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Preview

The German Competition Authority publishes new guidelines on its leniency program and the setting of fines in cartel proceedings

GERMANY, CARTEL, INVESTIGATIONS / INQUIRIES, ALL BUSINESS SECTORS, SANCTIONS / FINES / PENALTIES, LENIENCY, COMPETITION POLICY, GENERAL ANTITRUST

German Competition Authority, *Bundeskartellamt publishes new guidelines on its leniency programme and the setting of fines*, Press release, 10 October 2021

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e-Competitions News Issue Preview

The German Federal Cartel Office (FCO) has published new guidelines on its *leniency programme* ¹ and on the *setting of fines in cartel proceedings* ². Unfortunately, both guidelines are so far available only in German. The previous guidelines date from 2006 and 2013 respectively. The FCO has now revised the guidelines in order to adapt them to the new legal provisions regarding leniency applications and fines that were introduced with the latest reform of the Act against Restraints on Competition (**ARC**) at the beginning of 2021. This reform implemented the ECN+ Directive. While the new guidelines do not completely overhaul the previous regimes there are still some notable changes. This is the case in particular as regards the setting of fines.

New leniency guidelines

- The FCO's leniency programme – like those in other jurisdictions – enables cartel participants to be granted immunity from or a reduction of the fine if they contribute to uncovering a cartel between competitors. In that regard the new leniency guidelines do not lead to substantial changes. The key elements remain the same:
- The FCO will not impose a fine if the undertaking is the first to submit evidence that allows the competition authority to obtain a search warrant for the first time. If the FCO is already able to obtain a search warrant it will generally refrain from imposing a fine if the undertaking is the first to submit evidence that makes it possible to prove the offence for the first time, and if no other cartel participant has already met the conditions for immunity.
- In other cases the FCO can reduce the fine by up to 50% if the undertaking submits evidence of the cartel

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which, relative to the information and evidence already available to the competition authority, represents significant added value for the purpose of proving the offence. The specific amount or the reduction will depend on the usefulness of the evidence provided.

Any immunity or reduction is always subject to the undertaking fully and expeditiously cooperating with the FCO. Additionally, immunity or a reduction is not available if the undertaking has taken steps to coerce other cartel participants to join a cartel or to remain a member of such cartel. Undertakings can set markers, i.e. an initial declaration that they are willing to cooperate, in order to be assigned a place in the queue for leniency in the order in which the applications are received.

New guidelines on setting fines

New method for calculation

The new guidelines implement a new calculation method for fines imposed on undertakings that participated in a cartel. The FCO's president, Andreas Mundt, has expressed the view that under the amended guidelines *"the level of fines will (...) not change significantly"*. It remains to be seen whether this expectation is justified.

According to s. 81c(2) ARC the maximum limit of the fine is 10% of the total turnover generated by a single economic unit of which the undertaking concerned forms part in the business year preceding the authority's decision. The new guidelines set out how the FCO will – within this general framework – determine the amount of the fine in a specific case. Essentially, the FCO follows a two-step model: First, it determines a basic amount (Ausgangswert) which is then adjusted upwards or downwards based on the facts of the individual case. The following provides a summary overview of the new calculation method:

- Starting point is the amount of the turnover directly or indirectly linked to the infringement ("value of sales" or tatbefangener Umsatz). While the EU Commission's approach is to look at the sales made by the undertaking during the last full business year of its participation in the infringement (para 13 of the EU Guidelines), the FCO takes into account all sales related to the infringement during the total duration of the cartel.
- Depending on the size of the undertaking the FCO will use a specific percentage of the value of sales to arrive at the basic amount. For undertakings with an overall turnover of:
 - Less than EUR 100m, 10%-15% of the value of sales will be taken into account to arrive at the basic amount;
 - Between EUR 100m and 1bn, 15%-20% of the value of sales will be taken into account to arrive at the basic amount;
 - Between EUR 1bn 10bn, 20%-25% of the value of sales will be taken into account to arrive at the basic amount;
 - Between EUR 10bn 100bn, 25%-30% of the value of sales will be taken into account to arrive at the basic amount;
 - More than EUR 100bn, more than 30% of the value of sales will be taken into account to arrive at the basic amount.

