

THE CARTELS AND
LENIENCY REVIEW

TENTH EDITION

Editors

John Buretta and John Terzaken

THE LAWREVIEWS

THE
CARTELS AND
LENIENCY REVIEW

TENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

John Buretta and John Terzaken

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADERS

Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS

Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Alex Bagley

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITORS

Robbie Kelly and Helen Sou

SUBEDITOR

Jane Vardy

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at January 2022, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-533-7

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANDERSON MŐRI & TOMOTSUNE

ASSEGAF HAMZAH & PARTNERS

BAKER MCKENZIE LLP

CMS RUSSIA

CRAVATH, SWAINE & MOORE LLP

ELIG GŐRKAYNAK ATTORNEYS-AT-LAW

ESTUDIO BECCAR VARELA

FRESHFIELDS BRUCKHAUS DERINGER

HALDANES

HAMMAD & AL-MEHDAR

HOGAN LOVELLS

JSA

LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK

LINKLATERS C WIŚNIEWSKI I WSPŐLNICY

MINTERELLISONRUDDWATTS

NOERR PARTNERSCHAFTSGESELLSCHAFT MBB

POTAMITISVEKRIS

SIMPSON THACHER & BARTLETT LLP

SLAUGHTER AND MAY

TASSOS PAPADOPOULOS & ASSOCIATES LLC

TIAN YUAN LAW FIRM

URÍA MENÉNDEZ

WALDER WYSS LTD

CONTENTS

PREFACE.....	vii
<i>John Buretta and John Terzaken</i>	
Chapter 1	ARGENTINA..... 1
	<i>Camila Corvalán</i>
Chapter 2	BELGIUM 11
	<i>Stefaan Raes and Vincent Mussche</i>
Chapter 3	CANADA..... 22
	<i>Arlan Gates and Yana Ermak</i>
Chapter 4	CHINA..... 36
	<i>Wei Huang, Wendy Zhou and Bei Yin</i>
Chapter 5	CYPRUS..... 48
	<i>Nicolas Constantinides</i>
Chapter 6	EUROPEAN UNION 61
	<i>Philippe Chappatte and Paul Walter</i>
Chapter 7	GERMANY..... 74
	<i>Fabian Badtke, Alexander Birnstiel and Till Steinvorth</i>
Chapter 8	GREECE..... 92
	<i>Dimitris Loukas and Athanasios Taliadouros</i>
Chapter 9	HONG KONG 105
	<i>Felix K H Ng, Olivia M T Fung and Christina H K Ma</i>
Chapter 10	INDIA..... 121
	<i>Farhad Sorabjee, Vaibhav Choukse, Ela Bali and Aditi Khanna</i>

Chapter 11	INDONESIA..... <i>HMBC Rikrik Rizkiyana, Farid Fauzi Nasution, Vovo Iswanto and Anastasia Pritabayu R D</i>	133
Chapter 12	ITALY..... <i>Gian Luca Zampa, Ermelinda Spinelli and Alessandro Di Giò</i>	142
Chapter 13	JAPAN..... <i>Hideto Ishida and Yubki Tanaka</i>	156
Chapter 14	MEXICO..... <i>Omar Guerrero Rodríguez and Martín Michaus Fernández</i>	168
Chapter 15	NEW ZEALAND..... <i>Jennifer Hambleton, April Payne and Anna Percy</i>	188
Chapter 16	POLAND..... <i>Małgorzata Szwał and Wojciech Podlasiński</i>	202
Chapter 17	PORTUGAL..... <i>Tânia Luísa Faria and Margot Lopes Martins</i>	217
Chapter 18	RUSSIA..... <i>Maxim Boulba and Kristina Potapova</i>	234
Chapter 19	SAUDI ARABIA..... <i>Belal Hashmi</i>	243
Chapter 20	SINGAPORE..... <i>Daren Shiau, Elsa Chen and Scott Clements</i>	252
Chapter 21	SPAIN..... <i>Alfonso Gutiérrez and Jokin Beltrán de Lubiano</i>	264
Chapter 22	SWITZERLAND..... <i>Monique Sturny and Michael Schmassmann</i>	277
Chapter 23	TURKEY..... <i>Gönenç Gürkaynak</i>	287

Contents

Chapter 24	UNITED KINGDOM	300
	<i>Philippe Chappatte and Paul Walter</i>	
Chapter 25	UNITED STATES	313
	<i>John Buretta and John Terzaken</i>	
Appendix 1	ABOUT THE AUTHORS	347
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	365

PREFACE

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

This book brings together leading competition law experts from 25 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource for the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as considering the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced,

and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

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

This is the 10th edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

John Buretta

Cravath, Swaine & Moore LLP
New York

John Terzaken

Simpson Thacher & Bartlett LLP
Washington, DC

January 2022

GERMANY

Fabian Badtke, Alexander Birnstiel and Till Steinvorth¹

I ENFORCEMENT POLICIES AND GUIDANCE

i Snapshot of competition enforcement policies

Germany continues to be a relevant competition jurisdiction. The rules against cartels and anticompetitive conduct are primarily enforced by the Federal Cartel Office (FCO), which is an independent federal authority located in the city of Bonn.² It is considered to be a highly active authority with significant human and financial resources (approximately 400 staff, 165 of whom are legal or economic experts, and an annual budget of €34.4 million in 2020).³

Enforcement statistics⁴ and statements by key officials⁵ underline that cartel enforcement is a top priority for the FCO. Other enforcement authorities are the local competition authorities of the 16 German states, which are competent in cases whose effects do not extend beyond the territory of a single state, and public prosecutors, who are in charge of conducting investigations in cases involving criminal offences.

The Act against Restraints of Competition (ARC) is the primary law prohibiting cartels and other agreements and conduct restricting competition in Germany. The law underwent important changes on 19 January 2021 when the 10th Amendment act entered into force (the Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions' also known as the ARC Digitisation Law). One focus of the new rules is the protection of competition in the digital economy.

To this end, new administrative tools were introduced, in particular with regard to large digital platforms, as well as procedural rules that make it easier for the FCO to order interim measures and new provisions on the control of abusive conduct (regarding access to data relevant for competition). In implementing the EU ECN+ Directive,⁶ the amendment also equips the FCO with new powers in the area of cartel prosecution; for example, its

1 Fabian Badtke, Alexander Birnstiel and Till Steinvorth are partners at Noerr Partnerschaftsgesellschaft mbB.

2 In addition to protecting competition and applying and enforcing competition law in Germany, the FCO also has certain competences in the areas of public procurement (reviewing the award of public contracts by the federal government) and consumer protection.

3 Annual Report 2020/21, available on the FCO website: www.bundeskartellamt.de.

4 €349 million in fines in 2020, see FCO Annual Report 2020/21, p. 34, available on the FCO website.

