

RECENT DEVELOPMENTS IN CARTEL ENFORCEMENT IN GERMANY — FEWER CASES BUT NEW GUIDELINES ON LENIENCY AND FINES



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RECENT DEVELOPMENTS IN CARTEL ENFORCEMENT IN GERMANY — LESS CASES BUT NEW GUIDELINES ON LENIENCY AND FINES

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The article looks into German cartel enforcement trends based on case statistics as well as recent cases. It also describes how the German Federal Cartel Office reacts to the challenge of a decreased number of leniency applications over time that was exacerbated by the pandemic. Also, the main procedural changes brought about by the new German Fining and Leniency Guidelines issued in the second half of 2021 after entry into force of the 10th Amendment of the German Act against Restrictions of Competition that implemented the ECN+ Directive. While some changes are significant, e.g. the abolishment of the ringleader test in the new German Leniency Guidelines and the consideration of compliance efforts in the new Fining Guidelines, they do not solve the underlying issue of the decline in leniency applications.

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I. INTRODUCTION AND SUMMARY

Cartel enforcement in Germany reached a further low in 2021 compared to 2020 and 2019. The threat of private damages actions continues to discourage whistleblowers from approaching the Federal Cartel Office (“FCO”) with immunity applications, which are the main starting point for the opening of new investigations. This trend has prompted a discussion of how cartel enforcement can be reinvigorated that goes well beyond Germany.² Due to the COVID-19 pandemic, the trend of fewer cases will likely continue for some time, because there were hardly any inspections in the last two years, resulting in a thin pipeline of new cases.

However, the FCO signaled increased enforcement efforts by conducting a large inspection at several cable manufacturers in January 2022 for alleged price fixing. Nevertheless, the main development in cartel enforcement in Germany last year are the new fining and leniency guidelines that were issued in the second half of 2021. The overhaul of the two sets of guidelines was prompted by the entry into force of the 10th Amendment of the Act against Restrictions of Competition (“ARC”) in January 2021 that implemented the requirements of the ECN+-Directive.³ While some important changes have been introduced in the revised guidelines, these will not resolve the underlying dilemma of reconciling public and private enforcement.

II. RECENT CARTEL ENFORCEMENT IN GERMANY

Statistics. The latest German case statistics confirm the continued downward trend in cartel proceedings in Germany.

Cartel Prosecution 2015-2021 in Figures⁴

Year	2015	2016	2017	2018	2019	2020	2021
Fines in total (in EUR million)	208	124,6	66,4	376	848	349	105
Leniency applications	76	59	37	25	16	13	9 ⁵
Inspections	18	17	10	7	5	2	2
New Procedures (total)	71	40	39	40	30	48⁶	
Closed proceedings	78	60	48	52	32	33	
Fine decisions	7	4	7	4	5	4	
Horizontal hardcore cartels	6	2	6	4	4	3	
Vertical Cases	1	2	1	0	1	1	3 ⁷
Referral to different competition authority	0	0	0	0	0	1	

According to the latest 2021 figures, the downward trend of recent years in cartel enforcement continues.

After a peak in total fines in 2019 with a total of EUR 848 million (of which EUR 646 million related to quarto steel plate proceedings⁸ alone), 2020 and 2021 saw a rapid decline to fines of EUR 349 million in 2020 and even EUR 105 million in 2021. Only in 2017 had the total level of fines imposed been lower.

² See Heike Anger, *Warum Kartellamtschef Mundt das Kronzeugenprogramm ausweiten will*, Handelsblatt of January 10, 2022.

³ See Ritz/Weber, *A Game Changer for Germany's Competition Practice*, CPI EU News, February 8, 2021, on the procedural changes brought about by the 10th ARC Amendment.

⁴ FCO Report on Activities 2015-2016 p. 146-147; FCO Annual Report 2015, p. 39; Annual Report 2016, p. 40; Report on Activities 2017-2018 p. 135-136; Annual Report 2017, p. 39; Annual Report 2018 p. 39; Report on Activities 2019-2020 p. 157-158; Annual Report 2019, p. 34; Annual Report 2020/2021, p. 34; Press Release Review of 2021 of December 22, 2021; Press Release Review of 2021 of December 22, 2021.

⁵ 10 according to: Heike Anger, *Warum Kartellamtschef Mundt das Kronzeugenprogramm ausweiten will*, Handelsblatt of January 10, 2022.

