

# Transactional resolutions in German competition law & merger control<sup>1</sup>

<b>1. Introduction</b> .....	2
<b>2. Transactional elements in administrative offence proceedings</b> .....	4
<b>2.1 Leniency policy</b> .....	4
2.1.1 Legal basis .....	4
2.1.2 Content and practical application.....	4
2.1.3 Compatibility with the rule of law .....	6
2.1.3.1 Scholarly controversies.....	6
2.1.3.1.1 Competence of the FCO to adopt and operate a leniency programme .....	6
2.1.3.1.2 Rights of defence and procedural rights .....	6
2.1.3.1.3 Principle of equal treatment and proportionality .....	8
2.1.3.2 Existing case law .....	8
<b>2.2 Settlements (<i>einvernehmlicher Bußgeldbescheid</i>)</b> .....	9
2.2.1 Legal requirements .....	9
2.2.2 Course of the procedure.....	10
2.2.2.1 Scope of application .....	11
2.2.2.2 Settlement discussions .....	11
2.2.2.3 Settlement contents.....	12
2.2.2.4 Conclusion and rewards.....	13
2.2.3 Control and Transparency.....	15
2.2.4 Overall assessment.....	16
<b>3. (Negotiated) agreements on the further course and outcome in criminal proceedings</b> .....	18
<b>4. Settlements in administrative proceedings</b> .....	20
<b>4.1 Settlements as part of administrative proceedings in general</b> .....	20
<b>4.2 Commitments</b> .....	20
4.2.1 Purpose and scope of application.....	20
4.2.2 Procedure and content.....	21
4.2.3 Enforcement.....	22
4.2.4 Possibilities to rescind .....	22
4.2.5 Appeal.....	23
4.2.6 Overall assessment.....	24
<b>5. Transactional resolutions vs private enforcement: Access to file by third parties</b> .....	25
<b>5.1 The tension between transactional resolutions and private enforcement in the current legal framework</b> .....	25
<b>5.2 Access to leniency applications and settlement declarations in current German Law</b> .....	27
5.2.1 Direct access to file by the cartel victim pursuant to sec. 406e of the StPO, 46(1) of the OWiG.....	27
5.2.2 Access to file by a civil court (Sec. 142(1), 273(2) No. 2 or 432 of the ZPO in conjunction with sec. 474(1) of the StPO).....	28
<b>5.3 Changes due to the Damages Directive</b> .....	30
<b>6. Commitments (remedies) in merger control</b> .....	31
6.1 Background and current legal basis .....	31
6.2 Procedure in case of commitments .....	32
6.3 Possible content .....	34
6.4 Enforcement and appeal.....	35

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## 1. Introduction

The main competition law provisions in Germany, that is, the prohibition of cartels and abusive practices as well as merger control, can be found in the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition), GWB. Since its entry into force in 1958, the GWB has undergone several reforms; its main substantive provisions are now largely in line with Art. 101 and 102 TFEU.

The *Bundeskartellamt* (Federal Cartel Office, FCO) is the competent authority to enforce the GWB and prosecute infringements if the anticompetitive effects extend beyond the territory of one German federal state (*Bundesland*) (sec. 48(1), (2) of the GWB).<sup>2</sup> In addition, the FCO applies Art. 101 TFEU and Art. 102 TFEU in the prosecution of cartels and abusive practices that are likely to affect trade between the EU Member States (Art. 3(1) Regulation (EC) No. 01/2003).

The FCO is an independent higher federal authority assigned to the Federal Ministry of Economics and Technology (sec. 51(1) of the GWB). This status basically implies that the FCO is organizationally and functionally independent.<sup>3</sup> Within the FCO, several Decision Divisions which are largely independent<sup>4</sup> and organized as quasi-judicial collegiate bodies (cf. sec. 51(2), (4) of the GWB) adopt decisions in a process modelled on judicial principles.<sup>5</sup>

It is at the FCO's discretion whether to initiate proceedings<sup>6</sup> and whether to prosecute and sanction a particular competition law infringement<sup>7</sup> (opportunity principle, Opportunitätsprinzip).<sup>8</sup> If it decides to take action, the FCO has two options:<sup>9</sup>

*Administrative Proceedings*, governed by sec. 54 et seqq. of the GWB in conjunction with the German Code of Administrative Procedure (*Verwaltungsverfahrensgesetz*, VwVfG) can lead to the adoption of commitment decisions without a finding of infringement (sec. 32b of the GWB) or to an order to discontinue a certain infringement (in the following: cease and desist

<sup>2</sup> *Bunte*, Kartellrecht, 2<sup>nd</sup> ed. 2008, p. 400 f.; *Hoffmann/Orth et al.*, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 12 paras 33, 40 et seq.