5 In a press release dated 29 December 2020, Andreas Mundt (president of the FCO) confirmed that '[c]artel prosecution still remains high on our agenda'.

6 Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

powers to make information requests and carry out inspections, and the corresponding duty of undertakings to submit to those requests and inspections, have been streamlined and expanded.

In addition, the role of the FCO in court proceedings concerning fines has been strengthened, the possibilities for cooperation with the competition authorities in other EU Member States have been expanded, and the FCO's powers to impose fines have been reinforced. The 10th Amendment of the ARC has codified the FCO's leniency programme and some of the criteria used by the FCO in determining the amount of the fine imposed in cartel proceedings. Consequently, the FCO's leniency notice of 2006 expired, and on 11 October 2021, the authority published new guidelines on its leniency programme (the FCO Leniency Guidelines) and new guidelines on the setting of fines (the FCO Fining Guidelines).

While there have been no significant changes with regard to the leniency programme, the FCO Fining Guidelines aim to align the FCO's practice closer to the fining practice of the German courts. In contrast to the practice of the European Commission, the level of the fine is determined less by the turnover involved in a cartel and more by the total turnover of the company; however, the FCO stresses that the new method of calculation is unlikely to significantly change the level of fines.⁷

Under the new rules, the FCO may also consider as a mitigating factor a company's undertaking of precautionary compliance measures prior to the infringement, or establishment of those measures afterwards, to prevent and uncover further infringements. In those cases, the FCO may reduce the fine.

ii Statutory framework for cartel enforcement by the FCO

Substantive basis

The primary basis for cartel enforcement is Section 1 of the ARC (ban on cartels). It establishes a general prohibition of all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition.

Since July 2005, Section 1 of the ARC has mirrored the wording of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), except the German prohibition applies irrespective of any (potential) effects on trade between EU Member States. The German parliament and the German courts have stressed that the application of Section 1 of the ARC shall closely follow EU precedents, practice, regulations⁸ and guidelines to build a coherent system of enforcement of EU and German competition law.

As a consequence of the parallel and decentralised enforcement of EU competition law introduced by Regulation (EC) No. 1/2003, the FCO also directly applies Article 101(1) of the TFEU.

Intervention powers and enforcement proceedings

The ARC grants the FCO far-reaching powers of investigation and intervention by means of two different types of proceedings against undertakings and associations of undertakings, on the one hand, and, to a certain extent, against individuals, on the other.

⁷ FCO press release of 11 October 2021.

⁸ Including EU block exemption regulations, see Section 2(2) of the ARC.

In administrative proceedings,⁹ the FCO can issue prohibition and commitment decisions, impose structural and behavioural remedies, issue reimbursement orders and determine the withdrawal from block exemptions and the withdrawal of benefits against undertakings and associations of undertakings.

In administrative offence proceedings,¹⁰ the FCO can impose fines for administrative offences against undertakings, associations of undertakings and individuals.¹¹

Tools to detect cartels

In 2000, the FCO introduced a leniency programme, which was revised in 2006 to largely mirror the leniency programme of the European Commission. Since 19 January 2021, the programme has been codified in Sections 81h to 81n of the ARC. The FCO Leniency Guidelines¹² set out supplementary administrative rules providing details on the proceedings and the reduction of the fine.

Since 2002, there has also been a whistle-blowing hotline to receive insider information on potential violations of the ban on cartels, in writing or by phone, from whistle-blowers who reveal their identity and relationship (business or personal) to potential violations of the ARC. Furthermore, in 2012, the FCO implemented an electronic whistle-blowing system to enable anonymous tip-offs. The system is accessible from the FCO website¹³ and guarantees the anonymity of whistle-blowers.

Following a decline in the number of leniency applications, possibly owing to rising private damages litigation, the FCO recently announced that it was examining innovative methods of detecting cartels, including market screening.¹⁴

Investigative powers

The investigative powers available to the FCO depend on whether the authority acts in administrative or in administrative offence (fine) proceedings. In administrative proceedings, the available tools are specified in the ARC. In contrast, in administrative offence proceedings, the FCO may rely on the powers available to public prosecutors in criminal proceedings, as well as on the powers enshrined in the ARC.

In both cases, the FCO may, in particular:

- a* request documents and information from undertakings, their affiliated undertakings and associations of undertakings;
- b* carry out unannounced inspections at corporate and residential premises;
- c* examine business documents; and
- d* seize evidence or make copies of data stored in electronic devices.

In general, addressees of information requests are protected against self-incrimination. Under certain conditions, individuals can be obliged to provide information or hand over

9 Sections 54 to 62 of the ARC.

10 Sections 81 to 86 of the ARC.

11 See Section V.

12 Notice No. 14/2021 of 23 August 2021 on General Administrative Principles on the Exercise of Discretion in the Structuring of the Procedure and Application of the Antitrust Leniency Program under Sections 81h-81n of the Act Against Restraints of Competition, available on the FCO website.

13 'Tip-offs about cartel violations', FCO website.

14 FCO press release of 29 December 2020.

documents, even if they thereby disclose facts that may put them (or a close relative) at risk of being prosecuted for a criminal or an administrative offence; however, information provided in this way may only be used against an individual (or their close relative) in criminal or administrative offence proceedings with the consent of the individual in question. Inspections normally require a court warrant.

Further guidance

The FCO has published guidance and information materials on the application and enforcement of competition law. Important substantive guidelines include:

- a* Information leaflet on cooperation possibilities for small and medium-sized enterprises (March 2007);
- b* Notice on the non-prosecution of cooperation agreements with minor restrictive effects on competition (March 2007); and
- c* Notes on the prohibition of vertical price-fixing in bricks-and-mortar food retailing (July 2017).

In addition, the FCO regularly publishes case summaries, annual reports and biannual activity reports. Guidance materials, reports and published decisions are available on the FCO website.¹⁵

iii Cartel enforcement in practice and figures

The FCO enforcement powers capture:

- a* classical price-fixing,¹⁶ output, territory or customer allocation, and bid rigging (hardcore cartels), including when facilitated by third parties;¹⁷
- b* exchanges of competitively sensitive information between competitors (e.g., current or future prices, volumes, business strategies and market behaviour),¹⁸ including when facilitated by third parties;¹⁹

15 'Ban on cartels' and 'Further documents', FCO website.

16 In December 2020, the FCO imposed fines totalling almost €175 million on five aluminium forging companies and 10 employees responsible for agreeing to pass on to their customers their respective procurement costs and cost increases (Case No. B12-24/17).