- In case the basic amount is higher than half of the maximum limit, i.e. 10% of the total turnover of the undertaking (see above), the FCO will not determine the basic amount based on the value of sales but will instead use half of the maximum limit as the basic amount.

- In a second step the FCO will adjust that basic amount upwards or downward based on the individual factors of the case. These are set out in s. 81d(1) ARC and include:

- The nature and the magnitude of the infringement;
- The relevance of the products and services affected by the infringement;
- The manner in which the infringement was committed;
- Previous infringements committed by the undertaking;
- Any adequate and effective compliance steps taken prior to the infringement to prevent and uncover infringements (see below 2);
- The undertaking's efforts to uncover the infringement and remedy the harm as well as the steps taken after the infringement to prevent and uncover infringements (see below 2).

Against this background the exact amount of the fine will still be difficult to predict even if the undertakings are able to determine their relevant basic amount. However the FCO provides two further clarifications that will assist with estimating the level of the fine:

- In classical hard core cartels (price fixing, market or customer sharing etc) the FCO will **normally adopt a fine above the basic amount**.
- On the other hand the FCO will usually consider that a fine of **maximum up to twice the basic amount is appropriate**.

Compliance measures as a mitigating factor

So far the FCO has been rather reluctant to accept a **compliance defence** in cartel cases. The reform of the ARC however introduced the concept of compliance measures as a mitigating factor (s. 81d(1)No. 4 and 5). These fall into two different categories:

- Adequate and effective precautions taken prior to the infringement to prevent or uncover infringements and
- efforts to uncover and remedy the harm after the infringement as well as efforts taken after the infringement to prevent and uncover future infringements.

The FCO now gives some indications as to how it will apply these criteria. With a view to compliance measures prior to the infringement the FCO explains when it will consider a compliance measure to be **effective**:

- Generally, a compliance measure will be deemed effective if it **leads to the uncovering and**

subsequently to the reporting of the infringement to the FCO.

- Conversely (although not explicitly spelled out by the FCO), the compliance measure will most likely not be viewed as effective if the infringement is uncovered only after the FCO has inspected the undertaking.
- However, the effectiveness is not precluded if the only reason the measure has not led to detection and reporting is that the persons responsible for the infringement acted for their personal benefit, disregarding the compliance code and deliberately misled their superiors.

As regards compliance measures after the **infringement** it will be very interesting to see how the FCO will interpret the obligation to **remedy harm** caused by the infringement. Given that cartel infringements are often subject to **follow-on damages litigation** there is a risk that a wide interpretation of the obligation to remedy the harm may conflict with the undertaking's rights of defence in private enforcement cases. In particular, the question whether the infringement has in fact caused monetary damages will often involve a complex assessment of economic realities in the specific markets. It would therefore be premature to demand that undertakings commit to specific compensation in a situation where the FCO has only just adopted its infringement decision. The FCO's guidelines do not elaborate on this point and it will be important to monitor the authority's practice in this respect in the future.

Parallels with ongoing developments in the UK It is notable that as Germany reforms the ARC, the UK is also considering significant changes to its cartel enforcement regime, particularly the methodology used to calculate fines. While some procedural amendments to the current regime are required by the UK's withdrawal from the EU, more generally the UK Competition and Markets Authority ("CMA") has advocated reform as a means to enhance and maximise deterrence, with CMA proposals likely to have the general effect of increasing fining levels in the UK. This differing policy perspective is demonstrated by various aspects of the proposed UK amendments. For instance, the CMA has narrowed the range of mitigating factors relevant when considering a fine discount. In stark contrast to the FCO, the CMA proposes removing compliance measures as a mitigating factor deserving of a discount, noting that there is a strict legal obligation on all companies to observe competition law. By way of further example, it is proposed that "specific deterrence" should be a separate factor when assessing fining levels, with fines capable of being increased according to the overall size and worldwide turnover of an undertaking. The CMA has emphasised its determination that cartel penalties should, as a general matter, materially exceed any financial benefit derived from an infringement. A detailed explanation of the CMA's proposed reforms is provided in the most recent edition of *Cartel Intel*, our quarterly update on key cartel developments across the EMEA. *Cartel Intel* is *available* ².