



Bundeskartellamt



open markets | fair competition

Effective cartel prosecution

Benefits for the economy and consumers



Foreword

Dear Reader,

Today, the fact that competition generally produces the best overall economic results is undisputed in most national economies. Well-functioning competition also puts companies under pressure because they have to optimize their products and prices in order to win and keep customers. Consequently the temptation to eliminate competition is equally great, especially in times of economic crisis.

Cartel agreements lead to higher prices for the consumer and a decline in supply. The expectation that restraints of competition can overcome economic problems or the challenges posed by structural change and that it can secure jobs is also illusory. Quite the contrary: Sustainable growth and secure jobs can only be created by competitive companies.



The cost of illegal agreements to the economy is immense. Simply banning cartel agreements under competition law is not enough. More importantly, it is absolutely essential that the ban is effectively enforced. This is not an easy task because cartels are difficult to detect. The Bundeskartellamt has successfully and vigorously enforced the ban on cartels for well over 50 years and in recent years has significantly stepped up its efforts in cartel prosecution.

By illustrating case practice over the last ten to fifteen years this brochure explains the special challenges of cartel prosecution and why this sometimes arduous task is worthwhile for all of us.

I wish you interesting reading!

Yours sincerely

A stylized, handwritten signature in black ink, consisting of a large, sweeping initial 'A' followed by a series of connected loops and a long horizontal stroke extending to the right.

ANDREAS MUNDT
PRESIDENT OF THE BUNDESKARTELLAMT

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I. Cartel prosecution: Central task of the Bundeskartellamt

If several enterprises co-ordinate their market conduct with the object of restricting or eliminating competition, this is called a cartel. Cartels which fix prices or divide markets among their members lead to excessive prices, coupled with inferior product quality, and hurt the economy as a whole and the consumer in particular. By specifically eliminating the uncomfortable yet disciplinary pressure created by effective competition, cartels also undermine the basis for sustainable growth and the dynamic power of innovative companies. Cartels are therefore highly damaging to society and cannot be considered merely trivial offences. Consequently, the prosecution and punishment of illegal cartels is a key task of public antitrust enforcement. It is no coincidence that the prohibition of anti-competitive agreements is formalized in the first paragraph of the Act against Restraints of Competition (ARC). Cartels are prosecuted as administrative offences and can carry heavy fines. In this regard the competition authorities have powers similar to those of a public prosecutor.

“There have never been as many unemployed in German economic history as in the period when cartels flourished most strongly. Cartels always have to be paid for by a lower standard of living.”

Ludwig Erhard:
Wohlstand für alle (Prosperity for all),
Düsseldorf/Vienna,
8th edition 1964, p. 185 f.

1. Increased effectiveness of anti-cartel enforcement

The Bundeskartellamt has always given high priority to the prosecution and punishment of illegal agreements, especially price and quota cartels and customer or territorial allocation agreements (so-called hardcore cartels). With the introduction of several measures over the last ten years it was able to further improve the effectiveness of its cartel prosecution, to the benefit of the economy as a whole and the consumer:

Key Witness Programme: Leniency programme

Since 2000 the Bundeskartellamt has an extremely successful key witness programme (so-called “Leniency Programme”). Cartel members who confess their involvement in a cartel to the Bundeskartellamt and so help to uncover a cartel are under certain conditions granted immunity from or a reduction of fines. In March 2006 the Leniency Programme was revised and made even more effective. Thanks to this programme a whole series of cartels have been successfully uncovered and punished in recent years.



The Leniency Programme in brief:

- Whoever as the first participant in a cartel agreement uncovers a cartel of which the Bundeskartellamt has no previous knowledge, always receives immunity from a fine (“first come, first served” principle). If the cartel was already known to the Bundeskartellamt at the time of the leniency application, the first applicant generally receives immunity from a fine if he can provide evidence of the offence and the Bundeskartellamt has insufficient evidence to prove the offence itself. The sole ringleaders and those members of a cartel who have coerced others to participate in the cartel are excluded from immunity from a fine.
- All other leniency applicants are eligible to a reduction of fines, depending on the probative value of their cooperation, which can amount to a maximum of 50 % of the fine.
- The requirement for immunity from and a reduction of fines is the continuous and unlimited cooperation of the leniency applicant with the Bundeskartellamt.

The Leniency Programme is explained in detail on p. 17.

Special Unit for Combating Cartels

In 2002 the Special Unit for Combating Cartels (SKK) was launched, which assists the Decision Divisions in the planning and implementation of investigatory measures (e. g. dawn raids) and in the increasingly complex evaluation of evidence.¹

Specialized Decision Divisions

The Decision Divisions at the Bundeskartellamt are mainly organized according to sectors of the economy. In 2005 and 2008, however, as a measure to further intensify the authority’s cartel prosecution activities, two new divisions, the 11th and 12th Decision Divisions, were set up which are dedicated to the cross-sector prosecution of so-called hardcore cartels (price and quota cartels, territorial and customer allocation agreements).

Number of cases

These measures and improved human resources have enabled the authority to follow up new indications of illegal agreements even more vigorously than in the past. The Bundeskartellamt’s increased effectiveness in prosecuting cartels is reflected in the development of the number of detected cartels. If we look at the last 16 years and take a four-year aggregate period to map a trend, we see that the number of proceedings initiated² has almost tripled: Whilst between 1994 and 1997 only seven cartel proceedings were initiated, this number increased to 20 between 2006 and 2009. A similar pattern emerges in the number of proceedings concluded³. Here the number increased from five proceedings between 1995 and 1997 to 14 proceedings between 2006 and 2009.

