

Newsletter, 3 August 2011

Bundeskartellamt's Activity Report 2009/2010

German authority to maintain intensity of cartel prosecution despite lack of resources
Key points of forthcoming amendment of the GWB published

On 28 July 2011, the German Federal Cartel Office (*Bundeskartellamt*, in the following "BKartA") published its Activity Report 2009/2010.¹ The highlights of the Report are summarised in the following.² As the German Act Against Restraints of Competition ("GWB") is currently being revised, this newsletter also takes into account the authority's requests and the legislator's intentions to amend the law. The key points of this 8th amendment of the GWB were presented by the Minister of Economics yesterday.³

Cartels

The years 2009 and 2010 were once again characterized by the authority's intensive cartel prosecution. A total of 172 companies and six private homes were searched in 27 cartel proceedings. The key tool to trace illegal cartel agreements remains the leniency programme which is increasingly called upon: 78 applications for leniency were filed during the reporting period, thereof six applications by individuals which can also be fined in Germany. The BKartA imposed fines totalling €297.5 million in 2009 and €266.7 million in 2010. The products concerned cover a wide range, including coffee, ophthalmic lenses, liquefied gas, roof tiles, mortar silos, printroom chemicals and utility steam generators. The probably most sensational proceedings were initiated in January 2010 when the BKartA dawn raided various food retailers and consumer goods manufacturers for alleged

vertical price fixing. The proceedings are still at an early stage.

Abuse of dominance

During the reporting period, over 70 abuse of dominance proceedings were initiated pursuant to Sec. 19, 20 GWB, partially concerning allegations of discrimination. Most of the proceedings continue to target the former state monopolies in areas such as telecommunication, energy and transportation. In the context of abuse of dominance cases, the president of the BKartA, Andreas Mundt, stated earlier this year that taking into account the differences in the social, cultural and economic development of the European member states and especially the US, it was not realistic to expect total convergence among antitrust regulators over how they prosecute companies that abuse their market power.⁴ He further stressed that due to the growth of companies in recent years local, national and global markets have become highly concentrated which calls for even more regulatory scrutiny.

In the context of the 8th amendment of the GWB it was considered to adapt the German rules on abusive behaviour which also prohibit the abuse of relative market power to European law which is less strict than the German law in its current form. However, due to its relevance for small and medium-sized companies, the law is only intended to be simplified systematically, but not to be changed in substance. A newly introduced Sec. 18 will contain a definition of market dominance for the purposes of the GWB.

A harmonisation with European law concerns the introduction of structural remedies (including the divestiture of companies), in

¹ The Report is available at the authority's website at www.bundeskartellamt.de (German version only).

² Not covered by this newsletter are public procurement, deregulation and remunicipalisation issues.

³ Federal Ministry of Economics and Technology, press release of 2/8/2011; the key points are available at the Ministry's website at www.bmwi.de (German version only).

⁴ Comment of president Mundt at the 59th Antitrust Law Spring Meeting, ABA, Washington D.C., on 1/4/2011.

addition to the existing behavioural remedies, to bring an infringement effectively to an end. Sec. 32(2) GWB will therefore be aligned to the wording of Art. 7(1) Regulation (EC) No 1/2003.

Private antitrust enforcement

During the reporting period, 556 cases of antitrust related matters were litigated before the German civil courts. The majority of the civil cases are still stand-alone actions. The proceedings mostly concern refusal to supply claims and the enforceability of contracts or their effective termination. The authority only takes an active role in civil proceedings before the Federal Supreme Court, where it has the right to submit an *amicus curiae* brief. According to the BKartA's observation, follow-on actions in the area of hardcore cartels have become more frequent during the last two years. The BKartA stresses in its Report that German private antitrust enforcement stands the test in the international "competition of jurisdictions", especially in respect of cartels being fined by the European Commission, and that no European legislation was needed in this field.

Following the publication of the Activity Report and corresponding demands by consumer organisations⁵, Federal Minister of Economics Rösler announced to improve the ability of consumer associations to claim damages on behalf of consumers which are - due to the insignificance of their respective damages - not able to bring an action individually.⁶ As part of the 8th amendment of the GWB, Rösler intends to extend Sec. 34 GWB to consumer associations which authorises the cartel authority to skim off of the economic benefit gained by the antitrust law infringement and to surrender it to the federal budget - as long as the benefit has not already been skimmed off by the payment of damages or the imposition of a fine. This is the second attempt to introduce the standing for consumer associations into the GWB. The legislator also intends to entitle other associations such as trademark associations to take legal actions, but will not introduce collective redress.