<sup>3</sup> Briefly *Becker*, in: *Löwenheim/Meessen/Riesenkampff*, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 51 GWB para 1; generally *Ibler*, in: *Maunz/Dürig*, Grundgesetz-Kommentar, 69<sup>th</sup> supplement 2013, Art. 87 GG paras 249-255.

<sup>4</sup> *Kling/Thomas*, Kartellrecht, 2007, p. 809 et seq.; *Klaue*, in: *Immenga/Mestmäcker*, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 51 GWB, para 5. It is in dispute to what extent individual instructions by the superordinate German Ministry of Economics are admissible. The majority view answers the question at least partially in the affirmative, see e. g. *Bechtold*, in: *Kartellgesetz: GWB*, 7<sup>th</sup> ed. 2013, § 52 GWB, para 3; differentiating *Klaue*, in: *Immenga/Mestmäcker*, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 51 GWB, paras 11 et seq., both with further references; against such instructions arguably *Emmerich*, *Kartellrecht*, 12<sup>th</sup> ed. 2012, p. 591 et seq.

<sup>5</sup> *Hoffmann/Orth et al.*, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 51 para 34; *Bunte*, *Kartellrecht*, 2<sup>nd</sup> ed. 2008, p. 399 et seq.

<sup>6</sup> Administrative offence proceedings are initiated by the first measure of the competition authority whose evident intention is to take legal actions against somebody because of an administrative offence, *Dannecker/Biermann*, in: *Immenga/Mestmäcker*, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, para 202.

<sup>7</sup> See sec. 47(1) of the OWiG.

<sup>8</sup> *Dannecker/Biermann*, in: *Immenga/Mestmäcker*, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, paras 195 et seqq.

<sup>9</sup> Sections 54 et seqq., 81 et seqq. of the GWB. The two types of procedures are regulated separately in German law, unlike in European competition procedure. For a short overview see *Bunte*, *Kartellrecht*, 2<sup>nd</sup> ed. 2008, p. 413–419; for a detailed comprehensive description of German competition procedure see *Hoffmann/Orth et al.*, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 12 paras 1-257.

or prohibition order). The parties have the rights of defence that generally apply in administrative proceedings, most notably the right to be heard (sec. 56 of the GWB) and a right to access to file which is subject to certain exceptions (sec. 29 of the VwVfG).<sup>10</sup>

*Administrative offence proceedings*, governed by the Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten, OWiG), can lead to fines against legal entities and/or natural persons and are necessarily associated with finding an infringement. Due to a referral in sec. 46(1) of the OWiG to the German Code of Criminal Procedure (Strafprozessordnung, StPO), the FCO must, as a rule, respect the principles of procedural law that apply in the criminal process. These include the duty to examine the facts of its own motion (Amtsermittlungsgrundsatz, principle of *ex proprio motu* investigation), the principle of *in dubio pro reo*, the prohibition of analogy (*nullum crimen, nulla poena sine lege stricta*) and important rights of defence (e. g. right to be heard, access to file).

The companies concerned may appeal an FCO order before the Higher Regional Court of Düsseldorf who conducts a *de novo* hearing of the case. In court, the FCO order imposing a fine basically serves as an indictment. Further appeals on points of law can be lodged with the Federal Court of Justice (BGH) in Karlsruhe.<sup>11</sup>

Competition law infringements can amount to criminal offences by natural persons, most importantly where competition is restricted through agreements in the context of public tenders (section 298 German Criminal Code, Strafgesetzbuch – StGB) or where an anticompetitive conspiracy fulfils the conditions of fraud (section 263 StGB).<sup>12</sup> If an act is at the same time a criminal and a regulatory offence, in principle only criminal law shall be applied.<sup>13</sup> Its enforcement is at the sole responsibility of the public prosecution.<sup>14</sup> Hence, as soon as the FCO has indications to the effect that an anticompetitive act constitutes a criminal offence, it must transfer the case to the public prosecution office (sec. 41(1) of the OWiG).<sup>15</sup> However, the FCO remains competent to adopt an order imposing fines against the implicated legal persons (sec. 82 sentence 1 of the GWB), which is a consequence of the fact that German law does not provide for the criminal prosecution of companies.