1 Details about the course of cartel proceedings can be found on p. 20.

2 A cartel proceeding is considered as initiated from the initial dawn raid.

3 A cartel proceeding is considered as terminated once a first fine has been imposed.

Diagramme 1
Cartel proceedings initiated and concluded
between 1994 and 2009

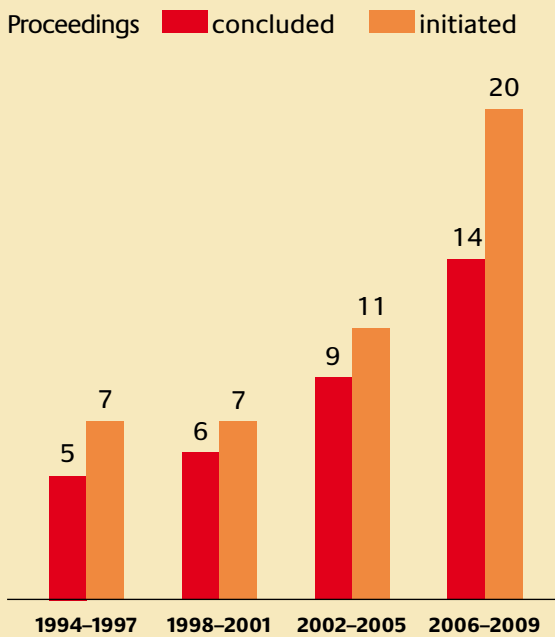
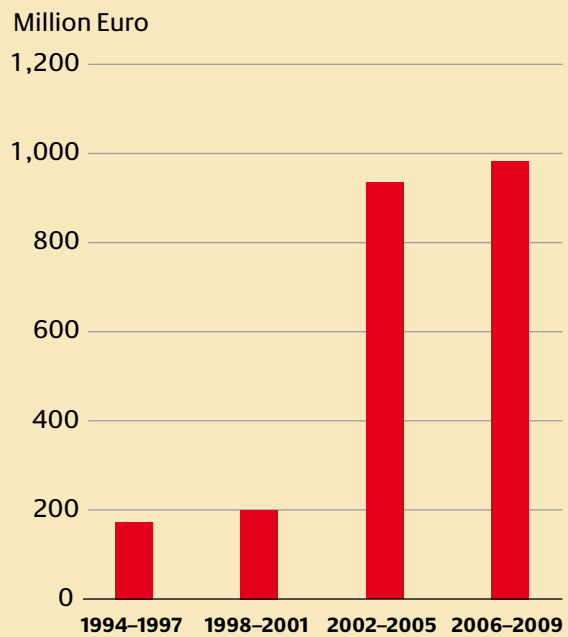
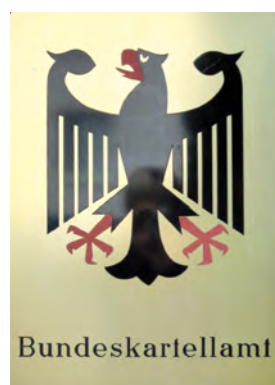


Diagramme 2
Fines imposed in cartel proceedings
between 1994 and 2009



Here the term proceeding means the prosecution of one cartel. Depending on the number of cartel participants (companies as well as employees involved), one proceeding can cover several cases. In the coffee proceedings in 2009, for example, fines were imposed in nine cases (against three coffee roasters and six employees).



Punishment of cartels with heavy fines

The increased intensity in the prosecution of hardcore cartels is reflected, among other things, in the level of fines imposed by the Bundeskartellamt. For example, the total sum of fines imposed in cartel proceedings rose from approx. € 165 million between 1994 and 1997 to almost € 1 billion between 2006 and 2009.

The fines collected are paid into the state budget.⁴ The criteria for setting fines is explained in detail on p. 23.

⁴ Since 1 July 2009 all fines collected by the Bundeskartellamt have been paid into the state budget. Previous to this any fine imposed as the result of a court decision was paid into the treasury of the respective federal state.

2. Effective deterrence as a major goal

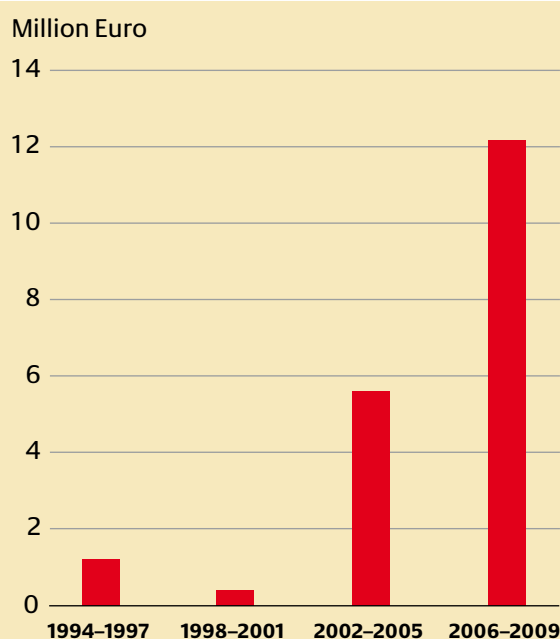
The aim of cartel prosecution is not only to uncover and end cartels. Its primary objective is to create the greatest possible deterrent effect. The negative effects of anticompetitive agreements can best be avoided if cartels are unable to emerge in the first place. To achieve this, the probability of an illegal cartel being uncovered and severely punished must be sufficiently great.

Higher fines as a deterrent

The significance of the fines imposed goes beyond the detection and punishment of individual cartels. Their effect is felt far beyond the concluded proceedings. The fear of being fined can deter others from forming a cartel.

However, the impending sanction has to be appreciable to the cartel participant for it to have an effective deterrent effect. If a cartel member is able to pay the impending fine out of the “petty cash”, the deterrent effect of the cartel prosecution is inevitably too little. Even the most effective competition authority would be fighting a losing battle here. As a consequence, heavy fines can be imposed to punish cartels. Since the level of fines was brought into line with European law in 2005, a fine can amount to up to 10 % of the turnover of a company.⁵

Diagramme 3
Average fine per company



In retrospect, fines imposed on individual companies in the 1990s were on average significantly lower than those imposed in recent years: Whilst these amounted to around € 1.2 million between 1994 and 1997, this sum had increased ten-fold to approx. € 12 million by the period 2006–2009. This considerable increase in the average levels of fines imposed also significantly raises the deterrent effect of cartel prosecution.

⁵ The criteria for setting fines are explained in detail on p. 23.

Table 1
Selected maximum fines⁶

Year	Cartel proceeding	Total fines imposed	Highest single fine against a company
		Euro	Euro
2003	Cement	700,800,000	251,500,000
2005	Industrial insurance companies	151,400,000	33,850,000
2007	Liquefied Petroleum Gas	248,950,000	67,200,000
2008	Clay roof tiles	188,081,000	66,280,000
2008	Décor paper	61,000,000	25,000,000
2009	Coffee	159,000,000	83,000,000

The latest average fine of approx. € 12 million includes several smaller cases with low fines. However, much higher fines were imposed on individual companies than would seem possible at a first glance at the average figure. Table 1 shows as examples the amounts of individual fines imposed in cases of great economic significance. The deterrent effect of these figures is also correspondingly great.