Merger control

With 998 and 987 mergers, the number of notifications remained stable in the last two years. However, in comparison with the two

previous years, the number of notified mergers has declined by approximately 50%. The BKartA attributes this decrease to restrained M&A activity during the financial crisis and to the introduction of the second domestic turnover threshold in early 2009. Foreign-to-foreign mergers with insignificant effects on the German market as well as domestic mergers of medium-sized companies do not need to be notified any longer. Still, the BKartA had to decide upon several complex merger cases. In 21 cases the authority opened second phase examination proceedings; eight mergers were subsequently cleared subject to conditions and four cases were prohibited. President Mundt emphasized that notwithstanding the low number of notified mergers, merger control has never been as important as today. All prohibition decisions concerned highly concentrated or duopolistic markets by which, so the authority, effective competition on the markets concerned was ensured. The authority is particularly concerned about the concentration in the food retail sector where even smaller transactions will continue to be subject to scrutiny.

According to the BKartA, the last two years have shown that the level of the second domestic turnover threshold (€ 5 million) has been well chosen. The BKartA now requests the legislator to adopt a provision similar to Art. 5(2) Regulation (EC) No. 139/2004 in order to prevent companies from splitting a notifiable transaction into smaller transactions to circumvent a merger filing requirement. Therefore, all transactions between the same group of companies within a two-years period should be treated as one for the purpose of German merger control.

The BKartA generally welcomes the intention of the legislator to introduce the European SIEC-test ("significant impediment to effective competition") into the substantive merger control analysis in Germany which would replace the current dominance test. However, when the authority presented its "Draft Guidance on Substantive Merger Control" on 21 July 2011, it stressed that whether a merger would create or strengthen a dominant position would still remain a standard example for the SIEC test.⁷

The BKartA intends to publish Guidelines on its practice of commitments in merger cases as well as on the assessment of joint ventures.

⁵ E.g. press release of the *Verbraucherzentrale Bundesverband* of 28/7/2011, www.vzbv.de.

⁶ Handelsblatt, „Neue Waffen gegen Kartellsünder“, 1/8/2011, page 5.

⁷ BKartA, press release of 21/7/2011.

Settlements

The majority of the fining proceedings were completely or partly closed by way of settlements between the BKartA and the companies and/or persons involved. The proceedings concerned vertical and horizontal cartels as well as a violation of the suspension obligation in a merger case.

The BKartA stresses that it welcomes settlements in cartel cases, where not all companies involved agree to amicably close the proceedings. Such hybrid settlements are still advantageous to the authority: it can not only use the corporate settlement declarations and the confessions of the settling persons as additional evidence, but can also present them as witnesses in appeal proceedings before the courts against any other parties after the fining decisions have become legally binding. The conditions for settling a case and the procedural steps are described in the BKartA's case summary of the coffee roasters cartel.⁸

Sector inquiries

Since 2005, the BKartA regularly applies the tool of sector inquiries into industries showing "indications of competitive imbalances" independent of concrete indications for infringements. During the reporting period, the authority conducted and launched several inquiries into different markets (e.g. milk, rolled asphalt, gas and electricity). This year's publication of the final results of the sector inquiry into the German fuel market and the price-setting mechanisms at petrol stations was subject to a wide media coverage and follow-up discussions. The ongoing inquiry into the food retail sector seeking to investigate the relations between retailers and consumer goods manufacturers is also followed closely.

Prospects

President Mundt heavily complains about the BKartA's lack of resources. Even though a third Decision Division for cartel prosecution has just been established⁹, the authority would frequently work at its capacity limits due to the complexity of the cases and the necessity to assess the increasing number of economic opinions submitted by the parties¹⁰ and to refine its own economic assessments.

The BKartA therefore urges the legislator to amend the law in order to ease its daily work. Especially the procedural rules applicable to fining proceedings needed to be revised as they currently entail areas of great uncertainty for the authority. Amongst other things, the BKartA requests to legally specify the rules of legal succession of cartelists. The legislator stresses to await the Federal Supreme Court's decision in the cement cartel case before closing this gap in legislation. The BKartA furthermore demands the introduction of the right to obtain information from the companies concerned in order to accelerate the judicial appeals proceedings. The legislator's current intention is to restrain the principle of oral presentation in court and to limit the legal entities' right to refuse to give evidence to business and market related data only in order to enhance the efficiency of such proceedings.

Comment

The Activity Report shows once again the vigour of the BKartA in protecting competition, in particular against cartels and that no sector or niche market is immune to its investigation. It would be a misjudgement by companies to conclude that the authority is only interested in larger or important everyday industries.

The now published key points of the envisaged 8th amendment of the GWB present the first document of the competent Ministry in the legislative procedure. The official draft is expected to be finalised in autumn this year. It remains to be seen which changes will finally come into effect in early 2012.

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⁸ BKartA, case summary "coffee roasters" of 18.12.2009 (B11-18/08), available at the authority's website at www.bundeskartellamt.de.

⁹ BKartA, Press release of 14.7.2011.

¹⁰ The BKartA received 18 economic opinions in 2010, 50% more than in 2009.

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