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<sup>10</sup> Exceptions apply insofar as it would impede the FCO properly discharging its duties and insofar it is required by legitimate interests of other parties or affected persons in confidentiality, see further *K. Schmidt/Bach*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 56 GWB, para 10.

<sup>11</sup> For a short English description of the procedure see *Bundeskartellamt*, The Bundeskartellamt in Bonn, Organisation, Tasks and Activities, Sept. 2011, p. 26.

<sup>12</sup> For an in depth treatment see *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, paras 136 et seqq.

<sup>13</sup> Sec. 21(1)1 of the OWiG, see further *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, paras 175 et seqq.

<sup>14</sup> See sec. 40 of the OWiG.

<sup>15</sup> If the public prosecution office should later discontinue the proceedings only in respect of the criminal offence, but there are indications to the effect that the offence may be prosecuted as a regulatory offence, it shall transfer the case back to the administrative authority, sec. 43(1) of the OWiG.

## 2. Transactional elements in administrative offence proceedings

### 2.1 Leniency policy

#### 2.1.1 Legal basis

The FCO has been operating a Leniency Programme, called *Bonusregelung*, for almost 15 years. The first version, *Notice no. 68/2000*,<sup>16</sup> was published in April 2000. The current version, *Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases - Leniency Programme* – dates from 7 March 2006. The main goal of the revision was to improve legal certainty and transparency for prospective leniency applicants, thereby enhancing the programme's attractiveness.<sup>17</sup>

The *Bonusregelung* essentially is a guideline in which the FCO sets out how it will exercise its discretion in setting the fine if a cartel member reports an infringement or supports the investigation. In this way, the programme creates legitimate expectations. These as well as the principle of equal treatment have the effect that the FCO is bound by the leniency programme to grant the benefits promised. By contrast, the courts are not bound and review the FCO's decisions according to the general statutory rules.<sup>18</sup>

Since the 7<sup>th</sup> amendment of the GWB in July 2005, the German leniency programme has a clear legal basis in sec. 81(7) of the GWB stipulating that the FCO may lay down general administrative principles on the exercise of its discretionary powers in assessing the fine.<sup>19</sup> Before July 2005, the leniency policy could be based on sec. 53(1)3 of the GWB which states that the FCO shall regularly publish its administrative principles.

The FCO's leniency programme has no clear equivalent in German general criminal law. Since 2009, sec. 46b StGB does however provide that the court can mitigate a sentence or even decide not to impose one if a perpetrator contributes to the discovery or prevention of serious offences; previously, there was a limited leniency policy in the context of terrorist offences.<sup>20</sup>

#### 2.1.2 Content and practical application

The first version of the FCO's leniency programme was closely in line with the *Commission Notice on the non-imposition or reduction of fines in cartel cases* from 1996.<sup>21</sup> The current version largely corresponds with the ECN Model Leniency Programme of 2006 and, hence, also with the Commission Notice on Immunity from fines and reduction of fines in cartel

<sup>16</sup> Bekanntmachung Nr. 68/2000 über Richtlinien des Bundeskartellamtes für die Festsetzung von Geldbußen (Bonusregelung)<sup>c</sup>, published by the FCO on 17<sup>th</sup> April 2000, and afterwards in the German Federal Gazette (Bundesanzeiger) of May 4<sup>th</sup>, 2000, No. 84, p. 8336.

<sup>17</sup> See further *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 81 paras 418, 425, 428; for a detailed comparison of the old and the new version of the German leniency programme see *Ohle/Albrecht*, WRP 7/2006, 866 et seqq.

<sup>18</sup> Cf. *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 para 206 and § 81 para 422.

