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Competition law enforcement: German experience and relevance for Belarus

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About the German Economic Team Belarus (GET Belarus)

The main purpose of GET Belarus is to conduct a dialogue on economic policy issues with the government, civil society, and international organizations. Experts of German Economic Team have experience in policy advice in several transition economies, including Ukraine, Russia, Georgia and Moldova. In Belarus, the German Economic Team provides information and analytical support to the Council of Ministers, the National Bank, the Ministry of Foreign Affairs, the Ministry of Economy and other institutions involved in the process of formation and implementation of economic policy.

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Competition law enforcement: German experience and relevance for Belarus

Executive Summary

Understanding the principles, the structure and organizational design of competition law enforcement in Germany could be of interest for Belarus as it is currently drafting its competition development program.

The German competition authorities are endowed with autonomy, highly-skilled and experienced personnel and extensive investigation and decision-making powers.

Since it is impossible and not a task in itself to understand, monitor and analyse the complexity of markets with a purely analytical desktop research approach, the German competition authorities use the synergies between its different tasks and divisions in order to gather case related information and gain insight into market structures and market conduct.

For example, during merger control proceedings the competition authority can request all information and data necessary to assess the impacts of planned merger on the markets. When parties of a planned merger need the clearance of a merger by the competition authority, they are obliged to answer all questions raised by the authority and to deliver all requested documents in due time. In that way, the authority learns more about market segmentation, market players, supply chains and value chains than any statistics or general survey could reveal.

Besides other investigation powers, the cartel detection division uses a key witness program in order to discover cartels. Members of a cartel who want to end the illegal cartel and avoid or reduce potential fines for the infringement of the law, may deliver all information and evidence needed to prosecute the cartel. Again, this information helps to understand market structure, market conduct and may lead to the discovery of other cartels causing harm to competition.

Competition authorities that are in charge of different types of competition cases (e.g. merger, antitrust and cartel cases) gain market related experience from one type of case that could be useful for assessing other types. For instance, it happens that cartels are discovered in the process of assessing a merger or that knowledge that resulted from complex merger case analysis can be used in antitrust cases regarding the same markets.

There are a couple of prerequisites for such synergies and effective competition enforcement. Firstly, the authority must have investigation powers and can be trusted to keep all information confidential. This is only the case, when the authority is highly independent from interference of any other ministry or state body. Secondly, competition authorities need highly educated lawyers and economists, which requires sufficient funding. Effective competition enforcement additionally requires an intelligent organizational design and a willingness of the divisions to cooperate and share knowledge with each other to ensure a consistent application of the competition law. Thirdly, since challenges for competition enforcement change over the years, flexibility to introduce new tools, as for example a key witness program, is needed to keep enforcement effective. The overall requirement is society's trust in the fairness of the legal system.

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Content

1 Introduction

The Belarusian economic policy has recently shifted attention to the field of competition policy. The Ministry of Antimonopoly Regulation and Trade (MART) was founded in 2016 under the Ministry of Trade. The Ministry is currently drafting a competition development program for the entire Belarusian economy. The competition development program includes competition policy principles, strategic goals and measures, drafting competition law and drafting the organizational design for the authorities that shall enforce competition law.

To do so, the MART gathers international experience, analyses international practices and assesses which of them can be applied in the Belarusian specific context.

This policy paper aims at supporting the reform process by providing German experience and explaining German practices. The paper focuses on the responsibilities and role of Germany's competition authority, the *Bundeskartellamt*, which can be regarded as a German equivalent of MART. Although the *Bundeskartellamt* is a high authority and not a Ministry, it is endowed with enough power and autonomy to act in most cases independently from any Ministry. In other words, in terms of competition enforcement the *Bundeskartellamt* is an independent and not a sub-ordinated authority.

2 Institutional setting of competition authorities

The German approach to competition enforcement includes a set of different authorities with distinct responsibilities. These responsibilities are either defined by functions or by territorial delineation with a set of rules for co-ordination and supervision.

The *Bundeskartellamt* (henceforth also referred to as competition authority) is an independent higher federal authority which is assigned to the Federal Ministry for Economic Affairs and Energy, established in 1958. Its main task is to apply and enforce the German competition law (Act against Restraints of Competition, ARC). The competition authority takes actions against all restraints of competition which have effects on the Federal Republic of Germany. Its tasks include:

- Merger control,
- The control of abusive practices of dominant or powerful companies,
- Enforcing the ban on cartels,
- The review of award procedures for public contracts,
- Consumer protection (since the amendment to the law in 2017).

Since 2005 it can also conduct so-called sector inquiries in order to determine the competition situation in individual sectors, if there are indications for in-efficient competition in these markets.

The *Bundeskartellamt* bases its decisions solely on competition criteria. It is independent in its decision-making, i.e. while handling cases and making decisions it is not bound by external instructions. This independence ensures that the *Bundeskartellamt* can focus on competition criteria in its decision-making. It is undisputed that there are other important economic and socio-political goals than to ensure competition. However, it is not the *Bundeskartellamt's* responsibility to realize those. The *Bundeskartellamt* has a head count of around 350 people.