⁶ This increase in new procedures (48) in 2021 is predominantly attributable to the surge in horizontal co-operations triggered by the COVID-19-pandemic, which the FCO has been monitoring, see FCO Report on Activities 2019-2020 p. 40 and 157-158. The minority appear to be hardcore cartel cases.

⁷ This number reflects only certain cases published yet. In one case, fines were imposed against first group of companies already in 2020.

⁸ Case B-12/25/16, Press Release of December 12, 2019, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/12_12_2019_Quartobleche.html; Case Summary available in English at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2020/B12-25-16.html>.

This strong fall is also noticeable in the number of leniency applications. From 37 in 2017 to 16 in 2019, the number has dropped even further since: In 2020 13 leniency applications were filed, compared to only 9 in 2021. Since 2017, there has been a continued reduction from still 76 applications in 2017.

The number of inspections is also steadily decreasing. While there were 10 inspections in 2017, there were only 5 in 2019, and 2 each in 2020 and 2021. This sharp decline cannot only be explained by the COVID-19 pandemic, but rather fits into a long-term trend, which can be attributed to private damages actions which make leniency applications unattractive.

A similar downward trend can be observed in the decrease of completed cartel proceedings. While there were 52 concluded cartel proceedings in 2018, the numbers dropped to 32 in 2019 and 33 proceedings in 2020. The number of concluded proceedings in which fines were imposed stagnated during this period at a low level of 4 or 5 proceedings per year, which shows that without a flourishing leniency regime public cartel enforcement is less effective.

Horizontal hardcore cartels. Only three horizontal hardcore cartel cases were brought to a close since the end of 2020. In July 2021, the FCO fined the remaining stainless long steel companies after a first round of fines against other participants in the cartel already back in 2018. In total, it imposed fines of EUR 355 million on ten stainless steel manufacturers, two trade associations and 17 individuals.⁹ The cartel members had colluded between 2002 and 2016 on steel surcharges, price calculation and exchanged competitively sensitive information. The cartel served to preserve market conditions after expiry of the EU Treaty on Coal and Steel in 2002. The investigation was triggered by a leniency application from Voestalpine. Some companies cooperated with the FCO and/or agreed to a settlement. Only two companies went on appeal against the fine.

The second fine for a horizontal hardcore cartel in 2021 concerned three steel mills.¹⁰ The FCO imposed fines totaling EUR 35 million. The investigation was triggered by a leniency application from a fourth steel mill, which was awarded immunity from fines. The steel mills had been exchanging competitively sensitive information during working group meetings as well as in the context of bilateral and multilateral contracts in order to pass on any changes in cost in full to their customers. All companies cooperated with the FCO and agreed to a settlement, resulting in fine reductions.

The third case related to price fixing and market allocation in street sewer pouring products in December 2020.¹¹ Fines of EUR 6 million were imposed against two suppliers for fixing prices and rebates in 2018. One of the suppliers got a discount for cooperation and settlement and was awarded partial immunity regarding the coordination of two bids. The other supplier only received a settlement bonus. The case was based on an anonymous hint under the FCO's whistleblower hotline.

At the beginning of 2022, the FCO fined the only two suppliers of bridge expansion joints that had engaged in a quota cartel between 2014 and 2019.¹² Fines of EUR 7.7 million were imposed and parallel penal proceedings are still pending. For once, a hint from the market prompted the investigation. Both companies cooperated and settled.

These cases confirm the general perception in Germany that also cooperation after the inspection is worthwhile because it is rewarded by significant fine discounts. The fact that most cases are settled suggests that companies are skeptic about winning an appeal at Düsseldorf Court of Appeals that in the past had little sympathy for cartel offenders.

Vertical infringements. Enforcement of vertical hardcore cases continues to be a priority for the FCO, even though fines are normally somewhat lower than in horizontal cases. Fines were imposed in three cases since the beginning of 2021.

9 Case B12-22/15 and B12-21/17, Press Release of January 13, 2020, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/13_01_2020_Pflanzenschutzmittel.pdf, Case Summary available in English at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2021/B12-22-15_B12-21-17.pdf.

10 Case B12-22/17, FCO Press Release of February 4, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_02_2021_Stahlschmieden.html, Case Summary only available in German at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B12-22-17.html>.

11 Case B11-8/18, GCO Case Summary, available in English at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2021/B11-8-18.html>.

12 FCO Press Release of February 10, 2022, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/10_02_2022_Brueckendehnungen.pdf.