<sup>19</sup> The legislator understood this to be a clarification that the FCO may adopt a leniency policy, which had previously been disputed by scholars, see *Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, BT-Drucks. 15/3640, p. 67. A further amendment in December 2007 (*Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels*, BGBl. I 2966) clarified that sec. 81(7) of the GWB applies in particular to setting the amount of the fine.

<sup>20</sup> See *Roxin/Schünemann*, Strafrechtsverfahren, 27<sup>th</sup> ed. 2012, § 14 paras 19 et seq., who are very critical of sec. 46b StGB.

<sup>21</sup> Official Journal C 207, 18/07/1996, p. 4–6. See *Bundeskartellamt*, Activity Report 1999-2000 (Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 1999/2000 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet), BT-Drucks. 14/6300 of June 22<sup>nd</sup> 2001, p. 43.

cases from 2006.<sup>22</sup> There are however three notable exceptions: First, whereas the Commission and the ECN Model Programme only exclude coercers from immunity from fines, the German programme also excludes the sole ringleader;<sup>23</sup> second, whereas the ECN Model Leniency Programme and the Commission notice refer only to corporate leniency,<sup>24</sup> the German leniency notice also applies to natural persons as far as the FCO's competence is concerned. Third, the Commission's leniency programme explicitly provides for the option to present information and evidence in hypothetical terms before filing an application.<sup>25</sup> In contrast, the FCO's programme does not mention such a possibility. A further important difference, though not mentioned in the programmes, is that the FCO as a rule does not issue a decision against an applicant who receives immunity from fines, which is an additional important benefit providing protection from follow-on claims.<sup>26</sup> The main content of the German programme can be summarized as follows:

- Part B lists the requirements for obtaining immunity from fines. This benefit is open for the first cartel member who comes forward before the FCO has sufficient evidence either to obtain a search warrant or at least to prove the offence. The cartel member must provide information that allows accomplishing these tasks. Ringleaders of coercers are excluded.
- Part C promises reductions of up to 50% for other cartel members (i.e. subsequent applicants or the ringleader/coercer) who provide information and, where available, evidence which makes a significant contribution to proving the offence.
- In any case, a fine reduction based on the leniency programme requires that the applicant cooperates fully and continuously with the FCO as set out in part D.
- Part E mainly explains how a leniency applicant may obtain a marker by the FCO, i.e. how he can provisionally secure a certain priority position with a short-form request. Furthermore, the FCO states that it will rate an application filed by a person authorised to represent an undertaking also as one made on behalf of the natural persons participating in the cartel as employees of that undertaking, unless otherwise indicated.
- In the final part F, the FCO *inter alia* assures leniency applicants to use its discretionary powers to refuse applications by private third parties who seek information from the FCO concerning the leniency application and the evidence provided therein. Besides, the FCO stresses that it cannot grant leniency to individuals with respect to criminal offences.

Over the years, the FCO's leniency programme has turned out to be a very effective tool in eliciting applications by participants of previously unknown cartels. The FCO publishes statistics every two years in its Activity Reports. At the time of writing, the latest statistics show that, under the old leniency programme, applications had remained at a rather low level, with an exceptional peak of 69 applications in the year before the reform. Under the current programme, the number of applications broadly follows an upward trend, rising from 7 in the

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<sup>22</sup> Official Journal C 298, 08/12/2006, p. 17–22.

<sup>23</sup> *Bundeskartellamt*, Activity Report 2005-2006 (English version), p. 11, 14-16.

<sup>24</sup> See ECN Model Leniency Programme 2006 para 15; ECN Model Leniency Programme 2012 para 15.

<sup>25</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17 para 16, 19.

<sup>26</sup> See *Burrichter/Ahlenstiel*, in: *Lowe/Marquis*, European competition law annual 2011, 2014, p. 95, 100.



year of its adoption (2006), to 41 in 2011 and 51 in 2012; the vast majority of applications are filed on behalf of legal entities.<sup>27</sup>

### 2.1.3 Compatibility with the rule of law

#### 2.1.3.1 Scholarly controversies

The FCO's leniency policy has met considerable criticism by several legal scholars and lawyers, especially at the beginning. Not all issues are settled yet. Due to limitations of space, this report can sketch only the main issues. Broadly speaking, the criticism refers to three main areas:<sup>28</sup>