Decisions on cartels, mergers and abusive practices are taken by a total of twelve Decision Divisions. The divisions are mainly organized according to sectors of the economy; three divisions deal exclusively

with the cross-sector prosecution of cartels. In the Decision Divisions, each case is decided upon by a collegiate body consisting of the respective Division's chairperson and two associate members. All decisions must be voted by the majority. The Decision Divisions with around 150 legal or economic experts are autonomous and not subject to instructions in their decision-taking. The Decision Divisions are supported by a General Policy Division, a Litigation and Legal Division and a Central Division.

Additionally to the *Bundeskartellamt,* each German *Bundesland* possesses its own competition authority **(***Landeskartellbehörde***)** which are in most cases divisions of Ministries of Economics in the respective *Bundesland*. Violations of the ban on cartels or abusive practices, the effects of which are limited to a single *Bundesland*, are prosecuted by the respective *Bundesland* competition authority. In cases the effects of violations of the ban on cartels or abusive practices extend beyond one *Bundesland*, the *Bundeskartellamt* is the competent authority to deal with a case. In order to ensure an appropriate division of responsibilities, the ARC provides for the possibility to refer cases between the authorities, when it is required by the circumstances of an individual case.

If anticompetitive cartel agreements or abusive practices are likely to affect trade between the EU Member States, the *Bundeskartellamt* also applies European competition law.

With respect to merger control, the *Bundeskartellamt* has exclusive competence and responsibility for the whole territory of Germany.

The *Federal Ministry for Economic Affairs and Energy* can interfere only in very exceptional cases. It can overrule a merger control decision under certain conditions. With respect to all other responsibilities, the competition authorities act autonomously and independently, being endowed with sufficient legal and man power.

The *Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway* also deals with competition issues. Its main task is to create effective competition in the above network-based markets (e.g. gas and electricity grids). A key feature of network-based markets is that companies need access to the grid network in order to sell their products or services to customers. This poses the problem that the network owner can deny access to his network or demand excessive prices to hinder the competitor from entering the market. One of the responsibilities of the Federal Network Agency in such cases is to ensure that the network owner gives his competitors non-discriminatory access to his network.

Finally, the *Monopolies Commission* serves as an independent expert committee, which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation. It has the statutory responsibility to monitor effective competition in Germany in general and in specific sectors of industry.

3 Focus of competition enforcement in Germany

Competition law in Germany and Europe encompasses a broad variety of different tasks, dealt with by competition authorities and courts. Three main pillars may briefly describe nowadays' general approach. **Merger control** is used as an instrument to uphold vital competition on markets. In cases where internal or external growths of undertaking have caused a lack of competition on markets, special rules apply to powerful undertakings to prevent them from any **abusive behaviour**. In cases, where competitors try to limit competition on market by entering into agreements, causing harm to consumers and society, **cartel investigations** seek to end unlawful agreements and threaten other

market players to enter into comparable agreements, also on other markets, by imposing high fines to deter from such kind of conduct.

Furthermore, **market studies** are a flexible tool that is used to address a wide range of needs. Market studies are conducted primarily in relation to concerns about the function of markets. They are research projects conducted to gain an in-depth understanding of how sectors, markets, or market practices work.

3.1 Merger control

3.1.1 Formal approach towards merger assessment

The competition authority controls mergers between companies, if they jointly achieve a worldwide turnover of more than EUR 500 m, and if at least one participating company has achieved a turnover in Germany of more than EUR 25 m and one further company a turnover in Germany of at least EUR 5 m. The calculation of the relevant turnover is based on the turnover achieved by the entire company group in the last business year preceding the merger.

There are some exceptions to that rule: Mergers are not subject to the control if

a) a company which achieved a worldwide turnover of less than EUR 10 m in the last business year, merges with another company (so-called “de minimis clause”) or

b) in a market concerned goods or commercial services have been offered for at least five years and where less than EUR 15 m turnover was achieved during the last year (so-called “minor market clause”).

Until a notifiable merger project has been cleared by the competition authority, a prohibition on its implementation applies which means that companies may not put a merger into effect which has not been cleared. If, nevertheless, a merger has been put into effect, the competition authority can subsequently dissolve the concentration and impose a fine.

After receiving the complete notification documents from the companies that aim to merge, the competent Decision Division at the *Bundeskartellamt* has a month time to examine the project (so-called “pre-examination proceedings” or “first phase”). When some of the information, as specified by the law, is missing or incomplete in a merger notification, the clock will stop. This also applies if it turns out that information was provided incomplete after the investigation has started. If no problems occur, the merger will be cleared informally before the expiry of the one-month time limit. Then, the merger can be put into effect.