17 In September 2018, the FCO imposed fines of approximately €16 million on DuMont Mediengruppe GmbH & Co KG, one representative and a lawyer. DuMont and the representative were found to have concluded an illegal territorial allocation agreement with Bonner General-Anzeiger media group on the distribution of newspapers in the Bonn area from 2000 to 2016. The lawyer was fined for having advised DuMont during the entire period and being actively involved in the arrangements to secure the illegal territorial allocation (Case No. B7-185/17).

18 In January 2017, the Higher Regional Court of Düsseldorf confirmed the FCO's decision to fine manufacturers of confectionery products and the Association of the German Confectionery Industry approximately €19.6 million for exchanging the state of negotiations with retailer and intended list price increases (Case No. B11-11/08). More recently, in February 2021, the FCO fined three steel forging companies and their senior staff €35 million for exchanging sensitive information on manufacturing cost, prices and negotiations with suppliers and customers (Case No. B12-22/17).

19 There are no FCO precedents on 'classical' hub-and-spoke scenarios. There are precedents on information exchanges facilitated by third parties; for example, in Case No. B11-11/08, the Association of the German Confectionery Industry was fined because its representatives encouraged an illegal information exchange.

- c certain competitors' cooperation arrangements (e.g., joint purchase agreements,²⁰ licensing agreements²¹ and supplier consortia);²² and
- d vertical price-fixing (i.e., fixed and minimum resale price maintenance (RPM)).²³

In November 2019, the FCO stressed that the ban on cartels may also cover market behaviour influenced by collusive algorithms;²⁴ however, there are no FCO precedents in this area.

Enforcement statistics²⁵ show that the FCO actively pursues violations of the cartel ban. The leniency programme and tip-offs via whistle-blowing tools continue to play an important role in uncovering those violations.

Nonetheless, leniency applications appear to be in decline owing to the increased risk of follow-on damages: the number of leniency applications has dropped from a peak of 76 in 2015 to 13 in 2020.²⁶ By contrast, anonymous tip-offs appear to be becoming more important.

The FCO is continuing to make wide use of its investigation tools. For instance, despite the disruptions of the covid-19 pandemic, the FCO carried out unannounced inspections at 17 companies in 2020.²⁷ In the same year, it imposed fines of approximately €349 million for violations of the cartel ban.²⁸

Pursuant to the new FCO Fining Guidelines (and the practice of the German courts), fines are generally calculated taking into account both the turnover achieved from sales of the

20 Usually if the cooperating parties' combined market shares exceed 15 per cent. See the information leaflet on the possibilities of cooperation for SMEs of March 2007, available at the FCO website.

21 In 2018, the FCO began investigating a cooperation between Sky and DAZN on the broadcasting of the Champions League in Germany. After Sky had acquired broadcasting rights for all matches between 2018 and 2021 in a tender conducted by UEFA, Sky and DAZN divided the rights among themselves. The case was discontinued in 2020 for discretionary reasons.

22 In December 2018, the FCO fined Gaul GmbH approximately €1.43 million for participating with competitors in supplier consortia for larger orders of rolled asphalt mixes, which resulted in price-fixing, and output, and customer and territorial allocation (Cases Nos. B1-189/13 and B1-11/15).

23 Between September 2020 and June 2021, the FCO fined three manufacturers and two retailers of musical instruments, as well as some of their senior staff, a total of €21 million for fixing retail prices and, with regard to the retailers, for horizontal price-fixing (Cases Nos. B11-33/19 and B11-31/19). In several large-scale proceedings between 2014 and 2016, the FCO imposed fines of approximately €290 million on food manufacturers and retailers with respect to RPM policies. The findings of those proceedings were included in the Guidance note on the prohibition of vertical price-fixing in the bricks-and-mortar food retail sector of July 2017.

24 Working paper, 'Algorithms and Competition' released by the FCO and the French Competition Authority on 6 November 2019.

25 Activity Report 2019/2020, p. 38 et seq., available on the FCO website.

26 *ibid.*, p. 39.

27 *ibid.*, p. 34. By comparison, there were inspections at 32 corporate premises and five private premises in the previous year, Annual Report 2019, p. 34.

28 *ibid.* In 2019: €848.

cartelised products or services during the existence of the cartel and the total annual turnover of the undertaking. In the vast majority of cases, the FCO reduces fines to reward the active cooperation of a party or its acceptance of guilt (settlement agreement).²⁹

If a fine goes to appeal, the Higher Regional Court of Düsseldorf may impose a new fine, which may be higher or lower than the original fine because the court is not bound by the findings of the FCO, or the FCO Fining Guidelines, and the court may use a different method for calculating the level of the fine.³⁰

On the spectrum of private litigation in Germany, the number of follow-on damages claims arising from decisions issued by either the FCO or the Commission continues to increase. Although there are no official statistics on follow-on damages claims, it is estimated that ‘over the last two years there were 640 new private litigation claims in Germany and most of them – around 300 – were related to the Trucks cartel’.³¹

II COOPERATION WITH OTHER JURISDICTIONS

The FCO may cooperate with the Commission, the national competition authorities (NCAs) of EU Member States and competition authorities outside the European Union. As part of this cooperation, the FCO may disclose confidential information, including business secrets, without the consent of the firms or individuals concerned; however, the FCO must generally ensure that information disclosed to another competition authority is used for competition law enforcement only and that confidential information is adequately protected.

i Cooperation within the European Competition Network

The FCO, the European Commission and NCAs form a network known as the European Competition Network (ECN), which cooperates comprehensively in the area of competition law and policy. In 2004, the FCO signed the statement regarding the Commission Notice on cooperation within the Network of Competition Authorities, and thereby agreed to collaborate within the ECN. The FCO’s cooperation covers three main forms:

- a* joint works of a more general nature, such as the preparation of draft texts, comparison of national decision practices and discussions on best practices;
- b* mutual communication of new investigations and envisaged decisions; and
- c* mutual assistance in specific investigations, including the coordination of investigations, assistance in unannounced inspections carried out by the Commission, execution of unannounced inspections on behalf of NCAs, exchange of evidence and information, and discussions on proposed courses of action.

29 For example, Case No. B9-44/14 (decision of June 2018, fines on three manufacturers of heat shields for price-fixing); Case No. B7-185/17 (decision of September 2018, fines on a newspaper publisher for territorial allocation); Cases Nos. B1-189/13 and B1-11/15 (decision of December 2018, fines on a bicycle wholesaler for vertical price-fixing); and Case No. B11-28/16 (decision of December 2018, fines on an asphalt mix producer for participating in supplier consortia).

30 For example, in the *Wallpaper* cartel case, the Higher Regional Court of Düsseldorf increased the fines from €10.5 million to €13.9 million in one case and from €3.8 million to €5.5 million in another, decision of 12 October 2017, ECLI:DE:0LGD:2017:1012.2KART1.170WI.00.