In 2020 and 2021, the FCO imposed fines totaling EUR 21 million against three manufacturers and two specialized retailers of musical instruments for resale price maintenance for several years.¹³ Proceedings had started in 2018 with an inspection. Fines against retailers are rare. However, in this case the retailers were instrumental in keeping the price discipline and even colluded horizontally between each other on price increases.

After an inspection in January 2019, the FCO fined a school bag manufacturer approx. EUR 2 million on July 16, 2021 for fixing and monitoring the resale price for school backpacks, and restricting online sales since 2010.¹⁴ Dealers who undercut prices were sanctioned. The supplier got a fine reduction for cooperation and settlement. Procedures against dealers participating in the resale price maintenance scheme were closed. The case had been prompted by a request for cooperation from the Austrian competition authority that did a parallel inspection in Austria in 2019.

Most recently, on November 11, 2021, the FCO imposed a fine of approx. EUR 7 million for resale price maintenance between 2015 and 2018 regarding loudspeakers and headsets against consumer electronics manufacturer Bose.¹⁵ While the German leniency regime does not extend to vertical infringements, the FCO nonetheless awarded fine discounts to Bose for cooperation and settlement, which is standard practice.

III. NEW FINING GUIDELINES

On October 11, 2021, the FCO published new *Guidelines for the Setting of Fines in Cartel Offence Proceedings* (“2021 Fining Guidelines”). They apply to all cartel proceedings not completed on the day of publication. Major changes compared to the 2013 Fining Guidelines arise with regard to the methodology of fine calculation and the impact of compliance programs on the level of fines.

A. New Fining Methodology

The reform of the 2013 Fining Guidelines was prompted by the 10th Amendment to the ARC that entered into force earlier in 2021. The ARC’s amendment implemented the ECN+ Directive that brought about a number of changes to German cartel enforcement. *Inter alia* it revised the statutory provisions on the imposition of fines and, in particular, provides for the first time for a catalogue of relevant criteria for the calculation of the fine.

In addition to the adjustments prompted by the ECN+ Directive, the 2021 Fining Guidelines aim to “*take greater account [...] of the practice of the German courts.*”¹⁶ In the past, significant differences emerged between the FCO’s calculation methods that focused more on revenues affected by the infringement, and the German courts’ approach that focused more on overall size of the company’s corporate group. The German fine calculation methodology differed already from the EC’s approach under the 2013 Fining Guidelines, and this will continue to be the case also under the new framework.

1. Step 1: Determination of the Basic Amount

The 2021 Fining Guidelines have brought about several methodological changes in fine calculation, in particular the calculation of a so-called basic amount, whereas the 2013 Fining Guidelines focused only on the maximum amount.

Under the 2013 Guidelines, the FCO first determined a “*profit and damage potential*” based on 10 percent of the companies’ German turnover affected by the infringement. This “potential” was multiplied by a factor ranging between 2 and 6, depending on the total turnover of the

¹³ Cases B11-33/19 and B11-31/19, FCO Press Release of August 5, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/05_08_2021_Musikinstrumente.html; Case summary, only available in German at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B11-31-19_B11-33-19.pdf.

¹⁴ Case B10-26/20, FCO Press Release of August 17, 2021 available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/17_08_2021_Schulranzen.html; Case Summary only available in German <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B10-26-20.pdf>.

¹⁵ Case B10-23/20, FCO Press release of December 2, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/02_12_2021_Bose.pdf, Case summary available in English at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2021/B10-23-20.pdf>.

¹⁶ FCO Press Release of October 11, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_10_2021_Guidelines_Liniency.html.

company's corporate group with a view to calculate a maximum amount of the fine. If the maximum amount for the fine so calculated exceeded the statutory 10 percent global revenue maximum, the profit and damage potential was replaced by the statutory 10 percent worldwide group revenues ceiling as maximum amount of the fine.

The 2021 Fining Guidelines provide for a new methodology. Instead of calculating the maximum amount, they determine first a basic amount based on a percentage of the corporate group's German turnover achieved from the infringement. The percentage of the affected turnover used to calculate the basic amount depends on the size of the relevant company's corporate group. The minimum of 10-15 percent of turnover affected by the infringement applies to groups with total revenues below EUR 100 million, whereas 25-30 percent apply to a group with revenues between EUR 10 -100 billion.

The minimum turnover to be taken into account in calculating the basic amount is 12 months, even if the conduct lasted for shorter. The possibility of estimating the domestic impact in an international market-sharing cartel has been added to the new guidelines.¹⁷

The basic amount of the fine can at maximum amount to up to half of the statutory maximum (10 percent worldwide group turnover). If the basic amount calculated based on the turnover affected by the infringement according to the above methodology exceeds 50 percent of the statutory maximum, instead 5 percent of global total revenues are taken into account as basic amount.