If further examinations are necessary, the merging companies receive a so-called “one-month letter”. This measure introduces the “main examination proceedings”; and the time-limit for examining the merger project is extended. If the main examination proceedings have been initiated, the competition authority has to decide on the case within four months starting from the notification to the competition authority. It either prohibits or clears the merger, in some circumstances imposing commitments.

Before taking a decision the *Bundeskartellamt* will listen to the counter-arguments of the parties. Under any circumstances the parties to a merger receive the statement of objections including all relevant arguments for the assessment of a merger and the chance to present their counter-arguments

before the decision is taken. If they request an oral hearing, parties may also present their arguments in person before the *Bundeskartellamt*.

It should be noted that a prohibition of merger is an exception. Most of the mergers which are notified tend to be pro-competitive. In cases where a merger affects several different markets and if there are concerns regarding competition limitations in some of these markets only, the competition authority will, if possible, decide an a conditional clearance to uphold the remaining, pro-competitive part of the merger.

To fulfil its obligation, the *Bundeskartellamt* is equipped with substantial investigative powers. Almost all investigations force undertakings to reveal commercially sensitive business data. To ensure that the business secrets are kept confidential the German criminal law states that it constitutes a criminal offence to reveal these information to third parties. In its own interest the *Bundeskartellamt* has taken measures to ensure the confidentiality of the data. The fact, that lawyers and business community have trust in the reliability of the *Bundeskartellamt* in this regard, is an asset for day-to-day work that cannot be overestimated.

3.1.2 Merger investigations

The competition authority has extensive investigatory powers in order to examine all necessary information for a comprehensive picture of the market situations. It may, for example, inspect all business documents and even request information from third parties, e.g. competitors, suppliers and customers of the merger parties. Parties and competitors have to answer questionnaires within specified deadlines.

They cannot refuse to send information, not even if it concerns important and confidential business secrets. The competition authority will treat business secrets with special diligence and will not disclose such information to the parties or competitors or any other undertakings or state bodies. The evolved trust in the reliability of the competition authority encourages companies to provide useful information for the assessment of concentrations. The reliability is an asset which has a tremendous importance for the work of the competition authority.

The assessment of merger cases is based on the idea that it should be prohibited in cases when it significantly impedes effective competition, in particular when the merger strengthens an already dominant market position.

Dominance is deemed to exist if a company has no competitors or is not exposed to any substantial competition, or if it has a superior market position in relation to its competitors. In order to examine whether a merger will create or strengthen a dominant position, the relevant market has firstly to be defined in terms of product and geographic area and in exceptional cases in of its temporal dimension. An important criterion in market definition is the demand-side oriented market concept. According to this concept such products or services belong to the same market which the informed consumer considers equally suitable to satisfy a certain requirement on account of their properties, purpose of use and price.

In examining whether a merger will significantly impede effective competition, several criteria should be taken into account. A good starting point for the examination is the market share held by the company concerned in the relevant market. A dominant position is presumed to exist within the meaning of the ARC if a company has a market share of at least 40%. A dominant position held by

several companies is presumed to exist if three or fewer companies reach a combined market share of 50 per cent or if five or fewer companies reach a combined market share of two-thirds ("oligopolistic market dominance").

The presumption of a single or oligopolistic dominant position shifts the burden of proof to the merging parties. They must proof that even after the closing of the merger the competitive conditions between them are likely to result in substantial competition, or the companies taken together do not have a superior position compared to the other competitors.

An important factor for assessing the market share is not only the absolute but also the relative market share, i.e. the market share of the company compared to the market shares of its competitors.

Apart from the extent of market share, the competition authority conducts an extensive examination of the competition situation in the relevant markets to determine how the merger can create or strengthen a dominant position. Criteria to be considered during the examination are the following:

- specific expertise,
- access to supply or sales markets,
- links with other companies,
- financial power,
- legal or factual barriers to market entry,
- actual or potential competition from companies established within or outside the country,
- the ability to shift supply or demand to other goods or commercial services, as well as
- the ability of the opposite market side to resort to other companies.

In assessing whether a merger will lead to competition problems, it is important to make a thorough assessment of the company's activities on the market and the market-related factors.

When in doubt, firms aiming to merge approach the responsible division of the *Bundeskartellamt* to discuss projects before they ever reach the notification stage. Some projects raising competition concerns are already abandoned or modified by firms at this early stage, once *Bundeskartellamt* officials have signalled that competition concerns are likely and the case will be assessed carefully and may lead to a prohibition. In recent years, plenty of mergers have been abandoned or restructured after such initial meetings and did not become a part of the prohibition statistics.

In case merger parties do not agree with the decision taken in a merger case, they can appeal to a court and/or can apply for the so-called "ministerial authorisation". This means that companies, whose merger projects have been prohibited, can apply for authorization to the Federal Ministry for Economic Affairs and Energy. The requirement for the issue of an authorization is that the restraint of competition in the particular case is outweighed by advantages to the economy as a whole resulting from the concentration, or that the concentration is justified by an overriding public interest. Ministerial decisions are also appealable before court. The practices that competition-based and politically motivated decisions are made in a two-stage process and that such authorizations are an exception rather than the rule have both proved to be useful.