The fines imposed are not intended to permanently weaken the companies participating in a cartel or to even force them out of the market or into insolvency. On the contrary, the economic viability of the companies concerned is always taken into account when a fine is set. German law also offers more leeway by allowing for the deferment of payment; in this way an adequately deterrent level of fines is achieved without jeopardising the further existence of the companies concerned.

⁶ Since litigation is still pending in individual cases, not all the fines are final. In the cement proceedings, the fine was reduced by the Düsseldorf Higher Regional Court to approx. € 400 million.

Key Witness Programme: Leniency Programme

The Leniency Programme already mentioned above also reaches beyond the objective of uncovering existing agreements. It also has a strong deterrent element. The cartel members can no longer be certain that their illegal agreement will remain undetected. As a result, the stability of cartel agreements is effectively weakened and in many cases illegal agreements cannot even materialize. The Leniency Programme is therefore an essential component of a pre-emptive competition policy which is focused on preventing illegal cartels from the outset.⁷

Private damages actions

Private damages actions are a tool which can further accentuate the deterrent effect of competition law. If cartel members have to expect additional actions for damages from customers harmed by the cartel as well as a heavy fine, this appreciably weakens the attractiveness of illegal agreements. This form of cartel prosecution has also been strengthened in recent years by legislative measures and several court decisions. An important function of private damages actions is to compensate the individual damage caused by a cartel infringement.

However, a sense of proportion needs to be maintained in the design of the legal framework for such damages actions. Over-emphasizing the individual aim of compensation or even the emergence of a “claims industry” such as witnessed to some extent in the United States of America, would weaken public cartel prosecution and the effectiveness of the Leniency Programme and would therefore be counter-productive.⁸

7 The Leniency Programme is explained in detail on p. 17.

8 Please find more details on p. 26.

II. An approach which pays off, especially for consumers

The prosecution of illegal hardcore cartels (price, quota, customer allocation and territorial agreements) is the area of effective competition protection which has the most direct positive effect on the economy and consumers. Due to their price-increasing effects and negative consequences for product quality, cartels cause great harm to the economy as a whole which can only be prevented if they are effectively prosecuted and broken up. Once a cartel is uncovered, the pressure from reinstated competition often directly leads to lower prices. Effective cartel prosecution therefore produces considerable benefits, especially for the consumer.

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, especially for the consumer. The following results can be derived from a condensed analysis of over 250 publicized studies on the effects of individual illegal cartels.⁹

- On average cartel agreements lead to **prices which are 25 % higher** than they should be, i. e. customers and consumers have to pay a price which is 25 % in excess of the price they would pay if competition were not distorted and functioning well.

- **International agreements** involving suppliers from several countries are even more damaging. In such cases the average price increase as a result of the cartel stands at **over 30 %**.

These percentage figures represent in some cases extremely large sums of money. For example, the estimated total damage caused by an international cartel which had completely eliminated competition in the manufacture of synthetic vitamins, amounted worldwide to over US\$ 8 billion from 1990 to 1999¹⁰ (at the current rate approx. € 6.7 billion). Harm caused to the consumer in Europe rose to approx. US\$ 3 billion (at the current rate approx. € 2.5 billion).

Specific experience in Germany also shows that hardcore cartels lead to overly excessive prices and harm the economy and, in particular, the consumer. For instance, in a proceeding before the Düsseldorf Higher Regional Court an economic expert ascertained that due to an illegal cartel, prices for a tonne of cement in Germany during the period from 1991 to 2002 were on average approx. € 6 higher than they should have been, i. e. overpriced by approx. 10 % (see box p. 13). Alone the price effect of this cartel caused an annual loss of approx. € 180 million. If the Bundeskartellamt had not uncovered and successfully broken up this cartel, the German economy and consumers would be unjustly obliged to pay at least this amount year for year.

⁹ Connor, John M., Global Price Fixing, Berlin 2008, p. 45.

¹⁰ Connor, John M., Global Price Fixing, Berlin 2008, p. 338.

Example: The cement case

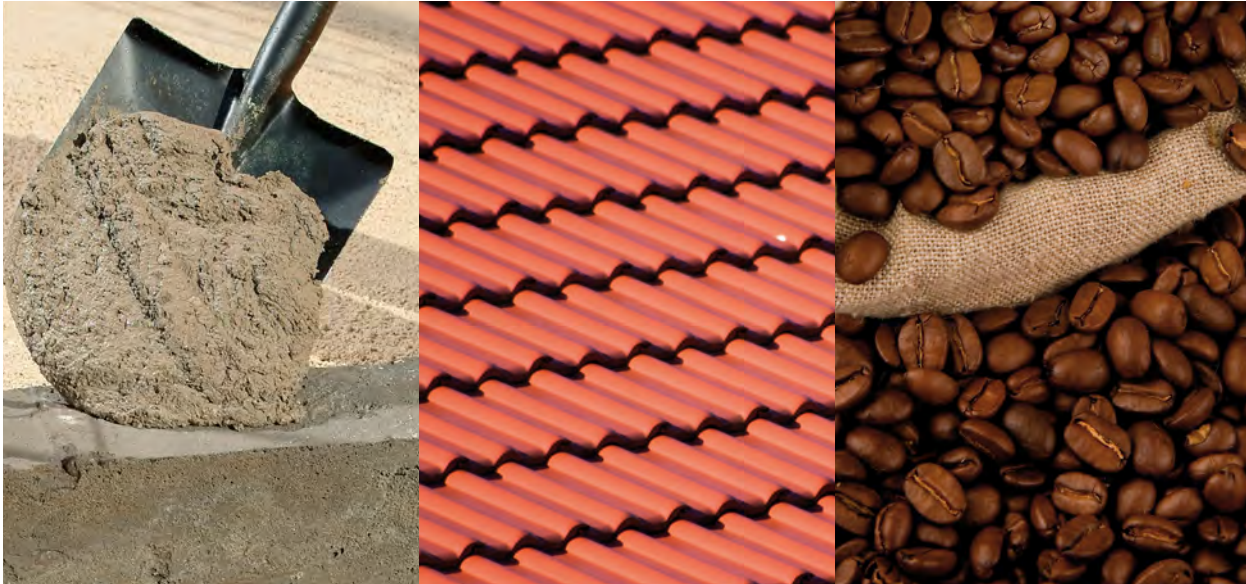
In examining a fines decision by the Bundeskartellamt, the court commissioned an economic expert to determine the price effect of a long-standing illegal cartel in the German cement market. Substantiated by extensive empirical data, the expert's analysis came to the following conclusions:

- As a result of the illegal cartel, the prices for a tonne of cement nationwide in Germany were almost € 6 above the price if effective competition had been in place. The economic expert himself gave this amount as a very conservative estimation.
- A cement price of approx. € 50 to 60 per tonne was to be assumed for the relevant period of the cartel agreement.
- Consequently, as a result of the cartel, the expert estimated that the cartel members were able to demand a price which was on average at least 10 % in excess of the price if effective competition had been in place.