##### 2.1.3.1.1 Competence of the FCO to adopt and operate a leniency programme

First, it has been called into question whether the FCO may state in general guidelines that it will refrain from sanctioning a cartel participant if the conditions of a leniency programme are fulfilled, thereby forgoing its discretion completely *ex ante*.<sup>29</sup>

In particular, it is still doubted whether the adoption of a leniency policy is an essential matter to be regulated directly by the legislator pursuant to the theory of "legislative reservation" (*Wesentlichkeitstheorie*) developed by the German Constitutional Court (*Bundesverfassungsgericht*).<sup>30</sup> Furthermore, scholars have questioned whether principles of criminal law allow the FCO to refrain from sanctioning cartel members without having regard to the circumstances of the particular case.

Both lines of critique were put forward in particular before July 2005 as long as the leniency programme could be based on sec. 53(1)3 of the GWB only. It was controversial among scholars whether this was sufficient, given that the issuance of a fine and thereby its setting severely interferes with fundamental rights. Today, the criticism has lost a considerable part of its force due to the introduction of sec. 81(7) of the GWB.<sup>31</sup>

##### 2.1.3.1.2 Rights of defence and procedural rights

A second line of critique relates to the question whether the leniency programme is compatible with the rights of defence of (alleged) cartel participants. Especially the following rights are at issue:

- *nemo tenetur se ipsum accusare*:

Via sec. 46 of the OWiG, as well as due to the rule of law guaranteed by the German constitution (Rechtsstaatsprinzip), the principle of *nemo tenetur se ipsum accusare* (privilege against self-incrimination) applies in administrative offence proceedings, meaning that no one is bound to incriminate himself. As a consequence, the person concerned in an administrative offence proceeding has the right to remain silent (*Aussageverweigerungsrecht*), and any witness may refuse to answer any questions if replying would subject him to the risk of being prosecuted for a criminal offence or an

<sup>27</sup> *Bundeskartellamt*, Tätigkeitsbericht 2011-2012, BT-Drucks. 17/13675, p. 28.

<sup>28</sup> For a detailed discussion see e.g. *Zagrosek*, *Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen*, 2006, p. 117 et seqq., 166 et seqq., 213 et seqq.

<sup>29</sup> Doubting *Dannecker/Biermann*, in: Immenga/Mestmäcker, *Wettbewerbsrecht: GWB*, 4<sup>th</sup> ed. 2007, § 81 para 425.

<sup>30</sup> *Zagrosek*, *Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen*, 2006, p. 119 et seqq.; *Dannecker/Biermann*, in: Immenga/Mestmäcker, *Wettbewerbsrecht: GWB*, 4<sup>th</sup> ed. 2007, § 81 para 440.

<sup>31</sup> See *Ohle/Albrecht*, WRP 7/2006, 866, 870; *Dannecker/Biermann*, in: Immenga/Mestmäcker, *Wettbewerbsrecht: GWB*, 4<sup>th</sup> ed. 2007, § 81 para 440.

administrative (regulatory) offence (*Auskunftsverweigerungsrecht*, sec. 55(1) of the StPO). It has yet not been resolved if these rights apply only to natural persons or if they also extend to legal entities. The answer depends on whether one sees these rights as being rooted exclusively in the general right of personality derived from Art. 2(1) and Art. 1(1) of the German constitution (Grundgesetz, GG), which does not fully extend to legal entities (Art. 19(3) GG),<sup>32</sup> or whether these rights are also required by the constitutional rule of law (Rechtsstaatsprinzip). A widespread view among scholars is in favour of the latter and argues that legal entities are included.<sup>33</sup> The German Constitutional Court (Bundesverfassungsgericht) had first shared this opinion,<sup>34</sup> but denied legal entities the right to remain silent in a judgment of 1997.<sup>35</sup>

- *Right to a fair trial,*

The right to a fair trial does not, as such, entail detailed requirements and prohibitions. Rather, it is a generic term for several specific rights that must be spelled out by the legislator and that altogether constitute a system based on the idea of justice and the rule of law.<sup>36</sup> In administrative offence proceedings, these rights include in particular the right to be heard (Art. 103 GG), the right to effective counsel (sec. 46 of the OWiG, sec. 137 of the StPO), access to file (sec. 46 of the OWiG, sec. 147 of the StPO) and the right to present exculpatory evidence and arguments.