31 Konrad Ost (vice president of the FCO), speech at Global Private Litigation, Berlin, June 2019.

As there is no ‘one-stop shop’ leniency system in the European Union, the ECN also provides for cooperation on this matter, which may include the sharing of information on leniency applications and related documents; however, there are limitations, including the requirement of obtaining the consent of leniency applicants to have information and documents transmitted to the European Commission or to NCAs.

The 10th Amendment of the ARC, which implements the ECN+ Directive,³² has further strengthened the ability of the FCO to cooperate with NCAs from other EU Member States. Rules on mutual assistance allow for investigative and enforcement actions taken by the FCO on behalf of other NCAs, including, with regard to inspections, interviews, the notification of preliminary objections and other documents, and the enforcement of decisions imposing fines and periodic penalty payments.

ii Cooperation outside the ECN

At the global level, the FCO actively participates in a number of multilateral competition-related organisations, such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD), to exchange views on broader policy and enforcement issues and to establish recommended practices.

Furthermore, the FCO also cooperates with competition authorities around the world on the basis of bilateral agreements. The cooperation varies between countries and may cover coordination of enforcement actions, sharing of information on investigations of mutual interest, discussions on competition policy issues and capacity building support.

A relevant example is the cooperation with the US Department of Justice and Federal Trade Commission. On 23 June 1976, the US and German governments concluded an agreement on mutual cooperation in the area of restrictive business practices. Based on this agreement, the FCO and the US agencies may exchange information and documents on anticompetitive practices that have an impact on trade in their jurisdictions, send information requests to undertakings based on the other authority’s jurisdiction, and consult on investigations relating to the same cartel activity that has an impact in both jurisdictions.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Jurisdictional limitations

Except in cases of mutual assistance where it acts on behalf of an NCA from another EU Member State, the jurisdiction of the FCO is restricted to violations of German and EU competition law that have effects on the German territory. The FCO tends to interpret this rule broadly and hence asserts jurisdiction even in the case of indirect effects in Germany. Consequently, the FCO can – and often does – assert jurisdiction over violations of the cartel ban that take place abroad and by undertakings, associations of undertakings or individuals domiciled outside Germany.

By contrast, the FCO may not assert jurisdiction over violations of the cartel ban that take place in Germany but have effects only outside the German territory. Depending on the facts of the case at hand, however, an export cartel may have potential effects in Germany and may, therefore, be subject to the FCO’s scrutiny.

32 Directive (EU) 2019/1.

Despite its far-reaching investigation powers, the FCO is not authorised to execute investigative measures outside Germany; in those cases, the FCO relies upon assistance from other competition authorities, especially within the ECN framework. Following the implementation of the ECN+ Directive, the FCO is now able to notify its decisions to, and enforce payments of fines against, undertakings, associations of undertakings and certain individuals without presence in Germany by means of cooperation with other NCAs under the ECN framework.

ii Exemptions

Restrictions of competition can be exempted from the cartel ban by:

- a* *de minimis* exemptions (i.e., limited effects on the market);³³
- b* general exemptions under any of the EU block exemption regulations;
- c* individual exemption under Section 2(1) of the ARC (mirroring Article 101(3) of the TFEU);³⁴
- d* exemption for small and medium-sized enterprises (SMEs) in Section 3 of the ARC (i.e., agreements that foster the competitiveness of SMEs); and
- e* sector-specific exemptions (e.g., certain agreements in the agricultural³⁵ and water supply sectors,³⁶ RPM policies for books and printed media,³⁷ and publishing corporations).³⁸

Exemptions will often not apply to classical cartel practices (hardcore cartels). Moreover, the *de minimis* exemption, the SME exemption and the sector-specific exemptions are only applicable under German law; they do not apply to violations of the cartel ban with effects beyond the German territory.

IV LENIENCY PROGRAMMES

i Scope

The German leniency programme is enshrined in Sections 81h to 81n of the ARC, and in the supplementary FCO Fining Guidelines. Its scope of application is limited in several ways.

With regard to the conduct covered, the statutory leniency provisions expressly limit the scope of application to ‘cartels’ (i.e., illegal horizontal agreements or concerted practices among competitors, such as price-fixing or market sharing agreements). In the past, however, the FCO also accepted cooperation concerning anticompetitive vertical behaviour and

33 The parties’ combined market shares do not exceed 10 per cent in horizontal cases (i.e., between competitors) and 15 per cent in vertical cases (i.e., along the supply chain). See the *de minimis* notice of March 2007, available on the FCO website.

34 Conduct is exempted if it contributes 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, and that neither imposes on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives nor affords those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

35 Section 28(1) and (2) of the ARC.

36 Section 31(1) of the ARC.

37 Section 30(1) of the ARC.

38 Section 30(2b) of the ARC.

granted significant fine reductions comparable to those under its then applicable leniency notice;³⁹ there are no indications that this practice will change following the codification of the FCO's leniency programme by the 10th Amendment to the ARC.

The statutory leniency provisions do not provide for immunity from sanctions imposed against individuals in criminal proceedings. In particular, bid rigging may be punishable as both an administrative offence and a criminal offence in Germany. In those cases, the proceedings against the individual must be transferred by the FCO to the public prosecutor's office, and the leniency programme directly benefits only the company in the FCO proceedings, not the individual in the separated criminal proceedings. However, under Article 23(2) and (3) of the ECN+ Directive, the public prosecutors (and the criminal courts) are obliged to take into account the individual's cooperation in the leniency programme and to either discontinue the proceedings or reduce the criminal sanction accordingly.

With regard to the beneficiaries, the leniency programme is available to anyone who may be the addressee of a fine imposed by the FCO or one of the 16 local competition authorities, namely undertakings, associations of undertakings and certain individuals (see Section V). Unless expressly stated otherwise, a leniency application made on behalf of an undertaking covers all persons and entities constituting the undertaking at the time of the application, as well as the current and former members of the supervisory or management bodies and employees.

Those in whose favour the application operates must meet the general leniency requirements to benefit from leniency. The leniency rules do not address the question of whether leniency applications by individuals also benefit the undertakings or associations of undertakings to which they are related; it is generally assumed that this is not the case.

Contrary to other jurisdictions, the German leniency programme does not provide for the possibility of 'immunity plus'.

ii Conditions and benefits

Full immunity will be granted to the first-in applicant if:

- a* the application enables the competition authority to obtain a search warrant (even if the competition authority was already aware of the infringements). Where the competition authority was already in a position to obtain a search warrant, the applicant may still receive full immunity if the application enables the competition authority to prove the offence;
- b* the applicant discloses its knowledge of, and involvement in, the cartel in the leniency application or cooperates fully with the competition authority in the investigation of the facts;
- c* the applicant ends its involvement in the cartel immediately following the leniency application (unless the competition authority requests otherwise to preserve the integrity of the investigation);
- d* the applicant agrees to cooperate fully and continuously with the competition authority;
- e* the applicant did not take steps to coerce other undertakings to join the cartel or remain in it.