2. Step 2: Overall Appraisal

In a second step, the FCO will adjust the basic amount taking into account mitigating and aggravating circumstances. This can lead to a fine below the basic amount or up to double the basic amount (either based on the turnover affected by the infringement or in case of application of the 5 percent total global turnover the 10 percent maximum).

On the one hand, the FCO takes into account offence related criteria (e.g. nature, gravity and extent of the cartel) and on the other of-fender related criteria (e.g. the company's role in the cartel, previous infringements, degree of intent or negligence, compliance measures taken).

These factors mirror the new section 81d of the ARC, that was introduced implementing the ECN+ Directive, as the point of reference on fine calculation. Before there was no statutory guidance on fine calculation other than a reference to gravity and duration. In case of hardcore horizontal restraints of competition such as price fixing and, quota, sales area and customer allocation agreements, the fine will, as a rule, be higher than the basic amount. The maximum statutory fine of 10 percent global turnover is however reserved for very serious infringements.

As stated above, the adjustment of the basic amount differs from the approach under the 2013 Fining Guidelines where only the maximum amount of the fine was calculated. Between EUR 0 and the maximum fine (either the 10 percent statutory cap or the multiplied profit and damage potential) the FCO engaged in an individual appraisal on the level of the fine. In hardcore cases the fine would usually range above 5 percent of the group's global revenues.

Following the overall appraisal of the relevant circumstances of the infringement, further adjustments to the fine calculated based on the adjusted basic amount can be made under the new guidelines, if the company's economic viability is threatened, if it has filed a leniency application (which can lead to rebates of up to 50 percent based on timing and value add of the application) or if it agreed to a settlement (10 percent discount).

3. Effect on the Amount of Fines

While the fine calculation method has been changed significantly, the FCO's president, Andreas Mundt, tried to assure the business community that the fines imposed should remain essentially at the same level.¹⁸ A significant downside arises from the fact that also the new guidelines are not binding on the German courts.¹⁹ Since the courts will likely continue to use a different method of calculation and have in practice in some cases increased fines on appeal, the cartel offender's incentive to file an appeal remains limited.

¹⁷ Para 12, 2021 Fining Guidelines.

¹⁸ *Mundt* in FCO Press Release of October 11, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_10_2021_Guidelines_Liniency.html.

¹⁹ See German Federal Court of Justice (*Bundesgerichtshof*), Judgment of February 26, 2013, KRB 20/12 – *Grauzementkartell*, para 57 regarding the non-binding character of the previous guidelines.

B. Possible Impact of Compliance Programs

For the first time, the 2021 Fining Guidelines explicitly take into account compliance systems as mitigating factor in fine calculation. According to the new section 81d of the ARC, companies can now invoke two forms of compliance defenses. Compliance measures taken before and after the offence can lead to a fine reduction.

1. Pre-offence Compliance Measures

Under the new ARC “adequate and effective precautions taken [by the company] prior to the infringement to prevent and detect infringements” constitute a mitigating factor.²⁰ The FCO specifies its requirements for the adequacy and effectiveness of precautions in its 2021 Fining Guidelines.

However, there is still no practical guidance on what constitutes appropriate compliance measures. In its guidelines, the FCO only states that

“the nature and extent of the requisite precautionary measures are dependent on the individual case and, in particular, on the type of the undertaking, its size and organizational structure, the provisions to be complied with and the risk of them being infringed.”

From the FCO’s point of view, the effectiveness of pre-offence compliance is demonstrated if the measures taken have led to the discovery and prompt reporting of the infringement.²¹ In any case, the pre-compliance defense is excluded if the company’s management level was involved. The Guidelines further explain that the compliance defense is not per se excluded, if the acting individual has disregarded the company’s compliance code to an extraordinary extent and with deliberate deception of his or her superiors in order to achieve personal advantages in the infringement. This high threshold raises the question whether pre-offence compliance will ever be recognized by the FCO. In contrast, section 81d ARC does not speak about the need for self-reporting by the company. The open question on what constitutes sufficient pre-offence compliance will likely need to be resolved in litigation.

2. Post-offence Compliance Measures

According to section 81d (1) no. 5 of the ARC “precautions taken after the infringement to prevent and uncover infringements”²² can mitigate the fine imposed on an infringer. This clarifies that post-offence compliance measures can be taken into account as positive post offence behavior in the assessment of the fine. According to the 2021 Fining Guidelines, a mitigation applies in particular

“if the company convincingly demonstrates the precautions taken to effectively prevent future similar breaches and a commitment to act in a legally compliant manner is clearly evident.”

