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EUROPE, MIDDLE EAST AND AFRICA
ANTITRUST REVIEW 2024

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review 2024* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister publications covering the Americas and the Asia-Pacific region, this review provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this latest edition, we have significantly expanded coverage of the European Union, with a specific focus on competition law enforcement under the new EU digital market regime, a deep dive into trends in cartel enforcement in Germany and an economist's take on the UK's collective proceedings and unfair pricing. This features alongside updates on various aspects of the antitrust landscape in Cyprus, Denmark, Egypt, the European Union, France, Germany, Greece, Israel, Switzerland, Turkey and the United Kingdom.

GCR has worked closely with leading competition lawyers and government officials to prepare this report. Their knowledge and experience – and above all their ability to put law and policy into context – are what give it such special value. We are grateful to all the contributors and their firms for their time and commitment.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review
London
June 2023

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Germany: vigilant cartel enforcement led to dip in cases

Anne Caroline Wegner, Helmut Janssen and Sebastian Janka
Luther Rechtsanwaltsgesellschaft mbH

In summary

The German Federal Cartel Office (FCO) continues to be an active, sophisticated and efficient enforcement authority. Most cartel cases in Germany are still settled rather than appealed to the courts as both the FCO and undertakings aim to avoid lengthy and burdensome oral hearings. Undertakings may also rightly fear that their fine could be substantially increased by the Appeals Court. As elsewhere, the overall trend appears to be a decline in cases (and, hence, overall fines) – albeit enforcement picked up some speed in 2022 with more than 18 dawn raids. The FCO has not only resumed dawn raids and reinitiated cartel proceedings but also commenced operation of the competition register, which will play a crucial role in public tenders.

Discussion points

- Trends in cartel enforcement in respect of the FCO, leniency and settlements
- Appeals Court proceedings and impact on undertakings' willingness to settle or appeal
- Impact of pending changes to procedural law in antitrust cases
- Implementation of the competition register at the FCO

Referenced in this article

- *Confectionery* cartel proceedings
- *Rossmann* case
- *Beer* cartel proceedings
- *Cologne Beer* cartel proceedings
- 11th amendment to the Act against Restraints of Competition
- *Sehlbach* case

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The German Federal Cartel Office (FCO) remains a very active, efficient and sophisticated enforcement authority. It has proactively picked up various matters and has many times been a front runner in Europe with its enforcement policy. It operates in a legal setting where substantive and procedural laws are reviewed and amended regularly. There have been four fundamental reforms of the Act against Restraints of Competition (GWB) since 2005.[1] A further bill of the German government (the 11th amendment) is soon to be introduced to parliament. This bill intends to strengthen the FCO's powers to investigate market sectors and to impose remedies, even in the absence of an infringement of competition law. As far as cartels are concerned, the FCO's, to date, never-used powers to order the disgorgement of economic benefits resulting from the violation of competition law will be strengthened: the bill provides for a statutory presumption that a competition law infringement caused an economic benefit of at least 1 per cent of the turnover generated in Germany with the products connected to the infringement. The amount to be paid can reach 10 per cent of the total turnover of the undertaking in the fiscal year preceding the FCO's decision. This means that in Germany cartel infringements may cost the undertaking up to 20 per cent of its annual turnover (a maximum 10 per cent fine plus a maximum 10 per cent disgorgement) plus damages to customers!

Because antitrust fines can only be based on the substantive law that was in force at the time when the competition law infringement was committed, some of the cases pending before or decided by German courts and the FCO nowadays are still dealing with former versions of the GWB; therefore, to illustrate the enforcement trends and precedents of the period covered, this article first presents some essential background information, then touches on numbers and trends in fining decisions issued by the FCO and leniency applications. It highlights the most relevant cartel fine cases that have gone to appeal, and the status of judicature on the liability of board members for the company's costs incurred for paying the cartel fines and damages.

In its last annual review, the FCO announced that it would adopt a tougher approach to investigations. It stated, for example, that it was planning on carrying out more unannounced searches (dawn raids) in 2022. On 18 January 2022, these announcements materialised when cable manufacturers were raided, followed by several further searches throughout the year. Furthermore, the FCO is advocating to make leniency applications more attractive by reducing the risk of private follow-on damages claims. The FCO argues that this is necessary from the perspective of public enforcement, as leniency applications have, to

1 Seventh amendment to the German Act against Restraints of Competition (GWB) of 2005 (inter alia, taking account of the changes prompted by Regulation 1/2003), eighth amendment to the GWB of 2013, ninth amendment to the GWB of 2017 (inter alia, taking account of the changes prompted by the Damages Directive 2014/104/EU) and, in 2021, the 10th amendment to the GWB (implementing, inter alia, the ECN+ Directive (EU) 2019/1 and making amendments to account for the specific challenges to antitrust by the digital economy).