In Germany the annual demand for cement is approx. 30 to 40 million tonnes. Alone in the first year after the cartel was uncovered, its discovery prevented potential losses of at least € 180 million.

After the cartel was ended, there was a strong upturn in price competition and the prices per tonne of cement immediately collapsed by more than € 10 per tonne. This case alone clearly exemplifies the direct benefits which can be gained from effective cartel prosecution by the Bundeskartellamt and the preventative approach towards effectively deterring illegal agreements.

Cartel agreements also cause immense monetary damage to the public sector. Just like private consumers, the Federal Government, Länder and municipalities have to pay excessive prices if cartels are not detected and ended. This not only applies to building materials like cement and concrete, which are used in great quantities for public works. The Bundeskartellamt is, for example, also conducting proceedings against cartel agreements on the supply of road salt and fire engine bodies. Here again the public sector as the injured party suffers greatly from excessive cartel prices.



2. The benefits of effective cartel prosecution

Specific cartel cases already give us an idea of the extreme anti-social character of cartel agreements and the benefits of effective cartel prosecution. However, the real dimension of this harm to society only becomes apparent on the realisation that 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: cement, clay roof tiles, industrial insurance, décor paper, lique-

fied gas, and coffee – to mention only the most significant cartel cases of recent years.

Using numerous economic analyses on the empirically based price effects of cartels,¹¹ several competition authorities have assessed the positive effects of their prosecution activities in recent years.¹² The results are impressive:

- In its 2008 report on competition policy¹³, for example, the European Commission estimated the economic benefit of the detection of a total of 18 cartels on which fines were imposed during the period 2005 to 2007. According to the report, the benefit to the consumer from the preven-

¹¹ See p. 12.

¹² These analyses are based on various assumptions on the probable duration or price effects of the cartels had they not been successfully uncovered. Such assumptions are unavoidable. Measuring exactly the price effect in an individual case can prove very tedious and predicting how long a cartel would have existed without being uncovered, is necessarily equally fraught with uncertainty. However, as long as estimations are based on very cautious assumptions on these contributory factors, these give a valuable impression of the anti-social character of this extreme type of competition restraint and an equally conservative value of the direct economic benefits of cartel prosecution.

¹³ EU Commission, 2008 Report on Competition Policy, Brussels 2009, para. 13; Report available at: http://ec.europa.eu/competition/publications/annual_report/index.html



Direct benefits of € 500 to 750 million per year...

And what benefits do the Bundeskartellamt's cartel prosecution activities have for the German consumer? At a conservative estimate, by uncovering and breaking up cartels the Bundeskartellamt has over the last years brought benefits to the German consumer of € 500 to 750 million a year. Were one to assume that without their detection and dissolution the cartels penalized between 2003 and 2009 would still be active today, this would mean an annual loss to the consumer or benefit from the authority's successful cartel prosecution of approx. € 750 million for the year 2010. Even assuming that some of the detected cartels might have also collapsed without the Bundeskartellamt's intervention, the result is still impressive. If, for example, one were to apply the estimate approach¹⁵ used by the British competition authority to assume the "duration" of cartels, this would still result in an annual saving of approx. € 500 million for 2010.

tion of the economic damage which these illegal agreements would have caused amounts to approx. € 7.6 billion, i. e. approx. € 2.5 billion per year. These estimations were based on a price effect of only 10 %, which, compared with previous studies, that apply an average price effect of 25 %, is a very conservative approach.

- In a similar analysis, which is based, however, on slightly different assumptions, the British competition authority (Office of Fair Trading) puts the total benefit of its cartel prosecution activities from 2006 to 2009 at approx. GBP 223 million (approx. € 200 million), i. e. an average benefit of approx. GBP 78 million per year (approx. € 70 million).¹⁴

¹⁴ Office of Fair Trading, Positive Impact 08/09, London 2009, p. 38; report available at: http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFT_s-work/offt1102.pdf

¹⁵ See box p. 16.

Assessing the direct benefits of cartel prosecution

The economic benefit of the Bundeskartellamt's prosecution activities for the consumer can be assessed on the basis of existing scientific results on the price effects of an illegal cartel agreement. The following criteria and assumptions can be used as the starting basis for a very cautious and conservative estimate:

- Consideration of the most significant cartel cases of recent years, based on the level of the fine imposed.
- The – cautious – assumption that a cartel on average leads to excessive prices of at least ten percent; at 25 % the price effect of illegal agreements deducible from empirical studies clearly exceeds this percentage.
- Regarding the duration of cartels, various assumptions seem justifiable. On the one hand, it could be assumed that all the cartels prosecuted during the period 2003-2009 would still be active today without the Bundeskartellamt's intervention. On the other hand, one could follow the estimate approach of the British competition authority, the OFT. First of all the OFT takes into consideration how long a cartel has already existed and makes a flexible prognosis on how long the cartel would have survived in the future. If the cartel had already been in existence for a long time, it is assumed, for example, that it is a stable cartel, which, if undetected, would have continued for several years more.

...and additional, scarcely quantifiable indirect benefits

These estimates in themselves show the considerable direct benefits of cartel prosecution. However, the figures given above represent only a fraction of the overall benefit to the economy of effective cartel prosecution. Its indirect effects, especially signal and deterrent effects, also have a positive impact. Although it is difficult to quantify the positive effects of these indirect benefits, they should by no means be underestimated. Even if the deterrent effects of effective cartel prosecution prevent only

a single cartel in a market which is significant for the wider economy, this will already bring benefits to the economy and consumers on a scale of several € 100 million.