The FCO thus tries to distinguish genuine from sham compliance. In the FCO’s view, indications for genuine compliance efforts are the active cooperation of a company in the investigation of the offence as well as the effort to make amends for the damage. Here, too, ambiguities may arise in practice, e.g. from the questions whether making amends requires claims for damages to be paid immediately, or whether willingness to negotiate and provisions in the balance sheet are sufficient.²³ In any event, it will be difficult to distinguish genuine from sham compliance. Nonetheless, the fact that pre- and post-offence compliance can now be taken into account in fine calculation in Germany is a big step forward.

IV. NEW GERMAN LENIENCY GUIDELINES

With the 10th ARC Amendment enacted earlier in 2021, the previous FCO’s leniency program from 2006 (“2006 Leniency Program”) had found its way into the statute (sections 81h-81n ARC) to increase legal security.

²⁰ Section 81d (1) sentence 2 ARC.

²¹ Para 14, comment 3, 2021 Fining Guidelines.

²² Para 14 2021 Fining Guidelines.

²³ Von Schreiter/Wünschmann, *Same same but different*, NZKart 2022, 4, 7-8.

On August 23, 2021, the FCO published new leniency guidelines (“2021 Leniency Guidelines”).²⁴ They apply retroactively for all leniency applications filed after January 19, 2021. For older applications, the 2006 Leniency Program will be applied unless the new Leniency Guidelines are more favorable.

Apart from the anchoring in the ARC and further details and clarifications in the new guidelines, the leniency regime in Germany remains largely unchanged in terms of content. It offers cartel members full or partial immunity from fines if they cooperate with the FCO and help to uncover the cartel from the inside. Only the first cartel member applying for leniency (and continuously and fully cooperating with the FCO) can benefit from full immunity from antitrust fines. Immunity after the inspection is possible, but the requirement of the applicant enabling the authority to prove the infringement is in practice very difficult to meet after the inspection. Applicants after the inspection normally benefit from fine reductions of up to 50 percent. The percentage of the reduction is dependent on the rank and value add of the application. In practice, the FCO is quite generous with discounts. Leniency is still not available for vertical infringements also under the new guidelines, which can in combined infringements that involve horizontal and vertical conduct deter potential applicants from making an application. In practice, the FCO provides significant fine discounts also for cooperation in vertical cases, however normally no immunity from fines.

A. Changes Compared to 2006 Leniency Program

A noteworthy change in the 2021 Leniency Guidelines is that the ringleader disqualification of the immunity applicant has been replaced by the “coercer test” applicable under EC’s 2006 Leniency Notice. While immunity from fines could be denied to so-called “ring leader” of a cartel under the FCO’s 2006 program²⁵, under the 2021 Leniency Guidelines immunity can only be denied, if the cartel participant has taken steps to “force” other cartel participants to participate or remain in the cartel.²⁶ As a result, a ring leader can now receive complete immunity from fines like in Brussels, unless it coerced other companies into participation into the cartel. The vague “ringleader” criterion had in the past often been criticized as being a deterrent from filing for leniency, because companies had to fear to be disqualified from immunity, e.g. because they were the market leader or because they had organized meetings between competitors.²⁷ For the coercive cartel member, however, a reduction of the fine pursuant to section 81I of the ARC remains possible. The burden of proof for the (attempted) coercion is on the FCO. So far, this ground for denial has not been applied in practice.²⁸

A further new feature of the 2021 Leniency Guidelines is the confirmation of the concept of partial immunity. Companies providing the FCO with additional facts on a distinct part of the infringement (e.g. new infringement periods or new geographical areas) can profit from partial immunity even if they are not the original immunity applicant.²⁹ The FCO will not use such additional facts against the providing company when setting its fine. This concept had been applied by the FCO in the past, e.g. in the dishwashing liquid cartel. However, the clarification in the 2021 Leniency Guidelines enhances legal security.

The 2021 Leniency Guidelines also clarify that the leniency applicant must not destroy, manipulate, or withhold any relevant evidence.³⁰ This obligation already applies at the time a company is considering a leniency application. While the FCO would likely have taken the same view interpreting the applicant’s duty to cooperate, this clarification enhances legal security.