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some extent, become unpopular because of the increased risk of private damage claims. The FCO is even reflecting on whether to fully indemnify key witnesses from claims for damages caused by cartels.

Background: particularities of German cartel enforcement procedure

German cartel enforcement – of article 101 of the Treaty on the Functioning of the European Union (TFEU) and the German equivalent in section 1 of the GWB – follows the procedural rules of criminal enforcement. Other than the European Commission, the FCO needs to address (and may fine) at least one individual in a leading position who has either been participating in the cartel activity or has (negligently or intentionally) not fulfilled supervision obligations (instruction, organisation and control), thereby facilitating an infringement committed by an individual acting for or on behalf of the undertaking.

A fine can only be imposed if at least one individual's cartel conduct can be identified. In practice, the FCO fines between one and three individuals from the senior management of each company involved in misconduct (provided that their involvement can be proven) as well as the undertaking itself.

If a company files for leniency, it usually includes those individuals who have acted for the company, thereby extending the leniency benefits to them. Any individual can, in principle, blow the whistle and request leniency just for himself or herself, although this rarely happens.

If the cartel activity concerns tenders, individuals involved are subject to criminal sanctions according to the Criminal Code, instead of just an administrative fine. In those types of cases, a leniency application will not relieve the individuals of pending criminal sanctions. However, an individual's contribution to the cooperation is likely to be taken into account as a mitigating circumstance when it comes to determining the criminal sanction for that individual. If an individual is to be criminally prosecuted, the FCO will go after the undertaking, and the criminal prosecution services will target the individual; both authorities can work in parallel or consecutively. A recent example is the technical building services cartel, in which the FCO ended its proceedings by imposing fines on undertakings while the criminal proceedings pursued by the prosecution service in parallel against the individuals had not yet been concluded. In criminal court proceedings, the FCO has the same rights as the prosecution service.

Infringement decisions of the FCO can only be contested in front of the Appeals Court's specialist cartel senates. Unlike the EU courts, the Appeals Court will not review whether the fining decision was justified and whether the competition authority has acted within the limits of its discretionary powers;

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rather, the Appeals Court will deal with the case under the general rules for criminal proceedings, and it must establish every single fact in a public hearing, including witness hearings.

Appeals Court trials are, therefore, quite burdensome on all parties; they usually take between 20 and 50 days in court – in extreme cases, they can take up more than 100 hearing days[2] (former examples include 136 days in the *Liquid Gas* cartel).[3] The length of such trials, combined with the possibility of the Appeals Court to impose a fine that is higher than the fine imposed by the FCO, has been a strong incentive for undertakings to settle with the FCO rather than to take the case to court or, when in court, to withdraw the appeal.

A prominent example is the *Beer* cartel, in which the FCO imposed fines on six undertakings amounting to a total of €336 million. Two undertakings appealed. One of them, Radeberger brewery, withdrew its appeal against a €154 million fine on the day before the hearing as it feared that its fine could soar to €1 billion should its appeal not succeed.[4]

In the following sections, we highlight some of the cases, including cases that have not been settled. The examples explain how those cases have affected the balance of power between undertakings and the FCO when negotiating settlements and deciding whether to appeal the case.

Proceedings and fines at FCO level: number crunching

While the number of new behavioural proceedings (non-hardcore horizontal cases) appears to have remained more or less stable in the past few years, with an intermediate 'drop' in 2019,[5] the number of typical hardcore proceedings in which dawn raids have been executed and the number of leniency applications have decreased once more. The overall fines dropped from a total of €358 million in 2020 to only €105 million in 2021 (involving 11 undertakings)[6] and 24 million in 2022 (20 undertakings fined). However, at the same time, the FCO has spent a significant amount of its energy on pursuing the abuse of market power of the digital giants.

2 *Ost/Breuer*, *NZKart* 2019, p. 119 et seq.
3 'Bußen falsch berechnet: OLG Düsseldorf muss Verfahren gegen Flüssiggaskartellanten neu aufrollen', *Juve* (29 January 2019).
4 'Bierkartell: Carlsberg kämpft mit Baker, Radeberger kapituliert mit Mütze Korsch', *Juve* (13 June 2018).
5 39 in 2017 and 40 in 2018 (see 'Tätigkeitsbericht des Bundeskartellamts 2017/2018', pp. 135 and 136); 20 in 2019, 36 in 2020 (see Tätigkeitsbericht des Bundeskartellamts 2019/2020, p. 157).
6 Bundeskartellamt Review of 2021 (www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/22_12_2021_Jahresrueckblick.html;jsessionid=993ED34C36E08EBFDEA8CA67CE618E9F.1_cid371?nn=3591568).