By comparison, the annual budget of the Bundeskartellamt is less than € 25 million. From this it would seem fair to conclude that cartel prosecution by the Bundeskartellamt and its successful intensification over the past years is a worthwhile operation, not least for the consumer.

III. Uncovering cartels: the Leniency Programme – a key success factor

Agreements between companies and concerted practices of companies are particularly damaging to the national economy if they are reached between competitors and concern key competition parameters (such as prices, quotas, customers or supply areas). Owing to their antisocial character, such ‘hardcore cartels’ are punished with heavy fines.¹⁶ Nevertheless, there are always some competitors who will agree on joint price increases or allocate customers.

1. The Leniency Programme fulfils several functions

The Leniency Programme helps to uncover cartels

Due to the threat of heavy fines, cartel agreements are usually entered secretly. There is a high level of conspiracy: the cartel members rarely produce written documents and try to hide possible evidence or destroy it at an early stage. As a consequence, it is usually very difficult 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 necessary 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 is achieved with the help of the Leniency Programme, under which a cooperation with the Bundeskartellamt can lead to a reduction of or even immunity from a fine.

The Leniency Programme serves as a deterrent

The Leniency Programme not only serves to improve the gathering of evidence, but also has a second 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 shy away from entering into such illegal agreements which, in turn, prevents considerable damage to the national economy.

2. Development and revision of the Leniency Programme

As one of the first competition authorities after the European Commission, the Bundeskartellamt decided as early as 2000 to make a special offer to cartel members willing to leave a cartel: Those uncovering an until then unknown cartel will be granted immunity from a fine. Those cooperating after the Bundeskartellamt has become aware of the agreement will be granted a reduction of their fine, the amount of which will depend on the value of their contribution to clarifying the facts of the case. Here the ‘first come first served principle’ applies: those who approach the Bundeskartellamt first will be

16 See p. 23.



granted the largest reduction. By and by, other competition authorities in the European member states also introduced leniency programmes. For this reason, and also in view of the fact that agreements in Europe increasingly have a cross-border dimension, a model leniency programme was drafted at European level¹⁷, which was to be used as a reference by the national authorities and the European Commission. Based on its experiences with its first programme, and in anticipation of the European model programme, the Bundeskartellamt revised its leniency programme in 2006. Its aim was to define more clearly the provisions of the programme and to provide companies with more transparency and legal certainty. On 15 March 2006 the new leniency programme came into force.¹⁸

3. How does the Leniency Programme work?

The revised leniency programme of 2006 clearly distinguishes between immunity from and reduction of a fine. Only the first applicant will be granted immunity from a fine, later applications can only lead to reductions of a fine of up to 50%:

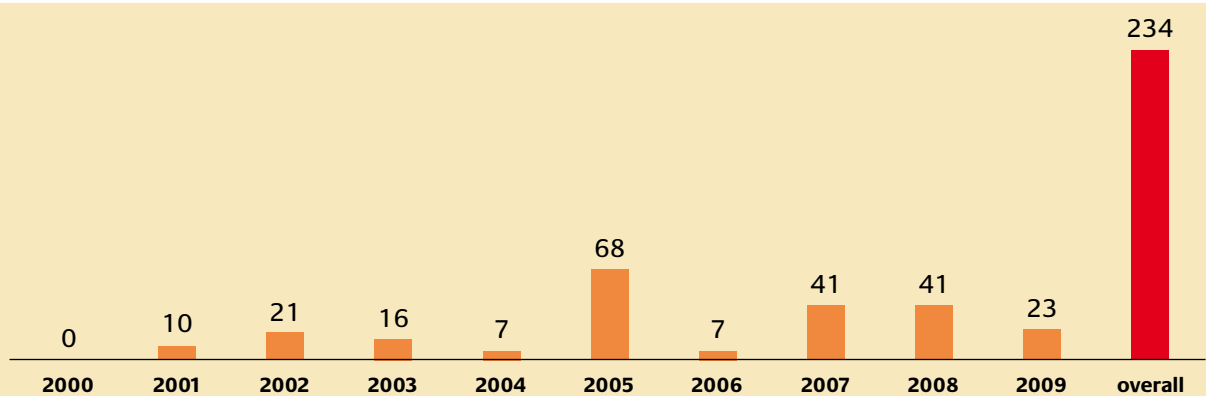
- The applicant who is first to disclose information and evidence which raises the initial suspicion of a hardcore cartel, will be automatically granted immunity from a fine. This provision only applies if the applicant cooperates fully and on a continuous basis with the Bundeskartellamt and was neither 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 will have to do more to be granted immunity. He has to enable the Bundeskartellamt to prove the offence and cooperate on a continuous basis with the authority.
- 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.

One objective of the leniency programme is to make it as easy as possible for cartel members to cooperate with the Bundeskartellamt. An ap-

¹⁷ The ECN leniency programme in the Internet: www.ec.europa.eu/competition/ecn/model_leniency_de.pdf

¹⁸ Notice no. 9/2006 of 7 March 2006 on the immunity from and reduction of fines in cartel cases, Leniency Programme; available on the Internet at www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf

Diagramme 4
Number of leniency applications filed 2000–2009



plication can therefore also be filed verbally and/or in English. An applicant's position in the leniency queue is decisive for his immunity or the amount of reduction of his fine. However, cartel members often do not have immediately available the extensive information required for a leniency application. With its 'marker system' the Leniency Programme therefore offers the possibility to secure a position in the queue for a certain amount of time. The applicant declares his willingness to cooperate with the Bundeskartellamt and indicates the type and duration of the cartel law violation, the product and geographic markets affected, as well as the identity of the cartel members. In addition, a marker application must state at which other competition authorities applications have been or are intended to be filed. The applicant then receives a confirmation of receipt and has a maximum of 8 weeks to draft a complete lenien-

cy 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.

4. Number of leniency applications filed to date

The first version of the Leniency Programme was already a success. This can be seen by the number of leniency applications filed: Between 2000 and 2005 a total of 122 leniency applications were filed. Under the new Leniency Programme, a further 112 were filed in only four years (2006–2009). Thus, more than 230 leniency applications have already contributed to successfully uncover, end and punish cartel agreements.¹⁹

¹⁹ The number of applications exceeds the number of proceedings, since the investigations are usually directed against several parties and each party can apply for leniency. 'The parties concerned' are the employees who participated in the cartel agreements. The companies on whose behalf the agreements were reached are referred to as 'the companies concerned'. All in all, 234 leniency applications were filed in 88 cases.