While the 2006 Leniency Program provided that an applicant has to stop participation in the infringement on request from the FCO, the 2021 Leniency Guidelines make the termination of the infringement at the time of the application a direct requirement unless the FCO permits certain conduct to secure the integrity of the investigation.³¹

24 Notice no. 14/2001 on General Administrative Principles relating to the Exercise of Discretionary Powers in the Conduct of the Procedure for an Application of the Leniency Regime in accordance with Sections 81 h to 81 n of the Act against Restraint of Competition, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Leniency_Guidelines_08_2021.html.

25 Para 3, no. 3, 2006 Bonus Program.

26 Section 81k (3) ARC, para 6 no. 3 2021 Leniency Guidelines, art. 17 (3) ECN+ Directive.

27 Schroeder, *Die neue Bonusregelung des Bundeskartellamts – ein großer Schritt in die richtige Richtung*, WuW 2006, 575; Panizza, *Ausgewählte Probleme der Bonusregelung des Bundeskartellamts vom 7. März 2006*, ZWeR 2008, 58, 84.

28 The same is true at EC level, see Kamann/Ohloff/Nölcker, *Kartellverfahren und Kartellprozess*, § 7 *Verfahrenseinleitung*, para. 39.

29 Section 81I (3) ARC, and para 10, 2021 Leniency Guidelines.

30 Section 81j (1) no. 3 d), no. 4 a) ARC.

31 Para 7, 2006 Bonus Program; para 12 no 2 2021 Leniency Guidelines.

The deadlines for finalized leniency applications after a marker application have been softened. While the previous bonus program provided for a fixed maximum period of 8 weeks between the receipt of the marker and submission of a finalized leniency application, the period mentioned in the new Guidelines is now only a standard period which applies “*as a rule*” which is a welcome development.³²

The 2021 Leniency Guidelines emphasize the importance of personal statements, which should generally accompany leniency applications.³³ They were not mentioned in the 2006 program.

Also the process regarding marker, leniency and summary applications that protect applicants against a loss of their status in case of change of jurisdiction in ongoing proceedings is explained in further detail in the new guidelines.

However, they no longer include the possibility to contact the FCO anonymously through a lawyer to check whether immunity is still available in a given industry. Instead, the new guidelines now explicitly exclude anonymous contacting.³⁴ While this change could discourage some companies from filing a leniency application, the FCO is likely concerned about abuse or anonymous requests that aim to find out whether an investigation is already under preparation in a given industry.

B. FCO's Initiative to Incentivize Leniency Applications

To achieve a turnaround in the number of leniency applications, the FCO's president has recently recommended to exempt the immunity applicant from damages claims.³⁵ However, this proposal conflicts with current German law implementing the EU Damages Directive according to which the immunity applicant is only liable to its own customers and exempt from joint and several liability unless the other cartel members cannot fully compensate the victims (see section 33e ARC). In addition, the immunity applicant is protected against the disclosure of his leniency statements and settlement submissions for the purpose of actions for damages under section 33g (4) ARC. Nonetheless, pre-existing documents accompanying leniency applications are not protected, which can be as valuable for plaintiffs in follow on damage cases as the application itself. Enlarging the protection for pre-existing evidence submitted by the applicant could further incentivize applicants, but also this change would be in practice difficult to achieve, because the European Court of Justice created the distinction between leniency applications and pre-existing documents in the Pfeleiderer preliminary ruling case.³⁶

Since further protection of immunity applicants is not possible without significant legislative changes at EU and German level, the FCO should consider stepping up its own detection capabilities, e.g. through screening markets, taking up complaints from market participants and cooperating with other competition authorities in the ECN.

32 Para 12, 2006 Bonus Program; para 17 and 25 2021 Leniency Guidelines.

33 Para 19, 2021 Leniency Guidelines.

34 Para 13, 2021 Leniency Guidelines.

35 *Mundt* in FCO Press Release of October 11, 2021, *supra* note 18; WuW Nr. 07-08 06.08.2021, 418, 420; Reinhard Kowalewsky, „*Schier uneinholbare Wettbewerbsvorteile: Kartellamt vermutet Absprachen zwischen Apple und Amazon*“, Rheinische Post Online, of January 2, 2022 14:00; Heike Anger, *Warum Kartellamtschef Mundt das Kronzeugenprogramm ausweiten will*, Handelsblatt of January 10, 2022; FCO Press Release of December 29, 2020, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/29_12_2020_Jahresr%C3%BCckblick.pdf.

36 ECJ, Judgment of June 14, 2011, *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, ECLI:EU:C:2011:389; 2011 I-05161.



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