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	2018	2019	2020	2021	2022
Dawn raids (number of undertakings involved)	7 (51)	5 (32)	2 (3)	2	18 (of which 6 conducted in support of other authorities)
Leniency applications that lead to investigations	21	16	13	9	13
Proceedings closed with fines	4	6	5	6	2
Overall fines imposed (€)	376 million	848 million	349 million	105 million	24 million
Undertakings fined	22	23	19	11	20
Individuals fined	20	12	24	8	7

The names of individuals fined and the amounts of the fines imposed on them are not published by the FCO. Hence, specific up-to-date data is not available. However, from the FCO's former statistics, it can be established that between 2011 and 2020 the FCO fined 302 individuals an overall amount of €23.6 million. The average fine imposed in that period amounted to approximately €80,000. An earlier FCO report had, however, shown that the highest fine imposed on a single individual in between 2008 and 2015 had amounted to €800,000.[8]

The year 2022 did not see any spectacular new cases closed with particularly high fines by the FCO, such as the largest overall fine by far (€646 million), which was imposed on steel manufacturers for cartelising the production of quarto plates in 2019.[9] The 2022 cases both concerned construction works, and individuals have been pursued for the respective criminal offences by the competent district attorneys for bid rigging.[10]

Like many other antitrust authorities, the FCO offers a settlement bonus of 10 per cent. The vast majority of cases (virtually all that do not go on appeal) are, therefore, closed by way of settlement.

Owing to various factors, undertakings perceive the option not to settle as risky – particularly given that the Appeals Court, in a number of cases, handed down fines that were substantially higher than those imposed before the FCO. Furthermore, a settlement decision is a relatively short text compared to a full-blown fining decision and may, therefore, provide less information for cartel damages claimants; hence, an undertaking will endeavour to appeal (and not settle) only if it considers that there is a substantial chance to escape the fine

7 Jahresrückblick des Bundeskartellamts 2020, pp. 2–3.
8 'Tätigkeitsbericht des Bundeskartellamtes 2015/2016', for the period of 2008–2015, pp. 32–34.
9 Federal Cartel Office (FCO) press release, 'Steel manufacturers fined approx. €646 million for agreeing on prices of quarto plates' (12 December 2019).
10 Bundeskartellamt https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2023/B10_28_18.html and https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2022/B11_22_17.html

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altogether (eg, because the statute of limitation has been exceeded). Finally, appealing a case will postpone the deadline for the prescription of damages claims, which is another deterring factor when considering an appeal on the amount of the fine.

Owing to the burden of the appeals procedure that includes a large number of days in court, the FCO, in turn, has a strong incentive to settle so it can spend its resources on pursuing and fining (new) cartels rather than on defending its decisions in lengthy proceedings.

While an appeal may result in higher fines, if the Appeals Court finds the undertakings to be guilty, more recent cases have shown that the Appeals Court sides with the undertakings fined on substance in some cases.

Leniency: flattening the curve?

For two decades, the FCO has employed a leniency programme (launched in 2000 and overhauled in 2006). Private practitioners have frequently criticised the somewhat opaque practice that differs from case to case, depending on which unit within the FCO deals with the case, while also praising the flexibility of the FCO.

In some cases, even leniency applications submitted after dawn raids led to comparatively high reductions. This has triggered speculation that the FCO may have wanted to deliberately discourage perpetrators from seeking refuge with the Appeals Court and instead enter into a settlement, thereby closing the case at that stage. This type of speculation may or may not have grounds; however, undertakings that have simply done their best to reduce their fine will certainly not complain, and the FCO legitimately has no interest in having its resources tied up by many days in court.

In some respects, the recent amendment of the law leads to a higher degree of legal certainty for leniency applicants as the cornerstones of the leniency programme – including the possibility of placing a marker (section 81m of the GWB) – have been incorporated into the law, thereby making them binding on the Appeals Court also.[11] Since 2011, the number of leniency applications to the FCO had been increasing steadily over the years, peaking in 2015 (76 applications); however, since then, it has been decreasing: 59 in 2016; 37 in 2017; 21 in 2018; 16 in 2019; 13 in 2020; nine in 2021; and 13 in 2022.

11 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_10_2021_Guidelines_Liniency.html?nn=3591568.

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The lowest figure in 2021 was probably caused by the covid-19 pandemic, during which companies may have focused on other issues (and less on internal investigations and compliance measures, which typically lead to a disclosure of misconduct and subsequent leniency applications). Furthermore, it must be taken into account that while dawn raids may have been triggered by leniency applications, a significant part of the leniency applications in the past have been follow-on applications after or during a dawn raid; in other words, the sinking number of dawn raids is likely to have contributed to the low number of overall leniency applications.