Defined by competition law, in the EU, Germany and other Member States of the European Union, the notification of concentrations is only mandatory in cases where specific criteria are met. The main intention is to assess only concentrations with a significant importance and impact to the national economy which is basically reflected in the turnover thresholds and the kinds of concentrations

covered by merger control. Only in a limited number of cases, the assessment of mergers does lead to competition concerns and a prohibition decision. A proper investigation is necessary to distinguish the pro-competitive cases from those with significant competition concerns. The investigatory powers of the competition authority vary from informal meetings to formal information requests to get an understanding of the main parameters of competition, competitors and customers. Formal surveys are used in cases where the willingness to cooperate is limited. Companies should be aware of the consequences (fines) for not complying with the obligation to answer correctly, completely and in time.

There is no standard approach for investigations and assessment. The case by case analysis forms the basic understanding of industrial sectors. The analysis has a tremendous effect on subsequent merger cases and is also of value for antitrust cases. Talking to competitors, customers, getting an idea of the segmentation of markets and identifying competition forces on markets is the basic knowledge which is fundamental for the entire work of the competition authority.

3.2 Abuse of market power

The purpose of merger control is to prevent the creation or strengthening of dominant positions by means of concentrations, i.e. external growth. However, there are also companies which hold dominant positions resulting from internal growth, i.e. without merging with other companies, or because of monopoly rights.

Companies holding a dominant position are not exposed to significant competitive pressure. Their scope of action is thus not sufficiently controlled by competition. For this reason, dominant companies are subject to a special control of conduct: the control of abusive practices under competition law. Therefore, the control of abusive practices represents a regulatory tool of the state which compensates for the absence of substantial competition.

To check whether a dominant position exists, the ARC provides for so-called presumption thresholds for the market shares of the companies concerned as well as further company and market-related evaluation criteria.

The abusive exploitation of a dominant position by one or several undertakings is prohibited. But even companies, which do not hold dominant positions but are still powerful because small or medium-sized companies depend on them as suppliers or purchasers, are subject to a special prohibition of discrimination and unfair hindrance.

In principle, all practices that significantly and without any objective justification impair the scope of economic activities of other companies (competitors, customers or suppliers) constitute an abuse of economic power.

The evaluation as to whether a company abuses its market power requires a multi-method examination. Even if companies are dominant they may not be prohibited from engaging in purely competitive conduct. However, practices, which a company can only pursue because of its market power and which hinder or discriminate other companies in a way that would not be possible if effective competition existed, are abusive. Such other companies could be competitors, customers or suppliers.

The different forms of abusive conduct include so-called exclusionary abuse and so-called exploitative abuse.

As an example: a so-called *exclusionary abuse* describes a situation when a dominant company uses its superior position to deny its competitors access to a network-grid or other facilities essential for competitive activities. Exclusionary abuse can also be established when a dominant company tries to squeeze its competitor out of the market by means of a specific cut price strategy. The sale of goods or commercial services below cost price is also prohibited under certain conditions. This provision was tightened at the end of 2007. Sales below cost price are generally prohibited in the food sector; objective justification for this is only possible in very limited exceptional cases.

Exploitative abuse means that a company imposes unreasonable prices or terms and conditions on its customers or suppliers. To assess whether a certain conduct is abusive, inter alia the so-called "comparative market concept" is applied. Possibly excessive prices are compared with prices that have been formed in comparably competitive markets.

Indications of possible abusive practices pursued by a certain company are brought to the competition authority's attention by competitors, suppliers and customers.

There are two possible ways for the *Bundeskartellamt* to act against abusive conduct. Firstly, by means of administrative proceedings the authority can impose an order to discontinue the conduct objected to. Secondly, it can impose fines in administrative offence proceedings.

3.3 Cartel investigations

If several enterprises co-ordinate their market conduct with the object of restricting or eliminating competition, this is called a cartel. Examples of cartels are agreements between competitors on prices, quantities, territories or customer groups. The companies involved can achieve greater profits through these agreements because they are exposed to little (if any) competitive pressure. Such agreements generally lead to higher prices for consumers or a deterioration in offer and are insofar highly damaging to society.

In practice, cartels are often euphemistically referred to as "co-operations", "interest groups" or "strategic alliances", which, however, does not alter their restrictive character.

According to German competition law a general prohibition applies to cartels, i.e. agreements between enterprises, decisions by associations of enterprises and concerted practices are prohibited, which have as their object or effect the prevention, restriction or distortion of competition. This prohibition covers not only the above classical cartels between competing companies (horizontal agreements) but also other anticompetitive agreements between companies which are in a supplier/customer relationship with one another (vertical agreements). An example of a vertical restraint of competition is when a producer tells a free trader the price at which he should sell the product.

