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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Germany

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Germany --

1. Introduction

1. Cartel prosecution and cartel investigations have become increasingly international issues. Whereas in the old days, most of the detected cartels operated solely on a national level, a trend has emerged in the past decades where cartels aim at restricting competition not only in national markets but also in cross-border contexts. With ever growing globalisation and the increasing integration of the European internal market, competition authorities face national and multinational enterprises engaging in cross-border cartels, which makes their detection and prosecution a lot harder. Therefore, cooperation among competition authorities in cartel investigations has become more common and to a certain extent even indispensable. Cartel prosecution cannot afford to stop at national borders. Only effective – internationally coordinated - cartel prosecution can counterbalance cross-border cartel activities and thus protect competition and consumer interests.

2. In the last decade, the Bundeskartellamt has realigned its focus and successfully strengthened its efforts in the prosecution of both national and international cartels. When investigating international cartels the Bundeskartellamt is in close contact with other competition authorities worldwide in order to cooperate and jointly combat such anti-competitive agreements. This paper will first give an outline of the Bundeskartellamt's legal framework for international cooperation with other competition authorities (2.). It will then continue by describing practical issues of cooperation with other competition authorities (3.) and will give recent examples of cooperation experience (4.). Finally, the paper will give suggestions on how to improve the international cooperation in cartel prosecution (5.).

2. Legal framework for international cooperation

3. International cooperation is governed by multilateral or bilateral agreements and national legislation. The most important multilateral agreement for international antitrust enforcement is the framework of the European Competition Network (ECN) and the Commission Notice on cooperation within the Network of Competition Authorities (a.). Furthermore, a number of agreements in the framework of the European Union and the Council of Europe also apply to mutual legal assistance.¹ International bilateral agreements are manifold. The Bundeskartellamt's international cooperation is described in the following (b.).

¹ The most important agreement for the European Union is the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ 2000, C 197, 01. The most important agreement for the Council of Europe is the European Convention on Mutual Assistance in Criminal Matters of 1959.

4. The national legislation is mainly laid down in the German Act Against Restraints of Competition (ARC).² Especially with regard to the disclosure of information, the Bundeskartellamt's officials are furthermore bound by the German Criminal Code. Section 203 of the German Criminal Code provides that it is a criminal offence for a public official to unlawfully disclose a secret of another party, in particular a business or trade secret, which was confided to or otherwise made known to him in this capacity.

2.1 Cooperation within the ECN

5. With Regulation (EC) no. 1/2003³ a system of parallel competences was created within which the European Commission and the competition authorities of the Member States apply the competition rules laid down in the EC Treaty (Articles 101 and 102 TFEU). Together the national competition authorities and the Commission form a network of authorities, which act in the public interest and cooperate closely to protect competition. The ECN is a discussion and cooperation forum for the application and enforcement of EC competition policy. The network provides a framework for cooperation between the European competition authorities in cases in which Articles 101 and 102 TFEU are applied and a basis for creating and fostering a common competition culture in Europe. The framework of the ECN is laid down in the "Commission Notice on cooperation within the Network of Competition Authorities".⁴

6. The German provision of Section 50 a (1) ARC refers to Article 12 (1) of Regulation 1/2003. It "authorizes the competition authorities to provide, for the purpose of applying Articles 101 and 102 TFEU, the Commission and the competition authorities of the other Member States of the European Community with any matter of fact or of law, including confidential information and in particular operating and business secrets, to transmit to them appropriate documents and data, to request these competition authorities to transmit such information, and to receive and use in evidence such information. [...]". Section 50 a (2) ARC provides further that the "cartel authority shall use in evidence the information received only for the purpose of applying Article 101 or Article 102 TFEU and in respect of the subject-matter for which it was collected by the transmitting authority [...]".

7. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under Article 12 (1) of the Regulation may also be used for the application of national competition law (Article 12 (2) Regulation 1/2003).

8. Finally, Section 50a (3) ARC, which mirrors Article 12 (3) Regulation 1/2003, provides that "Information received by the cartel authority [...] can only be used in evidence for the purpose of imposing sanctions on natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 101 or Article 102 TFEU. Where the conditions set out in sentence 1 are not fulfilled, a use in evidence shall also be possible if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the rules of the receiving cartel authority. The prohibition to use evidence pursuant to sentence 1 shall not exclude using the evidence against legal persons or associations of persons. However, compliance with prohibitions to use evidence which are based on constitutional law remains unaffected." This provision is to ensure that the constitutional rights of the alleged cartelist and the same level of protection

² An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf.

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1, 1.

⁴ Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101, 03.

are provided for. This may especially be an issue when cooperating with a competition authority that adheres to a criminal cartel enforcement regime.

9. Within this legal framework the ECN member states can provide one another with evidence, including confidential information. The complementing Notice on cooperation within the Network of Competition Authorities provides that where a competition authority “deals with a case which has been initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network”.⁵ However, save for two exemptions⁶, the information voluntarily submitted by a leniency applicant can only be transmitted to another member of the ECN with the consent of the applicant.⁷ These restrictions were introduced to secure the effectiveness of the different leniency programmes in place. The Bundeskartellamt is bound by these restrictions in its cooperation.