³⁹ For example, in January 2016 the FCO fined LEGO only €130,000 for its RPM policies towards retailers with respect to 'highlight articles'. The FCO stressed that it considered LEGO's substantial cooperation and settlement agreement in imposing such a low fine.

The leniency programme does not exclude the possibility of subsequent applicants moving into the position of the first-in applicant if the latter is not eligible for full immunity. The idea of overtaking the position of the first-in applicant strengthens competition between leniency applicants to offer the most valuable contribution.

First-in applicants that are not eligible for full immunity and subsequent applicants that do not overtake the position of the first-in applicant may still receive a fine reduction if:

- a* the applicant discloses its knowledge of, and involvement in, the cartel in the leniency application or cooperates fully with the competition authority in the investigation of the facts;
- b* the applicant ends its involvement in the cartel immediately following the leniency application (unless the competition authority requests otherwise to preserve the integrity of the investigation);
- c* the applicant agrees to cooperate fully and continuously with the competition authority;
- d* the application submits evidence that represents significant 'added value' for the purpose of proving the infringement relative to the evidence already in the possession of the competition authority.

The final amount of the fine reduction depends both on the added value of the information and the evidence submitted to the competition authority and on the timing of the application relative to other leniency applications. The FCO Leniency Guidelines clarify that a fine may be reduced by up to 50 per cent. The decision on the reduction is made in the final decision imposing the fine.

iii Cooperation

The requirement of cooperation is comprehensive. First-in applicants and subsequent applicants will receive immunity or a fine reduction only if they cooperate 'genuinely, on a continuous basis and expeditiously' with the competition authority for the entire duration of the proceedings (not only upon the filing of leniency applications). This requires the applicant:

- a* to promptly provide all information about, and evidence of, the cartel to which it has access;
- b* to respond to any request for information that may help to establish the facts of the case;
- c* to ensure that members of the supervisory and management bodies as well as other employees are available for questioning. In the case of former members or employees, it is sufficient to make efforts to this end;
- d* not to destroy, falsify or conceal information about, or evidence of, the cartel; and
- e* not to disclose the fact of, or the contents of, the leniency application before the competition authority has released the applicant from this obligation.

In addition, during the time that the leniency applicant contemplated the making of a leniency application, it must not have:

- a* destroyed, falsified or concealed information about, or evidence of, the cartel; and
- b* disclosed the fact of, or any of the content of, its contemplated leniency application other than to any other competition authorities (including competition authorities of third countries).

iv Marker system and leniency proceedings

Leniency proceedings can be initiated until the competition authority reaches a final decision. In general, the later an applicant initiates leniency proceedings, the more information the FCO will have collected, the less ‘added value’ its contribution will provide, and the lower the fine reduction will be; however, the temporal order of leniency applications is not necessarily the main consideration in determining the amount of fine reductions. A later applicant may be able to present a more valuable contribution than earlier applicants and thereby secure a more significant fine reduction.

Applicants initiate leniency proceedings by contacting the competition authority. The FCO Leniency Guidelines specify that the Special Unit for Combating Cartels and the decision divisions responsible for prosecuting cartels are authorised to accept leniency applications. In addition, during an inspection, FCO staff can also accept applications on the spot. At the request of the applicant, the FCO confirms receipt of the leniency application, indicating its date and time.

The leniency programme also allows both first-in and later applicants to place a marker (i.e., make a declaration of their willingness to cooperate) prior to the filing of a complete leniency application to secure their place in the leniency queue. A marker should contain the following minimum information:

- a* name and address of the applicant;
- b* names of the other participants in the cartel;
- c* products and territories concerned;
- d* duration and nature of the infringement, in particular with regard to the applicant’s own participation; and
- e* a list of competition authorities (inside or outside the European Union) to which leniency applications have been, or are intended to be, filed.

On request, the FCO will acknowledge receipt of the marker indicating its date and time. The FCO will also set a time limit of generally no more than eight weeks for ‘perfecting’ the marker (i.e., for submitting a complete leniency application containing all necessary information and documents). Any information and evidence provided before the expiry of the time limit will be deemed to have been submitted at the time of the marker.

In the case of first-in applicants (or subsequent applications that manage to overtake first-in applicants) that fulfil the criteria for full immunity, the FCO, upon request, will issue an assurance in writing during the course of the proceedings that the applicant will be granted full immunity. The assurance will be conditional on the applicant’s compliance with the cooperation obligations. In the case of first-in applicants that are not eligible for full immunity and subsequent applicants, the FCO will only decide on the extent of the fine reduction when a final decision is adopted.

v Parallel leniency application to the Commission and simplified leniency application

There is no one-stop shop leniency system in the European Union that would allow a leniency application filed in one EU jurisdiction to be effective in all EU jurisdictions; however, if an applicant has applied for leniency with the Commission, either by applying for a marker or by submitting a full application, and if the application covers more than three EU Member States as affected territories, the FCO will accept a summary application. A summary application needs to include only as much information as a marker.

If the Commission informs the FCO that it will not pursue the case either in whole or in part, or if the FCO considers that more information is necessary for the delineation or allocation of the case, the FCO will require the submission of a complete leniency application. In this case, it will set a time limit for the complete filing. If the application is then made within that time limit, it will be deemed to have been made at the time of the summary application. There is no similar mechanism for applications filed to other NCAs.

vi Formalities of the leniency application

Leniency applications must be filed in writing or electronically (by specified secure means of communication). If expressly allowed by the FCO, a filing may also be made by email, by fax or orally (e.g., by telephone). A marker or a summary application can always be made by email, by fax or orally.

An application may be filed in German, in English or, after prior consultation with the FCO, in another EU language. If the FCO accepts the application in a language other than German, the applicant will need to provide a German translation upon request of the FCO.

vii Development of leniency applications

The number of leniency applications has been constantly decreasing in recent years, from an all-time high of 76 applications in 2015 to 13 in 2020.⁴⁰ The reasons for this development are not clear. Plausible explanations include that undertakings are willing to invest more in the implementation of compliance systems, which would lead to fewer cartels (see Section V), and that follow-on damages claims discourage leniency applications (see Section VII).

V PENALTIES

i Administrative fines

Violations of the ARC may be subject to fines, both for undertakings and associations of undertakings and for certain individuals.