However, there is surely a connection with the trend of rapidly increasing numbers of (successful) private damages claims. Those were sparked by legal amendments in 2005, 2009 and 2017, one being the rule that in a damages action a civil court may not question whether a company participated in an antitrust infringement if the FCO has held so. This development has led the FCO's president, Andreas Mundt, to raise the question of how to make leniency more attractive again for the whistle-blower – possibly by providing the first leniency applicant with more than just an exemption from a cartel fine, for example by granting further benefits, particularly through protection from follow-on damages claims.

While the FCO will not disclose leniency applications and accompanying material to third parties pursuing damages claims against cartelists, the authority will hand out infringement decisions. The decisions may be relatively short (with often only a couple of pages describing the infringement) if an undertaking enters into a settlement with the FCO. If there is no settlement, the decisions are much longer and contain much more information on the infringement; however, whether that information is helpful to prove the claim (in particular, to quantify damages) is a different matter.

The number of applications to the FCO to disclose infringement decisions has risen significantly over the past few years. While parliament has laid the legal basis for damaged parties in 2017 to claim information from cartelists, leaving access to the FCO's files only as a last resort, it had been a matter of dispute whether this new rule applies only to damages actions that are based on infringements that occurred after 27 December 2016. The 10th amendment to the GWB in 2021 clarified that this rule shall also apply to infringements committed before that date.

Appeal of fine decisions: no risk, no fun?

During the past few years, a few FCO decisions that imposed fines have been appealed to the Appeals Court. The Appeals Court has – after conducting its own proceedings – in various cases handed down substantially higher fines.

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Famous decisions that have led to significantly higher fines imposed by the Appeals Court than those imposed by the FCO include *Liquid Gas*,[12] *Wallpaper* (overall increase to more than 130 per cent of the initial fines),[13] *Confectionery Products* (overall increase to 150 per cent)[14] and *Rossmann* (initially almost 600 per cent).[15]

This *reformatio in peius* is compliant with German constitutional law and stems from the specific German procedural system, according to which the Appeals Court assesses all facts of the case from scratch and decides on a possible fine independently of the fine imposed by the FCO.

Nevertheless, those decisions of the Appeals Court increasing the fines to such an extent have been widely (and harshly) criticised by the industry and private practice as they have been perceived to de facto hinder companies in appealing against the FCO's fine decisions (and, at an earlier stage, urge them into settlement agreements with the authority or to withdraw the appeal).

Moreover, whereas the FCO has issued (self-binding) guidelines for the setting of fines, the Appeals Court is not bound by them and only has to take into account that fines cannot exceed 10 per cent of the company's group global turnover. Criticism has been voiced to the effect that appealing a fine decision would bring a systemic change of the calculation of the fine and, therefore, automatically lead to an increase of it.

A provision introduced to the GWB in 2021 explicitly specifies that – as in EU law and prior case law – the gravity and duration of the infringement must be taken into account when determining the amount of the fine. Furthermore, other factors are to be taken into account, such as the effects of the infringement and (for the first time) compliance efforts pre- and post-infringement, which is an important change.

The provisions still leave wide discretion for the courts. The FCO revised its fining guidelines, taking into account the new rules.[16] The FCO has in particular confirmed that their future approach will take greater account of the practice of the German courts in that a reference value will be determined in future based on the turnover linked to the infringement and the size of the company.

12 Court proceedings continued after two undertakings appealed, see Bundeskartellamt Tätigkeitsbericht (FCO activity report) 2019/2020, p. 127; www.bundeskartellamt.de/EN/AboutUs/Publications/Activityreports/activityreports_node.html.

13 'Tapetenkartell: Gericht erhöht Bußgelder für Mandanten von Hengeler und Gibson Dunn', *Juve* (17 October 2017); judgment final and binding (see Bundeskartellamt Tätigkeitsbericht (FCO activity report) 2019/2020, p. 75; www.bundeskartellamt.de/EN/AboutUs/Publications/Activityreports/activityreports_node.html).

14 'Informationsaustausch: OLG erhöht Bußgelder im Süßwarenkartell', *Juve* (6 February 2017).

15 For the saga of the (finally finished) proceedings see below.

16 See https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines_setting_fines_Oct_2021.html?nn=3591500.

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In a press release, the FCO has stated that the future guidelines will ultimately 'create more flexibility in the individual case but no essential change in the level of fines is expected'. Notwithstanding the amended guidelines, substantial uncertainties remain.

