND PROVEN WITHOUT LENIENCY.
German guidelines on leniency

- 2000: First leniency programme
- 2006: New guidelines on leniency
  - on website (also in English): www.bundeskartellamt.de
- Horizontal cartels
- Immunity for first to report and to fully cooperate
- Reduction of fines up to 50% for runner-ups
- Markers accepted (written or oral, German or English)
- Based on ECN model leniency programme
- Main difference:
  - Individuals can apply for leniency
  - No immunity for sole ringleader
German guidelines on leniency

Marker (no. 11)

- Turn to whom?
  - Head of SKK
  - Head of Department

- How?
  - verbally or in writing
  - in German or English

- CONTENT?
  - Type and duration of infringement
  - Product and geographic markets affected
  - Identity of the involved persons/undertakings
  - Applications with other competition authorities

- Acknowledgement of receipt (date/time)
- Max. 8 weeks for drafting of leniency application
Development of leniency in practice
Possible reasons for development

- Marker-System easy and reliable
- Low Thresholds for first step:
  - Marker by phone or fax
  - Limited information required
- No discretion to reject marker/leniency application
- Same Decision Division/case handler in charge of case from start until final decision.
- Marker for First *and* Following Applicants
- Individuals can apply for leniency
- „Significant added value“ even without documents
Possible reasons for development

„DOMINO EFFECTS“:

- Increasing number of cases
  - increasing awareness of cartel law in media and general public
  - public relations
  - increasing awareness of leniency programme among cartel lawyers
  - confidence on fair application of programme by BKARTA in practice
  - high but proportionate fines

- Ongoing cases trigger new ones on neighbouring markets:
  - sweets => chocolate bars
  - fire engines => turntable ladders
  - railway tracks => points
  - concrete pipes => paving stones
  - drugstore products => dishwasher detergents
Civil Damage Claims:
- Sec. 33 (4) ARC: binding effect of final decisions
- Potential leniency applicants consider all possible consequences (fines and civil damages).

Hot Topic in Germany: Access to leniency materials
- ECJ: Pfleiderer
- Followed by Bonn Local Court: No access to leniency documents
- Balancing of interests: effective application of leniency programmes should prevail over interests of damage claimants
- Same result: Higher Regional Court of Düsseldorf
- In line with ECJ in Donau-Chemie and EnBW
- New: Com. Guidelines on Private Enforcement
Outlook

- Effectiveness of leniency programme needs to be preserved:
  - no access of third parties to leniency materials
  - protection from discovery (oral applications)

- Detection risk apart from leniency must be maintained

- BKARTA operates online communication platform for anonymous tip-offs (not only for delinquents but also for witnesses).
The Fight Against Hard Core Cartels in Europe
Madrid, November 27th and 28th

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German Experience

Thank you for your attention!

Juliane Schulze Wehninck LL.M.
Bundeskartellamt

juliane.schulze-wehninck@bundeskartellamt.bund.de

www.bundeskartellamt.de