The core concern is that FCO's leniency programme could undermine the above-mentioned rights by pressuring (alleged) cartel members not to make use of them.<sup>37</sup> This is of growing importance due to the rising level of cartel fines in Germany and the EU. In particular, it follows from the right to remain silent as well as from the other rights of defence that a lack of cooperation must not be considered as an aggravating factor. Technically, the leniency programme does of course not do this – rather, the FCO would first determine the fine and then deduct reductions for cooperation. However, a high overall level of cooperation might indirectly affect the basic amount of fines: If a competition authority makes extensive use of fine reductions to elicit cooperation, it may be tempted to increase the basic amount of fines to prevent a decrease of the (average) expected fine, thereby assuring a constant level of deterrence. Indeed competition law fines have increased dramatically in the last years. If the procedural practice should thereby leave companies no other reasonable option but to cooperate, the inherent waiver of rights of defence might be considered involuntary and

<sup>32</sup> See further *Di Fabio*, in: Maunz/Dürig, Grundgesetz-Kommentar, 69<sup>th</sup> supplement 2013, Art. 2 paras 224 et seq.

<sup>33</sup> With respect to the right to remain silent (Aussageverweigerungsrecht) see e.g. *Wrage-Molkenthin/Bauer*, in: Frankfurter Kommentar zum Kartellrecht, Vorbem. § 81-86 GWB 2005 (Lfg. 71 May 2010), paras 50 et seq.; *Vollmer*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 81 para 157; *Rogall*, in: Karlsruher Kommentar zum OWiG, 3<sup>rd</sup> ed. 2006, § 30 para 188; *Schuler*, JR 2003, 265. With respect to the right as a witness to refuse to answer self-incriminating questions *Klusmann*, in: Wiedemann, Kartellrecht, 2<sup>nd</sup> ed. 2008, § 57 para 37; *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 para 215 et seqq.

<sup>34</sup> BVerfG BB 1975, 1315

<sup>35</sup> BVerfGE 95, 220.

<sup>36</sup> Cf. BVerfGE 57, 250 = NJW 1981, 1719, 1722; *Hetzel*, Kronzeugenregelungen im Kartellrecht, 2004, p. 266.

<sup>37</sup> On the following see *Zagrosek*, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, p. 168 et seqq.; *Hetzel*, Kronzeugenregelungen im Kartellrecht, 2004, p. 266 et seqq.

thereby the right to fair trial might be infringed.<sup>38</sup> Currently, however, there is agreement that at least the FCO's cartel fines are below such a level. Besides, competition authorities are obliged to consider mitigating circumstances, including cooperation. This should not prevent them from taking other measures to fight competition law infringements (more) effectively.

### 2.1.3.1.3 Principle of equal treatment and proportionality

The leniency programme privileges cooperating cartel members compared to non-cooperating cartel members and to offenders in other fields of law where no leniency policy exists, so that no complete exemption of fines is attainable. To be compatible with the principle of equal treatment (Art. 3 GG), there must be an objective reason for the unequal treatment between cooperating parties and other offenders that serves a legitimate purpose, and leniency must be suitable and proportionate to fulfil that purpose.<sup>39</sup> By now, however, it appears to be widely accepted that the economic harm caused by cartels, their secret character and the ensuing value of cooperation by cartel members in the investigation justifies the FCO's leniency policy, in particular in view of the fact that ringleaders and coercers cannot fully escape a fine.<sup>40</sup>

### 2.1.3.2 Existing case law

Over the years, the FCO's leniency programme has gained more and more acceptance and is rather firmly established in practice today. So far, the courts have consistently accepted the FCO's approach: In 2007, the Higher Regional Court of Düsseldorf held that the FCO's leniency policy promising full or partial exemption from a fine is within the limits of the FCO's discretion to prosecute and sanction cartels. It therefore does not amount to holding out the prospect of an advantage not envisaged by statute, which would be prohibited by sec. 136a(1)3 of the German Code of Criminal Procedure.<sup>41</sup> The Court confirmed this holding in a further judgment of 2009.<sup>42</sup> About three months later, the same Court, in a judgment that mainly centred on how to define the upper limit of the fine in German law, again broadly accepted the FCO's leniency policy. The Court acknowledged that the cooperation of suspected cartel members is a mitigating circumstance to be considered in setting the fine, but stressed that the judge conducts an independent assessment in this regard.<sup>43</sup>

<sup>38</sup> Zagrosek, *Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen*, 2006, p. 179; Hetzel, *Kronzeugenregelungen im Kartellrecht*, 2004, p. 270.