In any case, the Appeals Court has also significantly reduced fines or even acquitted the accused (eg, for not being able to confirm that the infringement ever happened). Some of those decisions may not have received the same attention as those raising the fines.[17] However, there have recently been some important decisions supporting the fined undertakings' points of view, which have been perceived as a slight counter-trend. The decisions show that the Appeals Court and, on further appeal, the Federal Court of Justice (FCJ) take a close look at the cases and that an appeal can be helpful if the fined companies have substantive arguments apart from the mere calculation of the fine. Those developments show that appeals to cartel proceedings in Germany are alive and kicking. At the same time, the FCJ has also sent cases back to the Appeals Court where it found the Appeals Court had wrongly sided with the applicants.

Confectionary cartel

Whereas the Appeals Court substantially increased most of the fines imposed by the FCO in the *Confectionery* proceedings,[18] the FCJ overruled the Appeals Court and remanded the proceedings to a different senate of the Appeals Court in June 2019. The FCJ held, in particular, that the Appeals Court did not sufficiently consider the defending statements of the appealing companies but, in contrast, too uncritically followed statements of leniency applicant witnesses.[19]

The case is of specific interest to all industries and receives major attention as it concerns the limits of a lawful information exchange (in particular, in meetings of industry associations), which has significant importance beyond the confectionery industry. In this case, the FCO had followed a very broad concept of the ban on cartels, which reflects paradigmatically the authority's increased vigorous competition law enforcement over the past few years. The case is still pending at the Appeals Court.

17 *Ost/Breuer*, *NZKart* 2019, p. 119 et seq (the authors from the FCO underline that fine reductions had gone unnoticed).
18 See footnote 23.
19 'Alles von vorn im Süßwarenkartell: OLG Düsseldorf fängt sich eine Klatsche beim BGH', *Juve* (18 July 2019).

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Rossmann Case

Similarly, the FCJ quashed the Appeals Court's judgment in the *Rossmann* case on the basis of a purely procedural flaw within the appeals procedure. In this case, the Appeals Court had increased the original fine (imposed in 2015) by almost 600 per cent to €30 million. The decision underlines the relevance of the German courts applying criminal procedural rules, which are not to be taken lightly when deciding on cartel fines.

The case was remanded to a different senate of the Appeals Court,[20] which needed to fully try the case from scratch, including hearing all witnesses again. Rossmann, however, decided not to appear in court, so in 2020 the Appeals Court dismissed the appeal, which was intended to mean that the original fine (€5.25 million) remained in force.[21] However, the General Prosecutor's Office successfully appealed the Appeals Court decision to not try the case but to leave it with the original FCO fine, stating that procedural law would not allow not entering into a full trial. The FCJ confirmed that the withdrawal of the objection after the start of the main hearing was ineffective without the consent of the Attorney General's Office.[22] Hence, the case was remanded for a second time to the Appeals Court for a full trial. At the end of 2022, the First Cartel Senate of the Higher Regional Court of Düsseldorf, finally set the fine at €20 million.[23] The case demonstrates that there is a real risk of seeing a fine substantially increased by the courts when appealing a fine decision – with the company concerned no longer being in control of the outcome of the court proceedings.

Beer cartel, information exchange and the question of prescription

The *Beer* cartel appeal is one of the rare cases in which the undertaking concerned (Carlsberg) firmly held that it had not participated in the cartel at all; although, a couple of leniency applicants had settled on the basis that Carlsberg had been involved in their admitted wrongdoing. The FCO has fined six companies an overall amount of €330 million. Only Carlsberg pursued its appeal. While the FCO was overruled by the Appeals Court with regard to the *Beer* cartel, the FCJ – upon appeal of the FCO – in turn overruled the Appeals Court and sent the case back to another senate of the Appeals Court.

After 20 days of oral hearings, the prosecutor had requested in the original trial before the Appeals Court that the fine be raised from €62 million to €250 million; the Appeals Court, however, acquitted the accused. The Appeals Court was of

20 'BGH: CMS-Mandantin Rossmann bekommt neue Chancen im Streit um Kartellbußen', *Juve* (13 August 2019).
21 Higher Regional Court of Düsseldorf Press Release No. 27/2020, 'Kaffeekartell: Keine erneute Prüfung der Vorwürfe und des Bußgelds gegen die Dirk Rossmann GmbH' (17 August 2020).
22 FCJ, Cartel Senate, decision of 24 December 2021 – KRB 11/21 – Unexcused absence of secondary parties (*Rossmann*).
23 Higher Regional Court of Düsseldorf, decision of 11 November 2022 – 1 Kart 1/22 (OWi).