Under European law a general prohibition of cartels is provided in Article 101 EC. The *Bundeskartellamt* applies this rule in addition to Section 1 ARC, if the anticompetitive agreement is likely to affect trade between the Member States.

There are two possibilities for the competition authority to treat anticompetitive agreements. Firstly, by means of administrative proceedings the authority can impose an order to discontinue the conduct objected to. Secondly, it can impose fines in administrative offence proceedings. In particular, administrative offence proceedings are opened in the case of cartel agreements which lead to a

particularly severe distortion of competition. These can take the form of agreements between competitors on prices, quantities, territories or customer groups.

The competition authority can receive information about existing cartels from various sources, e.g. from competitors, customers, suppliers or even from the members of a cartel. During the last decade the information received from inside a cartel were of very high importance for the detection of illegal cartels. Cartel members, who by their co-operation contribute to uncovering a forbidden cartel, can be granted with a reduction on fines. In its key witness program, the so-called "Leniency Program", the *Bundeskartellamt* sets the conditions under which a reduction of fines is possible.

3.3.1 The economic harm caused by cartels

Numerous economic studies provide concrete evidence on the extent of harm caused by illegal cartels and on the benefits of effective cartel prosecution. A scientific study which analysed more than 1,000 cartels produced the following results:

On average cartel agreements increase prices by 15 %, i. e. customers and consumers have to pay a price which is 15 % higher than the price they would have paid if competition was not distorted and was functioning well.

International cartel agreements involving suppliers from several countries are usually more harmful than national cartels. The average cartel-induced price increase caused by international cartels is about 18 %. National cartels lead to an average price increase of about 13 %.

In some cases, these percentage figures represent large amounts of money in absolute terms. For example, the estimated total damage caused by an international cartel which had completely eliminated competition in the manufacture of synthetic vitamins, amounted to approx. EUR 7.4 bn worldwide from 1990 to 1994. The damage caused to European consumers amounted to approx. EUR 2.8 bn.

Another example is the European laundry detergent cartel which was active from 2002 to 2005 and involved eight European countries, including Germany. A recent scientific study has found that the financial damage caused to German consumers in the last nine active months of the cartel alone amounted to about EUR 13 m. Based on this figure the overall damage caused by the cartel in all countries involved and for the entire duration of the cartel is estimated to have been approx. EUR 315 m.

If illegal cartels have not been uncovered and terminated, the national economy and consumers would have continued to pay these excessive prices year after year. Once the cartel had ended, there will again be a strong upturn in price competition and the prices will decrease. This clearly exemplifies the direct benefits which can be gained from effective cartel prosecution and a preventive approach which is aimed at effectively deterring illegal agreements.

Cartel agreements also cause immense monetary damage to the public sector. Just like private consumers, the Federal Government, the *Bundesländer* and the municipalities have to pay excessive prices if cartels are not detected and terminated. This applies e.g. to building materials like cement and concrete, which are purchased by the public sector in great quantities. The *Bundeskartellamt* has, for example, conducted proceedings against cartel agreements on the supply of road salt, fire engine

bodies, hydrants and rails. Also in these areas the public sector suffers greatly from excessive cartel prices.

Box 1

The cement case

In a judicial review of a fines decision by the *Bundeskartellamt*, the *Düsseldorf Higher Regional Court* commissioned an economic expert to determine the price effect of a long-standing illegal cartel on the German cement market. Substantiated by extensive empirical data, the expert's analysis arrived at the following conclusions:

As a result of the illegal cartel, the prices for a tonne of cement were nationwide almost EUR 6 above the price that would have been charged if effective competition had been in place. The economic expert himself declared this amount a very conservative estimate.

A competitive cement price of approx. EUR 50 to 60 per tonne was assumed for the relevant period of the cartel agreement.

According to the expert's estimate, the cartel members had thus succeeded in enforcing a cartel price which on average exceeded the price under effective competition by about 10 %.

In Germany the annual demand for cement is approx. 30 to 40 million tonnes. The annual damage caused by the cartel can be estimated to be more than WUR 200 m.

3.3.2 The benefits of effective cartel prosecution

Specific cartel cases give an idea of the extremely anti-social nature of cartel agreements and the benefits of effective cartel prosecution. The real dimension of the harm caused by cartels, however, only becomes apparent upon the realisation that such illegal restraints of competition are still by no means a rare occurrence. The growing number of cases and the increasing success of intensified prosecution activity, not only by the *Bundeskartellamt*, bear witness to this. Cartel agreements have been uncovered in a wide variety of sectors: confectionary, coffee, sugar, beer, flour, ophthalmic lenses, chipboard panels, sausages – these are only some of the most significant cartel cases of recent years in Germany.

Some countries provide estimates on the extent to which their economy benefits from effective cartel prosecution. The British competition authority, for example, estimates that the average annual consumer savings for the period 2012 – 2015 amounted to at least GBP 65 m (approx. EUR 90 m). This figure refers exclusively to the direct monetary benefit consumers gain from the detection and prosecution of cartels by the CMA. The additional indirect effects of cartel prosecution are not considered in the amount quoted.