2.2 Other (bilateral) international cooperation

10. The Bundeskartellamt also cooperates with competition authorities that are not members of the ECN. The legal basis for such interactions can be found either in bilateral international agreements⁸ or alternatively in national provisions. The Federal Republic of Germany has concluded numerous bilateral and multilateral agreements on mutual legal assistance.

11. In cases where there is no bilateral or multilateral mutual legal assistance agreement, the Bundeskartellamt reviews requests for international cooperation according to the provisions of the German Act on International Mutual Assistance in Criminal Matters⁹ and the ARC.

12. The ARC specifically contains a provision which deals with “Other Cooperation with Foreign Competition Authorities” (Section 50b ARC). This provision is more restrictive than its counterpart dealing with the cooperation in the ECN.

13. According to Section 50b (2) ARC the Bundeskartellamt shall forward information pursuant to Section 50a (1) ARC only with the proviso that the receiving competition authority:

“1. uses the information in evidence only for the purpose of applying provisions of competition law and in respect of the subject-matter for which it was collected by the Bundeskartellamt,

⁵ See paragraph 39.

⁶ See paragraph 41. It provides that “1. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority” and “2. No consent is required where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions: (a) on the leniency applicant; (b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme; (c) on any employee or former employee of any of the persons covered by (a) or (b).”

⁷ See paragraph 40.

⁸ An example for a bilateral agreement dealing, inter alia, with cooperation and information exchange is the Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters which entered into force in October 2009, BGBl. 2007 II p. 1618 ff.

⁹ „Gesetz über die internationale Rechtshilfe in Strafsachen“ in the version of October 2010, BGBl. I p. 1408 ff.

2. respects the protection of confidential information and will transmit such information to third parties only if the Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential information in legal and administrative procedures.”

14. This provision states further that with regard to confidential information the ARC prohibits the passing on of information without a waiver of the undertaking concerned. Thus, without the consent of the company concerned, the Bundeskartellamt is prohibited from sharing such information with other competition authorities. This constitutes one of the main boundaries for information sharing in international cooperation. These rules apply equally to the information voluntarily submitted to the Bundeskartellamt by a leniency applicant. Again, the Bundeskartellamt requires the consent of the company to pass on this information.

15. Information obtained from other competition authorities can be relied upon by the Bundeskartellamt subject to the provisions of the agreement under which this information was obtained.

2.3 Other international cooperation

16. Finally, the Bundeskartellamt is in constant contact with other competition authorities in different international fora such as the OECD, the International Competition Network (ICN) and UNCTAD. These different organizations allow the Bundeskartellamt to engage in both a formal and informal exchange of ideas, knowhow and, to a certain degree, information. The Bundeskartellamt is a very active member in all of these fora. It strongly believes that it can greatly benefit from the work of these organisations and highly values the opportunities to exchange views with the other competition authorities.

17. Some of these international organisations have issued recommendations to which the Bundeskartellamt adheres to wherever possible.¹⁰

3. Practical issues of cooperation

18. Within the above-mentioned framework the Bundeskartellamt has several possibilities to cooperate with other competition authorities and does so frequently. Whereas formal cooperation is restricted to the tools defined in the respective mutual legal assistance agreements, informal cooperation can take different forms.

19. On that basis the Bundeskartellamt can report a great number of successful cooperation cases with other competition authorities. These include, inter alia, joint dawn raids, dawn raids conducted for other competition authorities, or conducted by other competition authorities for the Bundeskartellamt, as well as the questioning of witnesses on behalf of other authorities.

20. The sharing of non-confidential information is another very important tool of international cooperation in antitrust enforcement. The Bundeskartellamt engages in informal discussions of abstract

¹⁰ See for example the OECD “Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations”, 2005 or the OECD Council Recommendations “Anticompetitive practices affecting international trade”, 1995. It recommends for example that when a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices (I A. 1.).

subjects at conferences or in a more formal cooperation and information sharing in specific cases. Such information exchange can take place by either telephone or email, or at face-to-face meetings.

21. Another form of international cooperation with other competition authorities, which should not be underestimated, is the sharing of knowhow. The Bundeskartellamt is very active in fostering such knowledge exchange at twinning activities, international conferences or bilateral meetings.

22. Last but not least, informal international cooperation plays a very important role in the day-to-day work of the Bundeskartellamt. Due to informal contacts formed at various international meetings of international organisations such as OECD, ICN and UNCTAD, the Bundeskartellamt has good working relationships with numerous competition authorities worldwide. In the view of the Bundeskartellamt, these contacts provide an excellent basis for international cooperation with other competition authorities within the legal boundaries.