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the opinion that it was, if at all, only proven that Carlsberg had participated in a mere information exchange that had not resulted in an agreement and had, therefore, ended with the exchange of the information. Considering the statute of limitations, the Appeals Court ruled that the information exchange could no longer be prosecuted. Upon the prosecutor's appeal, the FCJ cancelled the judgement; the FCJ concluded that it could not be securely determined that the absolute statute of limitations (10 years) had been exceeded.

The FCJ highlighted that an information exchange in itself does not suffice to find an infringement; rather the infringement also requires certain factual coordinated behaviour in the market based on that information exchange as a second element in a concerted practice. On this basis, the FCJ found that the Appeals Court's findings were flawed in assuming (rather than examining) that there had been no influence on market behaviour. According to the FCJ, the Appeals Court should have taken into consideration the factual (albeit rebuttable) presumption that, according to FCJ and ECJ jurisprudence, undertakings are likely to take into account such sensitive information in their market behaviour.[24]

While market behaviour is, on the one hand, the necessary prerequisite for an illegal concerted practice, according to the FCJ the concerted practice, on the other hand, does not end as long as the market conduct continues. The FCJ concluded that the infringement still continues as long as the product for which the market behaviour has been influenced is still on the market.[25] The case has been sent back for a full retrial to another chamber of the Düsseldorf Appeals Court. After many more days of oral hearings, the Appeals Court decided in late April 2023 that Carlsberg had participated in an illegal exchange of sensitive information. The Court found that there had been sufficient effect on competition as the conversations held were 'partly responsible' for the one-euro-per-case price increase implemented shortly thereafter by Carlsberg and other brewers. Although this did not constitute a prohibited agreement, it did constitute a deliberate violation of the antitrust regulations in the form of concerted practices. The Appeals Court imposed a fine of €50 million after Carlsberg had indicated that it would not further appeal a fine in that range. The company had, however, expressly rejected the accusations against the company in its final pleading. It explained the agreement to the plea bargain on the grounds that the company wanted to finally close the lengthy and burdensome proceeding.[26]

24 The FCJ, however, clarifies that under the principle of presumption of innocence, the presumption could only be a mere indication that must be weighed alongside all other circumstances of the case. As such, the Appeals Court must show that it has done an overall assessment, also taking the presumption into consideration.

25 With regard to FCJ, Decision No. KRB 99/19 of 13 July 2020: 'Zu früh gefreut: BGH kassiert Carlsberg-Sieg im Bierkartell', *Juve* (13 October 2020); Luther, 'ECJ defines end of bid-rigging cartels and limits of enforcement' (29 January 2021).

26 Frankfurter Allgemeine Zeitung, 2 May 2023, https://www.faz.net/aktuell/wirtschaft/unternehmen/50-millionen-euro-geldbusse-fuer-carlsberg-illegale-preisabsprachen-18863115.html, '50 Millionen Euro Geldbuße für Carlsberg: Illegale Preisabsprachen' (faz.net)

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In other proceedings, the FCJ confirmed its legal position on prescription in a decision concerning bidding cartels. According to the FCJ, the limitation period does not start from the conclusion of the contract but only from the complete execution of the contract (ie, when the final invoice is issued).[27] The latter decision is interesting as it runs counter to an ECJ judgment issued shortly thereafter: the ECJ concludes that the end of a bid-rigging cartel is usually defined by the date of concluding the contract between the company that won a bid and the entity that invited the tender.[28]

Regional Beer cartel in Cologne

Undertakings accused of participating in a regional *Beer* cartel (a different one from the *Beer* cartel mentioned above) gained a spectacular victory over the FCO in 2021. The Appeals Court[29] acquitted several breweries from North Rhine-Westphalia of the charges of illegal price-fixing. In 2014, the FCO had imposed fines totalling €338 million on several breweries, associations and persons responsible for illegal price agreements.[30] The charges related to alleged price-fixing at a meeting of the North Rhine-Westphalia Brewers' Association at the beginning of September 2007. The Senate was unable to establish the alleged beer price agreements between the breweries; most of the witnesses did not remember any incidents, and the memories of the witnesses who testified were too vague to carry a conviction for illegal behaviour.[31] The judgment was recently confirmed by the German Federal Supreme Court and is now final.

Do cartelising managers have to compensate companies' fines and damages?