For undertakings and associations of undertakings, fines range from €1 million to 10 per cent of the worldwide group turnover generated in the preceding business year.⁴¹ As a consequence of the *Grey Cement* judgment of the Federal Court of Justice,⁴² the 10 per cent worldwide group turnover is considered as the outer bound of a fining spectrum within which the fine must be chosen, taking into account all the facts and circumstances of the case at hand.⁴³ This deviates from the Commission's approach, which considers it as a cap.

As part of the 10th Amendment to the ARC, the German legislator codified the relevant criteria for the determination of fines, including the turnover relevant to the offence, in Section 81d of the ARC. The FCO also amended its method to determine a starting point for the calculation of fines according to the FCO Fining Guidelines of November 2021.⁴⁴

According to the new guidelines, the base for the determination of the fine is the turnover size (i.e., a certain percentage of the group turnover achieved from the cartelised products or

40 Activity Report 2019/2020, p. 39.

41 Section 81c (2) of the ARC.

42 German Federal Court of Justice decision of 26 February 2013, KRB 20/12, *Grey Cement* cartel.

43 FCO, 11 November 2021, Guidelines for the setting of fines in cartel administrative offence proceedings.

44 *ibid.*

services in Germany during the existence of the cartel, depending on the worldwide group turnover). The turnover size is also related to the statutory 10 per cent outer bound of the fining spectrum.

If the turnover size does not exceed half of the 10 per cent fining limit, only the turnover size calculated according to the FCO's Fining Guidelines applies. If it exceeds half of the 10 per cent outer bound, the starting point for calculating the fine is half of the statutory limit.

The amount is then adjusted by aggravating and mitigating circumstances relating to the undertaking concerned (e.g., level of involvement in the cartel, market position in the affected markets and compliance measures) and the infringements (e.g., effects on the affected markets and the significance of the affected markets) pursuant to Section 81d of the ARC.

The codification of the relevant fining criteria sought to align the FCO's approach with the Commission's practice and the national courts' fining practices. Since courts are not bound by the FCO Fining Guidelines, in the past, they chose the fine by taking into account all the circumstances of the case at hand, on a spectrum ranging from €5 as the lower bound to 10 per cent of the worldwide group turnover of the undertaking concerned as the upper bound.

This approach makes it significantly more difficult to estimate the likely amount of a fine, and it may result in significantly higher fines compared with the methodology of the FCO.⁴⁵ As a result, undertakings may find themselves in the uncomfortable position of either having to accept a fining decision from the FCO, even if they fundamentally disagree with its findings, or taking the risk of receiving a much higher fine on appeal. It remains to be seen whether the introduction of Section 81d of the ARC, with its non-exhaustive list of circumstances to be considered for fining, achieves the goal of harmonisation.

The fines for certain procedural violations were increased by the newly introduced Section 81c(3) of the ARC, offering the possibility to impose fines above the previous range of €100,000 up to 1 per cent of the worldwide group turnover generated in the preceding business year.

According to Section 81a(1) of the ARC, companies belonging to one and the same undertaking, in particular parent companies and their subsidiaries, may be jointly and severally liable for fines imposed by the FCO. The FCO is thus able to collect fines from companies that have exercised, during the time of the infringement, a decisive influence over the companies or individuals found guilty of an infringement of competition law. The FCO may also collect fines from legal or economic successors.⁴⁶

In the case of associations of undertakings, fines are calculated mostly based on the methodology used for undertakings; however, the 10th Amendment to the ARC increased the risks of liability for associations of undertakings. Where a fine is imposed on an association of undertakings on account of an infringement relating to the activities of its members, the fine calculation base is no longer limited to the turnover recorded by associations of undertakings, but can be up to 10 per cent of the sum of the total turnover generated by the members active on the affected market.⁴⁷

45 Higher Regional Court of Düsseldorf decision of 12 October 2017, ECLI:DE:0LGD:2017:1012.2 KART1.170WI.00, *Wallpaper* cartel.

46 Section 81a (2) and (3) of the ARC. See European Court of Justice decision of 14 March 2019, ECLI:EU:C:2019:204, *Skanska*.

47 Section 81c(4) of the ARC.

The turnover of members on which fines have already been imposed in connection with the offence or that have been granted immunity from fines is not taken into account.⁴⁸ Moreover, the newly introduced Section 81b(2) and (3) of the ARC establish a form of default liability for members of associations of undertakings under certain conditions.

Regarding individuals, administrative fines can be imposed on the legal representatives of an undertaking or on individuals who are entitled to exercise managerial functions (i.e., directors, officers and certain senior employees). The fine can be imposed for active involvement in anticompetitive infringements or for failure to supervise and prevent infringements by lower-ranking employees.⁴⁹

Fines for individuals are capped at €1 million.⁵⁰ The exact amount will depend on the individual's own misconduct, which is reflected by the significance of the offence and the extent of his or her participation (active or failure to supervise) in the anticompetitive infringements and financial circumstances.⁵¹

Notwithstanding the above, and in addition to fine reductions of up to 50 per cent from leniency applications, the FCO has adopted an informal settlement procedure to grant an extra reduction of up to 10 per cent on the fines imposed on undertakings, associations of undertakings and individuals for those who accept to confess their infringements and enter settlement agreements.⁵²

Corporate compliance programmes are encouraged to prevent competition law offences or help to uncover them as early as possible, and applying for leniency is also encouraged. The 10th Amendment to the ARC requires the FCO to take into account, in setting the fine, the implementation of a compliance programme before and after the discovery of an infringement.⁵³ According to the FCO's guidelines on the calculation of fines, it may in general be seen as an effective compliance measure, and thus a mitigating circumstance, if it leads to the detection of the infringement and its disclosure to the FCO.

While compliance programmes may exempt undertakings and associations of undertakings from supervisory liability for acts by ordinary employees, they will not be useful once legal representatives or individuals who are entitled to exercise managerial functions (i.e., directors, officers and certain senior employees) commit a competition law offence themselves.

ii Exclusion from public tenders

A final decision finding that an undertaking committed a competition law infringement may lead to the exclusion of that undertaking from public award procedures for a period of three years following the decision.⁵⁴ The Competition Register Act⁵⁵ requires the FCO to operate

48 *ibid.*

49 Section 130 of the Administrative Offences Act.

50 Section 81(4), No. 1 of the ARC.

51 Section 17(3) of the Administrative Offences Act.

52 See footnote 19.

53 Section 81d (1), Nos. 4 and 5 of the ARC.

54 Section 124 of the ARC.

55 Entered into force on 29 July 2017. The Act provides for the creation of a blacklist of companies subject to compulsory facultative exclusion from public procurement proceedings owing to past involvement in, among other things, cartel practices (the Competition Register) and obliges contracting authorities to retrieve information on bidders from the Competition Register before awarding contracts.

the Competition Register, which enables contracting authorities to consult bidders' past behaviour in a unified nationwide electronic system and to refrain from awarding contracts to firms that have previously engaged in cartel practices.