IV. Cartel prosecution: an investigative challenge

It is very difficult to uncover and prove illegal cartels such as price and customer protection agreements. The persons involved in the agreements are usually very secretive and handle information that suggests the existence of such agreements with great care. Uncovering and proving a cartel law violation is therefore often like solving a jigsaw puzzle. First, all relevant evidence needs to be secured and subsequently analysed. And even where a cartel agreement has been proved and an order imposing a fine issued, the proceedings often continue: In many cases, they are followed by extensive court proceedings.

1. The investigatory phase

Sufficient indication of a cartel law infringement

The first challenge is to uncover an illegal cartel. Many cartels are disclosed by cartel members themselves, who make use of the Leniency Programme.²⁰ In addition, the Bundeskartellamt receives numerous, sometimes anonymous, tip-offs from market participants or informants. Serious indications are investigated by the Bundeskartellamt by way of informal talks, formal hearings and other investigations. Where the investigations reveal sufficient evidence of a cartel law infringement, the competent Decision Division decides on the institution of fine proceedings.

Privilege against self-incrimination

Once fine proceedings have been instituted, they follow to a large extent criminal procedural rules. In particular, the persons and companies that have allegedly participated in the illegal cartel agreements are not obliged to cooperate. The so-called privilege against self-incrimination applies (*nemo tenetur* principle). Since there is no obligation to provide information or evidence, the Bundeskartellamt can only secure the relevant evidence from the persons and companies concerned by searching their premises.

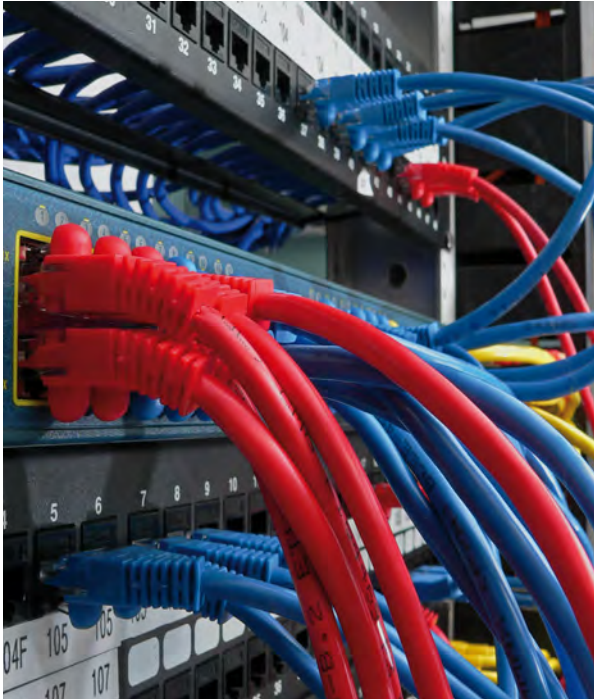
Dawn raids – preparation and deployment of staff

The next step after instituting fine proceedings is therefore to prepare a search of the premises of the persons and companies concerned. This is one of the major tasks of the Special Unit for Combating Cartels (SKK), whose staff consists of lawyers and investigative experts. In coordination with the competent Decision Division, the unit

- identifies the premises to be searched
- requests the necessary assistance from the Police and
- applies for a search warrant at the local court in Bonn.

In addition, the SKK involves the Bundeskartellamt's forensic IT experts in the planning stage, because documents that indicate illegal cartel agreements are increasingly saved electronically or sent via email due to the growing signifi-

²⁰ See p. 17.



cance of electronic media. For this reason, there are hardly any major cartel proceedings these days that do not involve the securing of IT data.

The SKK organises a search team of several Bundeskartellamt staff members for each premise to be searched and provides it with the relevant information.

How many sites are searched depends on the size of the case; the largest operation in recent years concerned a cartel proceeding in which 144 different sites were searched. The number of staff involved depends on the number of locations to be searched and on how many persons to be searched are expected to be present on the respective premises. The 20 largest operations of recent years in terms of staff numbers involved between 50 and 921 Bundeskartellamt staff members and police officers.

On-site searches

On the date of the dawn raid the judicial search warrants are executed. Search teams consisting of Bundeskartellamt staff and police officers search for relevant evidence, in particular in the offices of individuals that are suspected of having participated in the agreements. If relevant evidence is found, this will be secured and, in cases where evidence is not voluntarily handed over, seized. Not only incriminating or exculpatory documents are important, but also all documents which are relevant for the setting of the fine, e.g. salary or turnover statements and accountants' opinions.

Practical experience

In early 2008 the Bundeskartellamt conducted a major dawn raid on the suspicion that more than 50 companies had been involved in price-fixing agreements for several years. Consequently, a huge amount of data had to be analysed: In the course of the dawn raid almost 8 million file elements were secured at more than ten locations, e. g.

- approx. 513,000 documents (Word, PDF and html formats),
- approx. 118,000 work sheets (Excel and other spreadsheet formats),
- approx. 451,000 diagrams (inter alia Power Point format) and
- approx. 184,000 e-mail messages.

The examination of the evidence proved to be complex as it included the inspection of all electronic data secured in the dawn raid. In some cases the passwords of encrypted files had to be cracked and files with atypical formats opened by the experts of the SKK using special software.

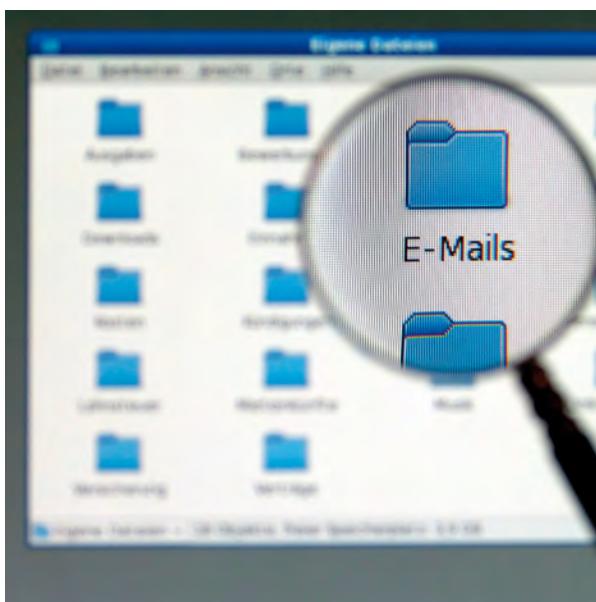
Due to their significance in proving cartels, electronic data are generally also secured during the dawn raid for further use in the proceedings. Since companies store immense amounts of data, a detailed on-site inspection is not possible without seriously impeding the company's business operations.