3.3.3 Direct benefits of at least EUR 460 m per year

To provide an answer on how do German consumers benefit from the cartel prosecution activities, the *Bundeskartellamt* has estimated the economic benefit resulting from the detection of the most relevant cartels on which fines were imposed between 2009 and 2014. As the *Bundeskartellamt* consciously made a conservative estimate, the results indicate the minimum benefit generated for

consumers by its cartel prosecution activities. The actual benefit may well have been higher. The estimated direct consumer benefit from the detection and prohibition of cartels for the entire period was at least EUR 2.75 bn. This corresponds to average annual savings of at least EUR 460 m for consumers.

3.3.4 Efficient enforcement powers

To effectively fight agreements between undertakings that result in harm to consumers and society, the main prerequisite and basis for a successful competition authority is an efficient tool box.

The *Bundekartellamt* is well equipped with all necessary rights e.g. to open proceedings, to conduct dawn raids, to question witnesses, to assess evidences, to issue a decision and to impose fines.

In principle, every dawn raid conducted by the *Bundeskartellamt* is based on a court's order. The court receives all necessary information in advance to decide if there is reasonable suspicion and that the principle of proportionality has been followed. While conducting dawn raids the *Bundeskartellamt* acts with rights comparable to those of a public prosecutor and can ask for support of police forces, if there is a need to ensure that the measures taken are effective. Police ensures e.g. access to the undertaking's offices and the cooperation during a dawn raid. In the worst case the police forces can arrest people who disturb the dawn raid in a way that the success of the measure is put into question.

The whole proceedings i.e. analysis of evidence, examination of witnesses and defendants, drafting the decision until the determination of the fines, is done within the responsible department of the *Bundeskartellamt*. All decisions in the *Bundeskartellamt* are taken by the responsible rapporteur for a case, the head of department and the cases handler.

After receiving the *Bundeskartellamt's* decision, enterprises and its representatives have the options to pay the fine imposed, if they agree with the charges and assessment of the *Bundeskartellamt*, or can appeals against the order at a Higher Regional Court with a specialised jurisdiction for competition law.

The German competition authority itself has comprehensive powers to combat competition infringements. In other jurisdictions, especially if cartel infringements are pursued under criminal laws, there is a different division of the rights of the competition authority and the courts.

For example, the Danish Competition Council only has the power to make identify an infringement and issue an order to bring the infringement to an end or to take a commitment decision. It has no power to impose fines. In order to impose a fine in a cartel case, it is required that the Director General of the Danish Competition Authority makes an assessment whether to hand over the case to the Public Prosecutor for Serious Economic and International Crime.

Especially in a system where a cartel infringement is considered to cause a criminal offence, the investigations and findings of the competition authorities form an indictment for the subsequent lawsuit (e.g. Department of Justice, USA).

3.3.5 Detection of cartels

There are many different sources which can lead to the detection of cartels. For example, the *Bundeskartellamt* has received information indicating illegal agreements from

- market players,
- former cartel members or
- enterprises conducting a due diligence while entering into a contract with another company to merge.

Some of these sources use an anonymous whistle-blowing system which was launched in 2012, or information from other law enforcement agencies. The *Bundeskartellamt* also conducts its own research or follows up on new information gathered in ongoing proceedings.

The *Bundeskartellamt's* Leniency program is of significance in the context of the detection of unlawful agreements. Over half of all cartel proceedings are triggered by information provided by key witnesses. The *Bundeskartellamt* can grant cartel members, who contribute to uncovering a cartel, immunity from or a reduction of fines. The Leniency program sets the conditions under which immunity from or a reduction of fines can be granted. The clear majority of competition authorities worldwide use such an investigation tool.

3.3.5.1 The Leniency program helps to uncover cartels

In cases of anti-competitive agreements, it is unclear who committed an infringement. Even the fact that an infringement has taken place is initially unknown. Illegal cartel agreements are conducted in secret. There is a high level of conspiracy: The cartel members rarely produce written documents, and they try to hide possible evidence or destroy evidence at an early stage. In the eyes of outside observers, excessive prices could have many other causes. Consequently, it is usually a big challenge for competition authorities to discover an infringement at all, let alone secure sufficient evidence to prove the illegal cartel agreement and impose a fine. After all, the administrative order imposing the fine needs to withstand judicial review. In order to effectively combat cartels, it is often only possible to uncover cartel agreements with the help of an insider. It is therefore essential to induce cartel members to cooperate with the competition authority. This can be achieved by a key witness scheme, the Leniency program. The incentive for cartel members to cooperate with the competition authority and uncover a cartel is the prospect of gaining immunity from a fine or at least a substantial reduction of the fine imposed.