<sup>39</sup> Hetzel, *Kronzeugenregelungen im Kartellrecht*, 2004, p. 260.

<sup>40</sup> See *Wrage-Molkenthin/Bauer*, in: *Frankfurter Kommentar zum Kartellrecht*, Vorbem. § 81-86 GWB 2005 (Lfg. 71 May 2010), paras 5 et seqq., 18 seqq. (however partly still critical); Wiesner, *Der Kronzeuge im Kartellrecht*, 2004, p. 118 et seqq.; Zagrosek, *Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen*, 2006, p. 213 et seqq.; Hetzel, *Kronzeugenregelungen im Kartellrecht*, 2004, p. 259 et seqq.

<sup>41</sup> OLG Düsseldorf, judgment of March 23<sup>rd</sup> 2006 - VI-2 Kart 3/05 OWi = WuW/E DE-R 1733-1749, partly reversed on other grounds by BGH NJW 2007, 3792.

<sup>42</sup> OLG Düsseldorf, judgment of March 30<sup>th</sup> 2009 - VI-2 Kart 10/08 OWi, 2 Kart 10/08.

<sup>43</sup> OLG Düsseldorf, judgment of June 26<sup>th</sup> 2009 - 2a Kart 2 - 6/08, reversed on other grounds by BGH, decision of February 26<sup>th</sup>, 2013, KRB 20/12 = NJW 2013, 1972.



## 2.2 Settlements (*einvernehmlicher Bußgeldbescheid*)

In administrative offence proceedings, transactional (consensual) resolutions with the competent Decision Division are possible with respect to the termination of proceedings as well as with respect to the amount of the fine.<sup>44</sup> Both have been widespread for a long time.<sup>45</sup> Where the Decision Division imposes a fine, a consensual resolution is commonly referred to as *einvernehmlicher Bußgeldbescheid* or *Settlement*,<sup>46</sup> the former German term being the traditional one, the latter the more recent. Practitioners estimate that they usually occur in at least 50 % of the proceedings.<sup>47</sup> Looking only at the proceedings between 2007 and 2011, the rate even amounts to more than 80 %, which includes numerous hard core cartels and some vertical restraints.<sup>48</sup>

### 2.2.1 Legal requirements

Conventionally, the normative guidelines for a settlement with the FCO have been derived from the standards developed in the case law on negotiated agreements in German criminal procedure.<sup>49</sup> These include in particular the following: A waiver of the right to appeal is excluded as part of a settlement; an admission must be backed by sufficient other evidence; all parties must receive equal treatment and be granted a certain level of transparency with respect to the course of the settlement, the latter however with due account of the fact that Decision Divisions do not conduct public hearings.<sup>50</sup> In mid-2009, the German legislator regulated negotiated agreements in criminal procedure with the *Gesetz zur Regelung der Verständigung im Strafverfahren*<sup>51</sup> (*Act on negotiated agreements in criminal proceedings*). That being said, the reform has not changed the validity of the aforementioned principles with respect to administrative offence proceedings before the FCO. According to the government's

<sup>44</sup> *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, paras 248, 250.

<sup>45</sup> According to *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, the practice of settling administrative offence proceedings began already shortly after the entry into force of the GWB in 1958. *De Maiziere*, *Die Praxis der informellen Verfahren beim Bundeskartellamt*, 1986, p. 9 already explains that negotiating the fine had been commonplace for many years. He reports that since the beginning of the 80s, there was however an internal order not to make the amount of the fine a subject matter of negotiation any more, though this could occur nevertheless on a case by case basis. More recent publications on the matter do not mention such an internal order. The general requirements for settlements set by the courts arguably now leave no room for such an order (any more) because the FCO president has no authority to give instructions to the Decision Divisions (on the latter, see *Klaue*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 51 GWB, para 5).