Evaluation of evidence seized

In order to keep interference in business operations at a minimum (also for reasons of proportionality), only a rough screening of potentially relevant data is conducted on site: The electronic data of persons whose documents could be relevant for the proceedings is copied. This data is provisionally seized and taken to the premises of the Bundeskartellamt, where it is sifted with the help of special forensic software. First, the Bundeskartellamt IT experts use laboratory techniques to secure and decrypt the data and display it in readable formats. Subsequently, the data is analysed using key words and special

filters. This analysis is carried out by the case handler, sometimes with the support of the SKK. Finally, the filtered data that is considered to be potentially relevant evidence is burned on a DVD. All other data is deleted. The companies are provided with a copy of the data and are given the opportunity to release them on a voluntary basis. If they refuse to do so, a judicial order authorising the seizure will be applied for.

In order to combine the electronically assisted examination of the IT data with the analysis of the paper documents seized during the dawn raid, papers have been scanned and digitalised for several years now. With the help of the latest data analysis software, the IT data and paper documents can thus be analysed electronically via the same search runs. Although this helps to simplify and speed up the analysis, the evaluation of the data is still like a jigsaw puzzle because often documents are not self-explanatory but can only be understood in conjunction with other documents. Further obstacles are abbreviations or encryptions.



Other investigatory powers

During the investigations, witnesses and the parties involved are questioned and further investigations conducted, e. g. at other authorities. Where the suspicion of a cartel agreement is confirmed, the persons and companies suspected to be involved in the agreement are informed in writing of the accusation and given the opportunity to comment. Often this leads to extensive hearings. In addition, comprehensive access to the files has to be granted.

2. The setting of fines

If, following its investigations and hearings the competent Decision Division considers that a fine is required for punitive and deterrent purposes, an administrative order imposing a fine will be issued. Depending on the gravity of the infringement and the special circumstances of the perpetrator in question, the fine imposed on the persons involved in the cartel will amount to up to one million Euros. In the case of companies, a fine amounting to a maximum of 10 per cent of the worldwide group turnover will be imposed, depending on the gravity and duration of the infringement.

Although sometimes very substantial fines are imposed to deter and punish cartel activity, the economic viability of the companies is always taken into account to ensure that no company will be driven into insolvency. If the companies can prove that they have financial difficulties it is possible for them to pay by instalments or have the payment of their fine deferred.

Guidelines on the setting of fines

The individual steps of setting a fine have been published in the Bundeskartellamt's Guidelines on the setting of fines.²¹

21 Available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf

The Guidelines in brief:

- First of all the turnover achieved from the infringement is determined. This is the turnover achieved by a cartel member as a result of the cartel agreement.
- On this basis the basic amount of the fine is determined which can amount to up to 30 percent of the turnover achieved from the infringement. In the case of hardcore infringements the basic amount is generally set in the upper part of this range (between 20 and 30 percent).
- Subsequently, aggravating and extenuating circumstances are taken into account.
 - In the case of aggravating circumstances (e. g. repetition of an infringement, a particularly active role in the cartel) the basic amount can be raised. If a large company is involved the fine can be raised further by up to 100 percent to ensure its deterrent effect.
 - In the case of extenuating circumstances (e. g. coerced participation in the cartel, positive behaviour after the infringement and compensation for the damage caused) the fine will be reduced.
- If the calculated fine exceeds 10 percent of the total turnover achieved by the group, the fine will be reduced to this amount.
- A leniency applicant who has not been granted full immunity from fines will have a bonus deducted from his fine (which may have been reduced).
- If, in individual cases, a fine can be expected to adversely affect a company's economic viability, this will be taken into account by allowing deferment of payment and payment in instalments.

Settlement

It is also possible to terminate proceedings by settlement. If such a settlement is agreed, an additional reduction of the fine by a maximum of 10 percent will be granted. Cartel members have increasingly made use of this. As a precondition the facts of the case as established by the Bundeskartellamt must be admitted in a settlement statement and certain procedural commitments must be made. As a rule, the Bundeskartellamt will then only issue a brief administrative order imposing a fine. Such a settlement agreement can result in fine proceedings being concluded within a very short period of time without being followed by lengthy court proceedings.

3. Court proceedings

In many cases, however, the Bundeskartellamt's proceedings and orders imposing a fine are followed by court proceedings. If an order imposing a fine is appealed against, the Bundeskartellamt examines whether the order must be changed or revoked (so-called intermediate proceedings). If the complaints are substantiated, the order will be judicially reviewed. For this purpose the Bundeskartellamt refers the proceedings to the Düsseldorf General Prosecutor's Office. After their examination by this Office the proceedings are referred to the Düsseldorf Higher Regional Court. In non-technical terms the order imposing a fine assumes the function of an indictment. If the indictment is accepted, evidence relating to the cartel infringement is taken in the main hearing.



Witnesses will be heard and experts thoroughly interviewed. The court also generally orders that the cartel participants appear personally in court for the main hearing during which they will also be questioned in detail. Documentary evidence will also be examined during the main hearing. At all hearings the Bundeskartellamt is represented in court, in addition to the General Prosecutor's Office, in order to contribute its case knowledge to the proceedings.

Based on the insights obtained from the main hearing, the Düsseldorf Higher Regional Court has to issue a new decision and, if applicable, impose a fine. At the end of the main hearing the Higher Regional Court will give judgement.

Example: The cement case

At the time when the proceedings were referred to the courts, the files of the cement cartel proceedings, in which the Bundeskartellamt imposed fines totalling approx. € 700 million in 2003, filled 17 packing boxes. The amount of time and energy spent on the proceedings at the court of first instance was extremely high: From December 2008 to June 2009, 40 witnesses were heard in 36 days of court proceedings before the Düsseldorf Higher Regional Court, and an economic expert was heard in order to estimate the additional proceeds generated by the cartel. Ultimately the Düsseldorf Higher Regional Court imposed fines of almost € 330 million. A further € 70 million had already become final before this decision.