The requirements for electronic data transmission to the Competition Register have officially been in place since October 2021. The Competition Register was made live on 1 December 2021. The prosecuting authorities and the authorities competent for the prosecution of administrative offences are obliged to communicate data, and it is possible for registered contracting entities to consult the register.

iii Criminal sanctions

Bid rigging is the only anticompetitive conduct that also constitutes a crime under Section 298 of the Criminal Code; however, since corporate criminal liability does not exist in Germany, only individuals can commit the crime (both representatives and employees). The FCO must refer proceedings against individuals to the public prosecutor's office under Section 41 of the Administrative Offences Act. Although cooperation with the FCO may be relevant as a mitigating factor in criminal proceedings, cooperation generally does not preclude criminal proceedings or sanctions.

VI 'DAY ONE' RESPONSE

The ARC grants the FCO the power to carry out unannounced inspections (dawn raids) insofar as authorised by the competent judicial authorities. In the event of imminent danger, the FCO can conduct unannounced inspections without previous judicial authorisation.

Targets of unannounced inspections are either corporate premises or private premises and objects (e.g., private homes, cars and briefcases), and the FCO will be entitled to examine business documents, seize original documents and make copies of entire hard drives and data stored in electronic devices (e.g., computers, laptops, tablets and smartphones).

In the event of an unannounced inspection, immediate action is required not only from external advisers but also mainly from undertakings or associations of undertakings and their employees. It is advisable for undertakings and associations of undertakings to have dawn raid guidelines in place and to train their personnel accordingly so that employees are well aware of the steps that must be taken in the context of unannounced inspections. Some practical recommendations are as follows:

- a* The legal department or legal representatives must be immediately informed.
- b* The legal department or legal representative shall review search warrants. Generic and broad search warrants shall not be authorised.
- c* Employees have a duty to cooperate to a certain extent in establishing the facts of the case since the 10th Amendment to the ARC.⁵⁶ The duty to cooperate replaced a mere obligation to tolerate unannounced investigations and is subject to a fine in case of breach.⁵⁷ In certain cases, individuals may have to make self-incriminatory statements.⁵⁸

56 The duty to cooperate implements the ECN+ Directive and is enshrined in Section 59b (3) No. 3 of the ARC.

57 Section 81(2), No. 11 of the ARC.

58 Section 59b(3), sentence 2 of the ARC.

Although the statements cannot be used against them in criminal or administrative offence proceedings, they may be used against the undertakings or associations of undertakings to which they are related.

- d* Copies of all documents seized shall be retained. FCO officials often insist on seizing the originals rather than copies.
- e* Copies of electronic data seized shall be retained and the time spent by the FCO for reviewing the data shall be monitored. FCO officials often copy and seize electronic data for further review at the FCO's premises in Bonn. The FCO is, however, obliged to review the seized data within a reasonable period of two to three weeks to determine whether it might be useful for the investigations concerned, as well as to return useless data to undertakings or associations of undertakings without delay.
- f* The legal department or legal representatives shall have a debriefing meeting with FCO officials at the end of unannounced inspections and shall prepare the minutes of the meeting. FCO officials usually have a template available that can be used for this purpose.

The 10th Amendment to the ARC strengthened the FCO's investigatory power to implement the ECN+ Directive, thereby significantly reducing the rights of defence of undertakings, associations of undertakings and individuals concerned in FCO investigations. At the same time, the legislature introduced provisions on the right to access files in administrative competition proceedings.⁵⁹

VII PRIVATE ENFORCEMENT

Germany is a relevant and important jurisdiction within the European Union in the area of follow-on damages claims resulting from violations of the cartel ban. Follow-on damages claims are facilitated in Germany owing to the extensive experience of German courts in this area, as well as the changes brought about by the Ninth Amendment to the ARC in June 2017, which transposed the Damages Directive into German law.

The 10th Amendment to the ARC introduced only selective legislative novelties; however, the full effect of these legal amendments will only be seen for recent cartel activity as new material provisions are not applied retroactively.

i Calculation of damages

Germany is supposed to be a claimant-friendly jurisdiction with regard to the calculation of damages. Under German competition law, it is presumed that violations of the cartel ban caused damage, although this can be refuted.⁶⁰

Furthermore, the 10th Amendment to the ARC introduced a rebuttable presumption stating that transactions with cartel members regarding goods or services that fall within the scope of a cartel in terms of product type, time and geographic area are affected by the cartel.⁶¹ The presumption applies to both direct and indirect customers;⁶² however, it does

59 Section 56(3) of the ARC.

60 Section 33a(2) of the ARC.

61 Section 33a(2) of the ARC.

62 Section 33c(3) of the ARC.

not cover the amount of damages caused. Since German civil procedural law allows courts to determine the damages caused at its discretion and conviction, based on its evaluation of all circumstances, the legislature saw no need for action in this regard.⁶³

In the case of follow-on damages claims, some courts consider the consultation of judicial expert opinions as indispensable for their discretionary decision.⁶⁴ To date, only a few judgments have been based solely on the free discretion of the courts without reference to an expert opinion.⁶⁵

ii Passing-on defence

Both direct and indirect customers have standing and may claim damages for violations of the cartel ban. Defendants may benefit by raising the passing-on defence. This was confirmed in the *ORWI* judgment of the German Federal Court of Justice (FCJ) in 2013.⁶⁶

According to the case law of the FCJ, the passing-on defence is subject to high requirements. The defendant bears the burden of proof for the passing-on of increased prices to the next level of the value chain, without benefiting from a presumption of an increase in price.⁶⁷ Particularly in the case of dispersed damages (i.e., where indirect customers have suffered scattered and relatively low-value damage and are, thus, often deterred from bringing individual action), the passing-on defence may be excluded.⁶⁸ This excludes the granting of unfair benefits to the defendant, the exclusion thereby serving the purpose of prevention.

VIII CURRENT DEVELOPMENTS

With the introduction of Section 19a of the ARC, the FCO gained a new and far-reaching tool to prohibit companies that are of ‘paramount cross-market significance for competition’ from engaging in anticompetitive practices. The new anti-abuse provision follows a two-step procedure: the FCO may declare paramount cross-market significance for competition and then prohibit certain abusive conduct. The FCO has already initiated proceedings against all four GAFSA companies (Google, Apple, Facebook (Meta) and Amazon) within five months of the entry into force of the provision in order to quickly enter the second phase of the procedure.

Shortly after the 10th Amendment, the FCO applied Section 19a of the ARC for the first time in the already pending case against Facebook and its linkage to Oculus by extending the scope of its proceedings to the new provision. The authority is examining whether Facebook is of paramount cross-market significance and whether linking the services is to be assessed accordingly.