23. However, the Bundeskartellamt has also encountered some challenges in international cooperation. Only a few shall be mentioned here:

24. The handling of confidential information in the cooperation process is always the most significant issue. Although the sharing of information between competition authorities is generally to the benefit of the investigatory process, there are some difficulties attached which should not be forgotten. Even though international law provides for some safeguards by prohibiting an exploitation of such information), once the information has been shared it is no longer in the control of the sharing authority what happens to it. Different national procedural rules on access to files and disclosure may lead to further uncertainty on the accessibility of information that was originally confidential. Also in the light of the above mentioned provision in the German Criminal Code, this dilemma between the benefits and concerns of sharing confidential information has induced the Bundeskartellamt to be particularly cautious when sharing information.

25. Furthermore, international cooperation between competition authorities could lead to a situation where more than one competition authority intends to impose a fine on a certain company. In some cases the envisaged fines could render the company incapable of paying. In such cases a coordinated approach from the beginning through to the conclusion of a case is desirable.

4. Recent experience

26. In practice, a fair amount of the Bundeskartellamt's international cooperation in cartel investigations takes place within the framework of the ECN. In this formal framework the Bundeskartellamt has frequently exchanged information and cooperated with other competition authorities in the European Union.

27. Successful examples of Cooperation in the ECN are: The Bundeskartellamt coordinates its activities with the other competition authorities via telephone, email conversations or, if the case so requires, even in face-to-face meetings. The degree and extent of the cooperation will vary according to the circumstances of the given case. The Bundeskartellamt has also conducted either joint dawn raids or dawn raids for other ECN competition authorities. Vice versa it has also requested other competition authorities to conduct dawn raids for the Bundeskartellamt.

28. There are numerous examples of successful cooperation in the ECN. A recent case deals with the refusal to supply by a German producer, a conduct which may constitute a violation of Article 102 TFEU. The investigation was initiated by another ECN member following a complaint by a company. After initiating the investigation, the other authority requested an investigation by the Bundeskartellamt in accordance with Article 22 (1) Regulation 1/2003. It required the recovery of certain documents (request

and evidence to support the allegation). The Bundeskartellamt obtained the necessary search warrants from the local court in Bonn in the beginning of 2011. In spring 2011 officials of the Bundeskartellamt and the other competition authority conducted dawn raids in Germany. Simultaneous dawn raids were conducted in the Netherlands, Sweden and Denmark. The outcome of this case is still pending.

29. Another example is the cooperation in the so-called *sugar case*. In this case, the Bundeskartellamt cooperated with the Dutch Competition Authority (Nederlandse Mededingingsautoriteit – NMa) and the Austrian Competition Authority (Bundeswettbewerbsbehörde). The authorities exchanged information (such as minutes, evidence, and leniency applications) according to Art. 12 Regulation 1/2003, and NMa Officials participated in interviews in Germany. In the Netherlands no simultaneous dawn raids or investigations were conducted.

30. Finally, the *mills case* can provide further insight into difficulties which may arise while cooperating in international antitrust enforcement cases. The Bundeskartellamt had conducted dawn raids in 2008. Subsequently, the German, French and Dutch competition authorities all received leniency applications. The three authorities cooperated closely, which resulted in the exchange of documents between the authorities and the presence of a German official during dawn raids conducted in France. In discussions with several companies, the companies indicated that they might plead inability to pay if all competition authorities imposed fines. Therefore the question of “coordinated fines” arose.

5. Conclusion and suggestions

31. The Bundeskartellamt has benefited from the cooperation in the ECN and it supports the network in every possible way. The formal international cooperation in cartel cases the ECN offers is to the benefit of all the participating competition authorities. When the formal basis for the cooperation was laid down in 2003, it was the best possible path to take at that time. Almost ten years later, not only the benefits but also the shortcomings have become apparent. Therefore, the Bundeskartellamt suggests that it might be time to further fine-tune the system and enhance the focus on questions of procedural convergence.

32. The Bundeskartellamt also encourages further international cooperation in cartel investigations. International cooperation can have various benefits for the competition authorities, ranging from a sharing of the investigatory burden to more efficient proceedings. A look back on the experience gained with cooperation in international cartel investigations offers a number of potential lessons to be learned:

- In the case of parallel proceedings, a mutual exchange of information might be indicated at several stages throughout the proceedings up to the conclusion of the case.
- Furthermore, the competition authorities need to be careful to coordinate their course of action if more than one competition authority intends to fine a certain company. As mentioned above, this may lead to the competition authorities being confronted with the company’s plead of inability to pay. Close coordination between the competition authorities until the end of the proceedings can minimise the described difficulties.
- Finally, it is important to note that the possibility of cooperation must be exercised carefully. Authorities requesting international cooperation should always be willing to reciprocate. Competition authorities requesting legal assistance should always consider that the request also strains the resources of the responding authority. Requests for cooperation should therefore always be subject to strict scrutiny with regard to their extent and necessity. With these safeguards in mind, international cooperation can help all authorities make the best use of their limited resources.
- The Bundeskartellamt very much welcomes the future work on this subject as one of the Strategic Themes of the OECD Competition Committee.