

Cartel Detection: A Jurisdictional Perspective

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Cracking Cartels 04

ACCC

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„Highlights“

- **Cement cartel 2003:**
Bundeskartellamt imposed fine of more than € 700 million on 12 German producers of cement in April and December 2003
- **Ready-mix concrete cartel:**
Fines imposed 1999-2003 (proceedings I-V): more than € 200 million; some proceedings still pending
- **Insurance cartel (pending):**
fine proceedings against 18 major insurance companies in Germany; statement of objections filed in July 2003 and May 2004
- **Paper wholesale cartel 2004:**
€ 57.6 million fines imposed on 12 companies and 46 natural persons in May 2004

Some facts and figures

Bundeskartellamt searches and dawn raids

	Total	Fine Proceedings	Administrative Proceedings
2002	8	7	1
2003	10	7	3
2004	8	8	0

Jurisdictional Outline

- Bundeskartellamt can **apply** (as regards restraints of competition)
 - National Law (Section 1 ARC) and
 - European Law (Article 81 EC)
- Bundeskartellamt can **impose fines** for
 - violation of Section 1 ARC and
 - (as of 2005) violation of Article 81 EC
- Fine (and administrative) proceedings conducted under national law
- Bid rigging is penalized (Section 298 German Criminal Code) – responsibility: public prosecution office

- **Article 81 (1) EC:**

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market

- **New Section 1 ARC as of 2005:**

„Agreements between [*competing*] undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.“

Setting Fines

- **Current law** (Section 81 ARC)
 - fine of up to €500.000 or
 - up to three times the additional proceeds obtained as a result of the violation
- **New law** as of 2005 (Section 81 ARC new)
 - fine of up to €1 million
 - in discussion: change to turnover based approach (EC approach or others)

Fine Proceedings

- Against natural persons and companies
- **Quasi-criminal-proceedings:** governed by Administrative Offences Act (OWiG) and Code of Criminal Procedure (StPO)
- Constitutional requirements
- Judicial **search warrant** required (only issued if sufficient evidence for initial suspicion)
- Raids in **private homes** possible

Leniency Programme 2000

- **Immunity**

- First applicant
- Before preliminary investigations
- Continuous and unreserved cooperation
- Has not played a decisive role
- Discontinues participation at request of BKartA

- **Reduction**

- Considerable reduction by at least 50 per cent for first applicant after initiation of investigation
- Reduction for other companies making considerable contribution to uncovering a cartel

- **New leniency programme draft envisaged**

Recent decisions of the Düsseldorf Court of Appeal

- May 2004: successful appeal of parties against Bkarta fine decision in ready-mix concrete sector:
It cannot be concluded without doubt that participants in quota cartel concerning ready-mix concrete in Berlin area have realized excess profits in the concrete case
- October 2004: successful appeal of parties against Bkarta fine decision for boycott in the waste management sector (fine totalling € 4.4 million):
Court did not see sufficient evidence for boycott of new entrants into the waste management sector

Targeting Cartels: Recent Developments

- **Using economic methods/statistics:**
September 2003: Bundeskartellamt provides evidence establishing an initial suspicion of a price agreement (required by the court to issue a search warrant) by means of statistical surveys and economic argumentation
- **Calculation of additional proceeds** in the cement market for setting fines (using economic models and methods)

Targeting Cartels: Recent Developments



- Searches and dawn raids conducted by Bundeskartellamt have increased significantly in the last three years
- Increased public relations activities are raising public awareness of cartels
- 2001: creation of a special unit for combating cartels (SKK) with IT Specialists
- Relocation of Bundeskartellamt from Berlin to Bonn 1999
Change of venue has led to stricter requirements for granting search and seizure warrants

Targeting Cartels: Recent Developments

- **Oral leniency statements** of companies (fearing US discovery rules in private treble damages law suits in the US) accepted by Bundeskartellamt
- **New leniency programme** envisaged to encourage whistleblowers and to increase detection of cartels
- **Forensic IT**
 - Special software for evaluation of paper documents
 - Successful IT-based evaluation of IT-documents
 - Recent decisions of Bonn Regional Court on legal seizure of IT-documents
 - IT-specialists

Targeting Cartels: Recent Developments

New Competition Act 2005

- In the context of the new EU-Regulation 1/2003
- Fines for violation of EU law
- Increased fines for competition infringements
- Increase of periodic penalty payments of up to € 10 million (minimum: 1.000 €)
- New powers in administrative proceedings:
 - Skimming off of excess benefits
 - Decision to make binding commitments,
 - imposing behavioural and structural remedies,
 - new decision power on violations in the past
 - Finding of unapplicability

Recent Developments: Cooperation



- May 2004: Bundeskartellamt conducted search operation in the paper manufacturers sector assisted by simultaneous investigation by the Austrian Competition Authority within the ECN and coordinated with parallel proceedings by the Commission - cases pending
- July 2004: Bundeskartellamt conducted dawn raids on behalf of the Italian Competition Authority in the baby food sector within the ECN – case pending
- September 2002: Simultaneous dawn raids in the transport logistic sector conducted in the US and Germany by the USDOJ/ the German-based US Military Police and the Bundeskartellamt – case pending

Recent Developments: Cooperation

Inspections with EU-Commission/Searches for other EU Competition Authorities

	Assisted EU-COM (Inspection)	Searches within the ECN	
		EU-CA for BKartA	BKartA for EU-CA
2002	9		
		only possible	
2003	9	since 1 May 2004	
2004	5	1 (Austria)	1 (for Italy)

Recent Developments: Cooperation

- **Cooperation within European Competition Network**
 - Handling of leniency applications
 - Exchange of information in leniency cases
 - Case allocation
- **Investigations on behalf of EU-Competition Authorit.**
 - Article 22 Reg. 1/2003 allows EU-CAs to carry out inspections under their national law in their own territory on behalf and for the account of another EU-CA
 - BKartA can carry out inspections for the 24 other EU-CA under its national law
 - Model for international cooperation and coordination?