The question of whether members of the board are liable to the company for fines and lawyers' fees incurred by the company as a consequence of the company's antitrust law violation is still under a lot of discussion. In previous editions, we reported on the first-ever judgment of a German civil court that aimed to provide answers to this question.[32]

27 With regard to FCJ, Decision No. KRB 25/20 of 25 August 2020: Luther, 'ECJ defines end of bid-rigging cartels and limits of enforcement' (29 January 2021).
28 European Court of Justice, decision of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, Case No. C-450/19: Luther, 'ECJ defines end of bid-rigging cartels and limits of enforcement' (29 January 2021).
29 Appeals Court on 8 September 2021 acquitted several breweries from North Rhine-Westphalia (V-4 Kart 4/16 OWi).
30 FCO case report, B10-105/11, 2 April 2014.
31 Press release no. 29/2021, Higher Regional Court of Düsseldorf (8 September 2021): https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210908_PM_NRW-Bierkartell/index.php.
32 Judgment of 15 September 2020, *LG Saarbrücken*, Case No. 7 HK O 6/16, CB 2020, p. 79 et seq with annotation by Borbála Dux-Wenzel and Helmut Janssen.

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Long before that case was dealt with in court, a claim for manager liability was filed in the aftermath of another cartel: in 2012, the Federal Cartel Office imposed a fine on ThyssenKrupp (approximately €191 million) for participating in the *Railtrack* cartel. Faced with a number of damages claims, ThyssenKrupp agreed on settlements (eg, with the state-owned railway operator Deutsche Bahn for an amount of approximately €100 million). In 2014, ThyssenKrupp started an action for damages, amounting to approximately €300 million, against former members of the executive board allegedly involved in the cartel (known as the *Sehlbach* case). Proceedings before various courts dragged on for eight years and, according to media reports, came to an end in January 2022. Reportedly, in an out-of-court settlement, liability insurers, led by Allianz Global Corporate & Specialty and IAG, paid a double-digit million-euro amount. The exact figures are not publicly known, but it is said that the settlement was for less than 10 per cent of the amount claimed (ie, less than €30 million). According to reports, the managers did not need to contribute to that amount. Hence, the case has not created a precedent for further cases to come – but its outcome is probably not encouraging for companies who would like to see the employees participating in this cartel to bear at least part of the cartel fine and other damages.

Competition register

By setting-up the competition register in 2021, the FCO created a digital database that allows over 30,000 contracting authorities in Germany (ie, buyers that are controlled by the state) to obtain information about breaches of competition law and other economic offences by bidders before awarding a contract, and to exclude offenders from the contract-awarding process. Since June 2022, things have become serious for companies. Before the award of a contract worth €30,000 or more, each contracting authority will be obliged to enquire with the competition register. The FCO reports for 2022 that around 4,000 economic offences have been registered, while 120,000 enquiries have been made by contracting authorities (most recently, around 1,000 requests per day).[33] For this reason, companies that were found to have infringed competition law have already engaged in 'self-purification', in particular by implementing compliance measures (such as compliance management systems), and have engaged in compensation for damages. This is – and will be – necessary to be removed from the register's 'wall of shame'.

33 See Bundeskartellamt – Review of 2022 (date of issue: 22 December 2022): https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/22_12_2022_Jahreruecklick.html?nn=3591568.

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11th Amendment Bill proposes facilitating the skimming-off profits (disgorgements)

The German government has proposed a bill that will be introduced to parliament soon and that foresees two major amendments.[34]

The first follows an idea similar to the EU's plans for a New Competition Tool: it would allow the FCO to order any effective and proportionate measure (including as a last resort unbundling) on any dysfunctional market without having to prove a violation of antitrust laws.[35] This bill – if approved – will make certain activities easier for the antitrust authorities and possibly encourage that cases be tried under the new bill rather than to undertake the difficult task to prove an antitrust violation.

The second would empower the FCO to require undertakings to pay 10 per cent disgorgements of their group turnover for antitrust law infringements; this would come on top of fines and, therefore, would increase the cost of an antitrust violation to 20 per cent group turnover plus, of course, damages.

Provisions on disgorgement in the Act Against Restrictions of Competition can be traced back to 1980. To this day, the FCO has never passed an order on that basis. There is only one case reported in which the cartel authority of the Federal State of Hesse used this provision against excessive water prices of a municipal utility.

An important amendment proposed by the bill is that a legal presumption is to be introduced that the economic benefit amounts to at least 1 per cent of the turnover that the undertaking achieved in Germany with products and services linked to the infringement. In the case of longer-lasting infringements, this can add up to enormous amounts.

A 'benefit' or an 'advantage' does not necessarily mean the same as damage. In the legal sense, damage is an involuntary loss of assets. The difference between benefits and damages may well be illustrated by the decision of the FCO to prohibit Facebook from combining user data from different sources (Facebook, WhatsApp and Instagram), as this was considered an abuse of market power. As Facebook etc are completely ad-financed, Facebook, by committing the abuse, does not reduce users' assets. Users, therefore, do not suffer monetary damages for which they could sue Facebook. However, Facebook is likely to gain an economic advantage from the pooling of data because it can optimise the

34 Proposal of a draft bill for the 11th amendment of the Act against Restraints of Competition of 15 September 2022 of the Federal Ministry of Economics and Climate Protection.