It might appear unjust that the application of the Leniency program can lead to an offender "escaping" punishment. It should be noted, however, that without the information provided by the key witness the cartel might not have been uncovered at all, and then no sanctions could have been imposed and the cartel could have continued longer. Private claims for damages can also be brought against key witnesses after the authority's proceedings have been concluded, albeit with some restrictions.

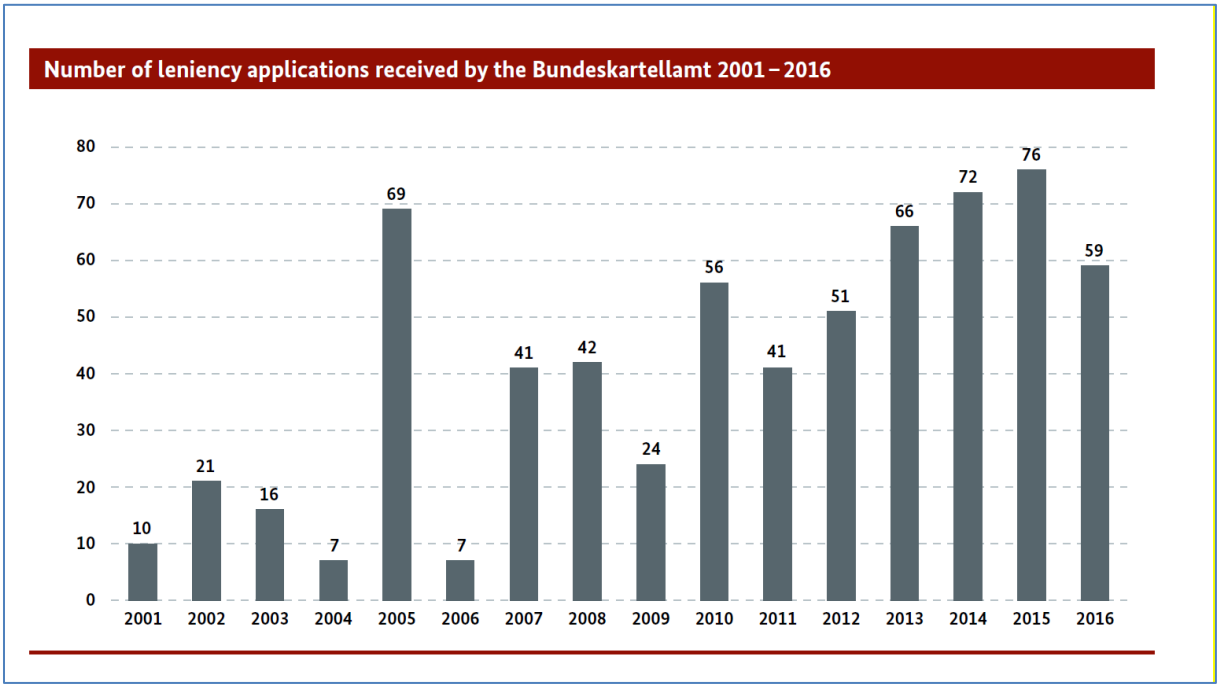
3.3.5.2 The Leniency program serves as a deterrent

The Leniency program not only serves to improve gathering of evidence, but also has another objective: an increased deterrent effect before an agreement is reached. The prospect of immunity from a fine creates uncertainty among cartel members as to whether one of them might blow the whistle at some stage to secure immunity. This element of uncertainty has an effect even before an illegal agreement is reached because the companies have to reckon with the cartel agreement being uncovered and proved through a Leniency application and them having to face painful sanctions and

damages actions from injured parties. As a consequence, companies abstain from entering into such illegal agreements which, in turn, prevents considerable damage to the national economy.

Figure 1

Number of leniency applications received by the *Bundeskartellamt* 2001 – 2016



Source: Bundeskartellamt

3.3.5.3 How does the Leniency program work in Germany?

The Leniency program is applicable to all participants in a cartel, both individuals and companies. It clearly distinguishes between immunity from and reduction of a fine. Only the first applicant will be granted immunity from a fine, further applications can only lead to reduction of a fine by up to 50 %:

The first applicant to disclose information and evidence giving rise to the initial suspicion of a hardcore cartel will be automatically granted immunity from a fine. This provision only applies if the applicant cooperates fully and on a continuous basis with the *Bundeskartellamt*, and was neither the only ringleader of the cartel nor coerced others to participate in it. If the first applicant only comes forward after the *Bundeskartellamt* has already formed an initial suspicion, he/she will have to do more to be granted immunity, i.e. he/she will have to enable the *Bundeskartellamt* to prove the offence.

All other applicants who cannot be granted immunity can have their fines reduced by a maximum of 50 %, provided they cooperate fully and continuously with the *Bundeskartellamt*. The amount of the reduction granted depends on the value of the cooperation and the order of precedence of the application in the Leniency queue.