Similar proceedings against Amazon were opened four months later. The point of reference for the proceedings are Amazon’s online marketplaces and other primarily digital

63 Section 287 of the Code of Civil Procedure.

64 For example, District Court Munich decision of 19 February 2021, 37 O 10526/17, *Trucks*.

65 District Court Dortmund decision of 30 September 2020, 8 O 115/14; Higher Regional Court of Celle decision of 12 August 2021, 13 U 120/16 (*Kart*).

66 FCJ decision of 28 June 2011, KZR 75/10, *ORWI*.

67 FCJ decision of 23 September 2020, KZR 4/19.

68 *ibid*.

offers. Shortly afterwards, the FCO initiated two proceedings against Google (1) to determine whether Google is of paramount significance across markets, and (2), based on (1), to analyse Google's data processing terms in depth.

As the fourth of the GAFA companies, Apple is being scrutinised by the FCO with regard to the question of whether Apple falls under the new competition tool owing to its iOS operating system. In addition to assessing Apple's position in the manufacturing of hardware products and its services business, the FCO 'will, among other aspects, examine its extensive integration across several market levels, the magnitude of its technological and financial resources and its access to data. A main focus of the investigations will be on the operation of the App Store as it enables Apple in many ways to influence the business activities of third parties'.⁶⁹

Not only did the FCO intensify its regulatory activities with regard to digital companies, it also increased the number of dawn raids after a temporary stop in 2020 owing to the covid-19 pandemic. In combination with the authority's new competences, such as the duty for employees to cooperate, companies should be prepared for and well aware of the changes brought by the 10th Amendment of the ARC.

69 Statement by Andreas Mundt, President of the FCO, in a press release dated 18 May 2021, available at www.bundeskartellamt.de.

ABOUT THE AUTHORS

FABIAN BADTKE

Noerr Partnerschaftsgesellschaft mbB

Fabian Badtke is a partner at Noerr Partnerschaftsgesellschaft mbB and heads the firm's antitrust and competition group. He advises and represents national and international clients on all aspects of European and German antitrust law, including merger control and coordination of multi-jurisdictional filings, antitrust investigations, behavioural matters, antitrust damages claims and compliance programmes. Fabian has particular industry know-how in the financial services, healthcare and life sciences, retail and media sectors.

Current and recent assignments include advising and representing: DAF and PACCAR in the defence against numerous antitrust damages claims in Germany as follow-on actions of the *Trucks* decision by the European Commission; Zimmer Biomet on ongoing antitrust compliance matters; Ingenico on the establishment of a joint venture with BS PAYONE resulting in the creation of one of the leading payment service providers in Europe; ICON on its US\$12 billion takeover of PRA Health Sciences; Thyssenkrupp regarding an alleged cartel in the car steel sector and follow-on internal investigations; and Fresenius/Helios on its €3 billion acquisition of 40 hospitals and 13 medical care centres from RHÖN-KLINIKUM.

Fabian has been recognised as a leading antitrust lawyer by various publications, including *Handelsblatt*, *Best Lawyers*, *The Legal 500*, *Who's Who Legal* and *JUVE Handbook*, where he has additionally been ranked among the frequently recommended individuals in healthcare antitrust. The business weekly *WirtschaftsWoche* has continuously recognised him as a top lawyer for antitrust and competition since 2019.

ALEXANDER BIRNSTIEL

Noerr Partnerschaftsgesellschaft mbB

Alexander Birnstiel is an antitrust partner at Noerr Partnerschaftsgesellschaft mbB in Munich and Brussels. He advises German and international clients from a large number of industries (including automotive, chemicals, primary and reinsurance, financial services, generic drugs, real estate, IT, food retailing and production, media, pharmaceuticals, sport and steel) on all questions of German and European antitrust and competition law.

He represents clients in cartel, abuse and merger control proceedings (including coordination of multi-jurisdictional filings) before the German Federal Cartel Office, the European Commission and national and European courts. He also advises clients on antitrust

issues associated with digitalisation projects (including setting up and running internet platforms), the interface between antitrust and intellectual property, private enforcement and compliance issues, and in dawn raid scenarios.

Alexander has been recognised by *Who's Who Legal Thought Leaders: Competition 2021*. He is named as a frequently recommended antitrust lawyer in *JUVE Handbook* (2021/2022) and *The Legal 500* (2020). He is cited in *Best Lawyers in Germany* (2021) as a leading expert in antitrust and is also named as a leading expert in competition and European law by both *Chambers Europe* (2021) and *Chambers Global* (2021). The business weekly *WirtschaftsWoche* recognised him as a top lawyer for antitrust and competition in 2020.

TILL STEINVORTH

Noerr Partnerschaftsgesellschaft mbB

Till Steinvorth is an antitrust partner at Noerr in Hamburg. He specialises in European and German competition law, with a focus on cartel investigations and competition law compliance. He also advises on other antitrust and competition matters, such as cooperation and distribution agreements, abuse of dominance, follow-on damages and merger control (including FDI screenings).

Till has defended clients in cartel proceedings before the European Commission, the German Federal Cartel Office and the competition authorities of the German states. His experience includes dawn raids, witness interviews, immunity and leniency applications, settlement agreements and internal investigations. He has particular industry know-how in automotive, building materials and construction, engineering, furniture, metals, real estate, waste disposal, telecommunications, internet and media.

Before joining Noerr in 2020, Till headed the German antitrust and competition law department of an international law firm, and he practised in several European competition law hubs, including Düsseldorf, Berlin, London and Brussels. Till has been recognised as 'Lawyer of the Year' for antitrust law in Hamburg by *Best Lawyers* (2022) and named among 'Germany's Best Lawyers' as one of only six lawyers for antitrust and competition law by *Handelsblatt* (2021). He is also listed as a frequently recommended antitrust lawyer in *JUVE Handbook* (2020/2021), where he has been described as 'professional, knowledgeable' and 'experienced and resourceful'. Other recognitions include by *WirtschaftsWoche* (among Germany's 'most renowned antitrust lawyers') and *Who's Who Legal* ('national leader' in antitrust law in Germany).

NOERR PARTNERSCHAFTSGESELLSCHAFT MBB

Börsenstraße 1
60313 Frankfurt
Germany
Tel: +49 69 97147 7124
Fax: +49 69 97147 7100
fabian.badtke@noerr.com

Jungfernstieg 51
20354 Hamburg
Germany
Tel: +49 40 30039 7129
Fax: +49 40 30039 7250
till.steinvorth@noerr.com

Brienner Straße 28
80333 Munich
Germany
Tel: +49 89 2862 8241
Fax +49 89 280 110
alexander.birnstiel@noerr.com

www.noerr.com

an LBR business

ISBN 978-1-83862-533-7