35 https://www.luther-lawfirm.com/en/newsroom/blog/detail/new-draft-german-antitrust-bill-will-the-federal-cartel-office-be-vested-with-new-powers-to-order-unbundling-on-any-disfunctional-market-without-having-to-prove-a-violation-of-an-titrust-laws.

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products it sells on the advertising market. If Facebook could generate higher advertising sales as a result of the infringement, this could be an advantage the cartel authorities will be able to withdraw.

Anne Caroline Wegner

Luther Rechtsanwaltsgesellschaft mbH

Anne Wegner has been specialising in German and European antitrust law, including related litigation, since 2001. She has been head of Luther's antitrust department since 2016. She focuses on cartel proceedings, vertical agreements, antitrust damages, compliance and abuse of dominance. Anne has many years of experience in representing her clients in those areas in cartel authorities' proceedings as well as in litigation proceedings. She has defended companies from diverse industries (including automotive suppliers, sanitary and heating wholesalers, banking and building materials). Anne regularly speaks and publishes on antitrust law. She is listed as a notable individual by, among others, Global Competition Review, Chambers and Partners, *Who's Who Legal: Thought Leaders Competition*, Best Lawyers, The Legal 500, Expert Guides, Women in Business Law and JUVE.

Helmut Janssen

Luther Rechtsanwaltsgesellschaft mbH

For 25 years, Dr Helmut Janssen has specialised in European and German antitrust law. He has appeared in proceedings before the European Court of Justice (both the General Court and on appeal) and the German courts, and has represented clients in numerous investigations before the European Commission and the German Federal Cartel Office and in transatlantic cases. His advisory services include, in particular, providing preventive advice (compliance) and defending his clients in cartel proceedings, assisting with foreign and domestic merger control proceedings, reviewing and structuring distribution systems and advising on cooperation agreements between competitors. Helmut also assists in a wide range of public grant cases (EU state aid law). He has also authored a reference textbook on antitrust law (sixth edition, 2023) and numerous professional articles on antitrust and state aid law. He is listed in *Who's Who*

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Legal: Thought Leaders Competition, Best Lawyers, The Legal 500, Chambers and JUVE as a leading consultant in antitrust matters.

Sebastian Janka

Luther Rechtsanwaltsgesellschaft mbH

Sebastian Janka advises national and international clients on European and German antitrust law. His advisory services cover, inter alia, M&A transactions (merger control by the European Commission and the German Federal Cartel Office and coordination of multi-jurisdictional filings), antitrust investigations and fine proceedings conducted by the European Commission and the German Federal Cartel Office, damages proceedings and other judicial and extrajudicial disputes (before German courts, the European General Court and the European Court of Justice), as well as compliance advice. Another focus of his work is digital business models. Moreover, having studied and worked in Germany, France, South Africa, Argentina and the United States, Sebastian has a very international focus.

Sebastian has authored numerous publications on matters relating to antitrust and sports law. He is a frequent lecturer and moderates discussions on the topic of antitrust law at national and international conferences.

Sebastian joined Luther as a partner in 2019 and is a member of the firm's industry groups that cover mobility and logistics, and information technology and telecommunications. He is recognised by various publications, such as Best Lawyers, *Who's Who Legal: Thought Leaders Competition*, The Legal 500 and JUVE.

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Luther works closely with other commercial law firms in all the prevailing jurisdictions worldwide. On the continent, Luther is a founding member of unyer (www.unyer.com), a global organisation of leading professional services firms that cooperate exclusively with each other. It is therefore able to support our German clients in their projects abroad just as comprehensively as our international clients in their projects in Germany or the European Union.

Luther won the Law Firm of the Year award in 2019, given by the German handbook for commercial law firms, *JUVE*, and has been nominated for Competition in 2021. It has a strong antitrust team, with six partners who have been recommended, among others, by Who's Who Legal, Best Lawyers, Chambers and Partners, The Legal 500, Expert Guides and JUVE.

Graf-Adolf-Platz 15
40213 Düsseldorf
Germany
Tel: +49 211 5660 0

Avenue Louise 326
1050 Brussels
Belgium
Tel: +32 2 627 7760

Karlstraße 10–12
80333 Munich
Germany
Tel: +49 89 23714 0

www.luther-lawfirm.com

Anne Caroline Wegner
anne.wegner@luther-lawfirm.com

Helmut Janssen
helmut.janssen@luther-lawfirm.com

Sebastian Janka
sebastian.janka@luther-lawfirm.com

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