The Leniency program is only applicable in cases of horizontal agreements and coordination between competitors. For other infringements of competition law, for example, violation of the prohibition of vertical price fixing, the cooperation provided by applicants can, however, also be considered as a mitigating factor in the calculation of the fines. One objective of the Leniency program is to make it as

easy as possible for cartel members to cooperate with the *Bundeskartellamt*. An application can therefore also be filed verbally and/or in English.

The applicants' position in the Leniency queue is decisive for their immunity from fines or the amount of reduction of their fines. However, cartel members do not often have the extensive information required for a Leniency application right away. With its 'marker' system the Leniency program offers the possibility to secure a position in the queue for a certain amount of time. Applicants declare their willingness to cooperate with the *Bundeskartellamt* and indicate the type and duration of the infringement; the product and geographic markets affected as well as the identity of the cartel members. In addition, a marker application must indicate other competition authorities where applications have been or will be filed. The applicant then receives a confirmation of receipt and has a maximum of 8 weeks to prepare a complete Leniency application. If the application is filed within this period, the position in the Leniency queue is safeguarded and other Leniency applications filed in the meantime move down in the queue.

Box 2

The Milling Cartel

Since 2000 some senior members of staff of the milling companies involved agreed on prices, customer allocation and supply volumes in numerous regular rounds of talks. The agreements applied to all forms of distribution and almost the whole territory of Germany. Agreements like this are hard core restrictions of competition and per se illegal and unjustifiable.

In February 2008, the *Bundeskartellamt* searched several milling companies in Germany after receiving information from the market about agreements on prices and quantities. The companies sold their flour to industrial producers and bakers (such as e.g. bakery product manufacturers and bakery chains) and to artisan bakers. Some milling companies with small packaging units sold flour in small packets (usually 1 kg packets) directly to food retailers.

In addition, the companies coordinated capacity planning by shutting down mills or preventing mills which had already been shut down from being returned to operation.

After receiving information from the market the *Bundeskartellamt* organised dawn raids which were conducted simultaneously at various locations with support of police forces. Relevant evidence has been seized and send for further analysis to the premises of the *Bundeskartellamt*. During the dawn raids, witnesses and possible defendants have been interrogated and Leniency applications have been received.

In cartel proceedings against companies in the milling industry the responsible department of the *Bundeskartellamt* has imposed a fine of more than EUR 65 m on undertakings on account of its involvement in illegal agreements in the sale of flour. The *Bundeskartellamt* granted a reduction in fine for one of the members of the cartel for its extensive cooperation in clarifying the accusations. Fines are generally calculated according to the seriousness and duration of the cartel law violation. While establishing fines, the *Bundeskartellamt* always takes account of the economic viability of the individual company and, can make use of measures such as deferment of payment and payment in instalments as far as the financial obligation imposed on the cartel members are concerned.

3.4 Sector Inquiries (Monitoring of Markets)

Since the 7th Amendment of the ARC in 2005 the *Bundeskartellamt* is entitled to conduct sector inquiries to gain an impression of the competition situation in certain economic sectors if rigid price structures or other circumstances provide reason to assume that competition in these sectors may be restricted or distorted.

Sector inquiries are not targeted against individual companies nor do they follow up a particular suspicion of a cartel violation. Their explicit purpose is to gain extensive information about the markets concerned. For example, the *Bundeskartellamt* launched a milk sector inquiry to examine all market levels from the dairy farmer through the dairy to the retail trade. The inquiry was triggered by evidence that there was only limited competition at individual market levels of the milk sector.

Market knowledge acquired from a sector inquiry can also be useful for the *Bundeskartellamt* in other proceedings. A sector inquiry in the fuel sector, for example, has furnished evidence regarding a dominant oligopoly existing in the German petrol station markets, consisting of Shell, BP, ExxonMobil, ConocoPhillips and Total. This knowledge is also important for merger control proceedings as they must determine whether a merger is expected to create a dominant position or strengthen an existing dominant position. If a sector inquiry finds evidence of a cartel agreement or abuse of market power under competition law, specific proceedings can be initiated. Where competition law instruments fail to produce sufficient evidence, sector inquiries can provide the legislator with options on how to improve competition control.

4 Conclusion

In a free market economy the interplay between supply and demand determines what kind of goods and services shall be exchanged, their prices and quality. Competition means that several companies compete with one another for the favor of customers. In a competitive environment customers or suppliers can switch to another company. Consequently, companies endeavor to offer their goods or services at the lowest possible price and to improve their quality. Competition therefore encourages companies to be innovative.

In a free market economy there is also a lot of leeway for market participants to act and to interact with other participants. Competition intents to force market participants to struggle for their success. Where there is freedom for the individuals, there is always a risk that some market players may abuse this freedom for their own benefit by limiting competition. To ensure viable competition on markets a strong competition enforcer is needed, not only equipped with instruments that contribute to a proper competition law enforcement. It is the interaction between those tools described above that reveals competition concerns and ensures a proper functioning of the markets for the benefit of all.

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