V. Private damages actions: Using opportunities, avoiding pitfalls

Anyone violating the ban on cartels is obliged to compensate the injured party for the damage incurred. Private damages actions can be a useful complement to the competition authorities' activities. In this regard they play an important role in competition law enforcement. If cartel members have to expect actions for damages from customers harmed by the cartel in addition to a heavy fine, this appreciably weakens the attractiveness of illegal and socially damaging agreements. The main purpose of damages actions, the compensation of an individual damage caused by a cartel, is also an important objective.

Strengthening private damages actions

The German legal system already provides for an effective system of private damages actions. During the last few years its effectiveness was further strengthened through legislative action and landmark court rulings. The clarifications adopted in the Act against Restraints of Competition in 2005 (see box) should be highlighted in this context.

The case law also improved the opportunities for customers to bring effective claims for individual damages against members of an illegal cartel. In 2009, for example, the Federal Court of Justice confirmed the admissibility of collective damages actions against the members of a cartel.

Statutory measures facilitating the enforcement of private damages claims:

- The affected opposite side of the market, i. e. the buyers and customers directly harmed by an agreement, are always generally entitled to compensation for the damage incurred by them.
- The burden of proof placed on the claimant was reduced to an adequate degree by establishing that a final decision made by a competition authority against a cartel has a declaratory effect in private damages proceedings. This means that a claimant is not obliged to prove the cartel law infringement again.
- Furthermore it has been determined that an individual damage does not have to be calculated down to the last cent, but can be estimated by the relevant court.
- A company participating in a cartel cannot avoid its liability for damages by simply pointing out that its direct customer passed the excessive prices generated by the cartel on to his customers.
- As cartel proceedings can be particularly lengthy it is also very important that during these proceedings the clock is de facto stopped for possible damage claims. That is to say, the length of the proceedings does not count towards the limitation period of the respective private damage claims.

Increase in private damages actions

The effectiveness of this legal framework is also proved by the fact that with the intensification of the Bundeskartellamt's prosecution and punishment of illegal cartel agreements²² the number and, above all, the scope of damages actions under cartel law against those participating in hardcore cartels have considerably increased. The cases in which private damages actions are pending or have been concluded involve very different economic sectors such as e. g. ready-mixed concrete, cement, paper, bleaching agents and vitamins, and also sectors such as marine hoses, lifts and airfreight services. Today, hardly any fines are imposed by a competition authority's decision which are not followed up by private damages actions. Publicity is generally attracted by individual major proceedings which involve damage amounts in the high double to triple-digit million range. For example, in the cement cartel case mentioned above²³ the estimated damage including interest amounts to approx. € 350 million.

Balance between public antitrust enforcement and private damages actions

As much as this development fosters effective deterrence and compensation and therefore must be welcomed, the risks posed to effective cartel prosecution by an excessive "complaints industry" should not be overlooked.

Possible negative effects on effective cartel prosecution could arise particularly if a stronger pursuit of private claims would threaten the effectiveness of the Leniency Programme as a success generator for public antitrust enforcement.²⁴ This could happen if a company does not apply for leniency because it faces the risk of liability under private law which could involve amounts comparable to the fine imposed or, in individual cases, even higher amounts.

This would also do a disservice to the objective of effectively compensating for the individual damage incurred. With the initial detection of cartels by the competition authorities and the declaratory effect which their fines decisions have in private damages proceedings, the success of private damages actions directly and intrinsically depends on the success and effectiveness of public antitrust enforcement.

²² See p. 6.

²³ See p. 13 and p. 25.

²⁴ See p. 17.

VI. Cartels without borders: Jointly meeting the challenges of globalisation

With the increasing integration of the European internal market, the cross-border activities of companies in Europe have also considerably increased. However, this also means that cartel agreements are concluded which have an effect in more than one country. There is wide agreement that cartel prosecution should not stop at national borders either. Since 2003, the national competition authorities, as members of the network of European competition authorities (ECN), have, together with the European Commission, applied European competition law to cartel infringements which have cross-border effects.²⁵ Consequently, in addition to the European Commission, one or several national authorities can also punish violations of European competition law. The European Commission and the competition authorities use the ECN for the allocation of cases. It is the objective of case allocation to ensure that the best placed authority deals with a cartel (or abuse) case. At the start of its proceedings each EU competition authority posts a case in which European law is (also) applied on the high security intranet of the EU competition authorities. In this way the information is made available to all the other competition authorities within the ECN. Criteria for finding the best placed authority are the geographical scope of the effects of a competition infringement, the possibilities for gathering evidence and the means for ending the infringement.²⁶

In order to be able to secure all necessary evidence the national competition authorities have been authorised to ask each other to undertake investigations for their respective proceedings and to mutually exchange evidence. In practice the requests for official assistance have proved to be a useful tool of investigation by which evidence from other EU countries can be secured for proceedings conducted by the Bundeskartellamt.

Apart from the formal investigative requests, many contacts take place with European and non-European competition authorities to ensure an informal exchange of general experience or experience relating to specific proceedings. The working groups within the European Competition Network are also particularly important as they promote this mutual exchange of experience and pursue the aim of a greater convergence in fines proceedings within the European Union.

²⁵ Cf. Council regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ EC L1/1 of 04.01.2003.

²⁶ As a rule the European Commission is to be considered the best placed authority if e. g. an infringement affects competition in more than three Member States.



Examples of cooperation within the ECN:

- Upon a request by the Bundeskartellamt the competition authorities of Austria, Sweden and France have carried out dawn raids in their countries, secured evidence on behalf of the Bundeskartellamt and transmitted this to Germany.
- The Bundeskartellamt has conducted investigations on behalf of the competition authorities of Italy, France and the Netherlands.

VII. Prospects

As the figures show, the considerable intensification in the prosecution of cartels described above has paid off. However, cartels remain a challenge. To uncover them we need effective investigatory powers. The Leniency Programme will continue to play an essential role. The success it has achieved so far multiplies its effect as cartel members' trust in each other dwindles: secret cartel agreements become more and more unstable. Private damages actions will complement increasing public antitrust enforcement activity and not only increase the deterrent effect but also help to compensate

those harmed by the cartel. However, successful public antitrust enforcement is a precondition for successful damages actions.

It is important for the Bundeskartellamt to be well positioned and equipped for this task. It will continue and strengthen its efforts in this area. Only these efforts can ensure that cartels, which cause substantial damage to consumers and national economies year after year, are broken up and that the creation of new cartels is prevented.



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