<sup>46</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 612.

<sup>47</sup> *Prange/Schneider*, *Handelsblatt* No. 37 of February 23<sup>rd</sup> 2010, p. 8, 9.

<sup>48</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 13 et seq.; see further *Vollmer*, E.C.L.R. 2011, 32(7), 350, 350 et seq.

<sup>49</sup> See *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 103 et seq.; *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, paras 205 et seq., both with further references and an overview about important requirements; for an in depth treatment see *Pfeiffer/Hannich*, in: *Karlsruher Kommentar zum OWiG*, 3<sup>rd</sup> ed. 2006, Einleitung, paras 29d-29g. Applying these requirements by analogy is justified by the fact that proceedings in which the GWB is enforced by way of fines are to be classified as administrative offence proceedings (*Ordnungswidrigkeitenverfahren*).

<sup>50</sup> *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 104 et seq.; *Vollmer*, E.C.L.R. 2011, 32(7), 350, 351 et seq.; on the prohibition of a waiver of legal remedy see also *ICN Cartel Working Group*, *Cartel Settlements*, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 29; for a general overview about the case law *Meyer-Goßner*, *Strafprozessordnung*, 56<sup>th</sup> ed. 2013, Einl. paras 119f et seq.

<sup>51</sup> BGBl 2009 Teil I No. 49 of 03.08.2009, p. 2353 et seq. See further below: 3. (Negotiated) agreements on the further course and outcome in criminal proceedings.

statement of reasons concerning the act (*Regierungsbegründung*), the legislator made a deliberate choice not to regulate settlements in administrative (offence) proceedings, inter alia because, in the words of the government's statement, this would unduly formalize the summary procedure of administrative authorities and because no significant practical need for such regulation was considered to exist.<sup>52</sup> The government's statement of reasons concerning the Act on negotiated agreements in criminal proceedings further explains that the act should not prevent “informal” settlements in exceptional cases in the future. In doing this, the principle of fair trial demanded to comply with the key requirements of the rule of law now regulated in detail with respect to criminal procedure.<sup>53</sup> The previous case law aimed at safeguarding exactly these requirements.<sup>54</sup>

### 2.2.2 Course of the procedure

Apart from the aforementioned guidelines, there are no specific statutory provisions governing settlements with the FCO in administrative offence proceedings. The details may therefore vary depending on the competent Decision Division.<sup>55</sup> In early 2010, the FCO explained in a case report<sup>56</sup> that it had modified its conventional practice, apparently bringing it more in line with the European Commission's new settlement procedure. All in all, the changes appear to be mostly minor in nature and seem to have evolved since 2008.<sup>57</sup> The FCO now calls “consensual” orders imposing a fine “settlement”, thereby adopting the terminology used by the European Commission.<sup>58</sup> It has described the modified approach in three documents:

- in an explanatory document of 23<sup>rd</sup> December 2013 about the settlement procedure,<sup>59</sup>
- in a case summary from March 8<sup>th</sup> 2010<sup>60</sup> on the decision in the "Fines proceedings against coffee roasters" (B11-18/08), p. 3 et seq.,

<sup>52</sup> *Gesetzesentwurf der Bundesregierung*, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18.03.2009, p. 16.

<sup>53</sup> *Gesetzesentwurf der Bundesregierung*, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18.03.2009, p. 16.

<sup>54</sup> However, a change seems possible with respect to whether an admission/confession is allowed as evidence in proceedings after a settlement has failed. According to the case law of the German Federal Court (BGH) (though not completely uniform) before the statutory regulation of the matter in criminal procedure, the confession/admission could still be used, see *Kühne*, in: *Löwe/Rosenberg*, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, 26<sup>th</sup> ed. 2006, Einleitung G, para 63; *Kölbel*, NStZ 2003, 232, 233, both with further references. By contrast, sec. 257c(4)3 of the StPO new version now stipulates that the defendant's confession may not be used in such cases. The government's statement of reasons concerning the Act justifies this with the defendant's fundamental right to a fair trial (*Gesetzesentwurf der Bundesregierung*, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18.03.2009, p. 14; likewise *Meyer-Goßner*, in: Meyer-Goßner, Strafprozessordnung, 56<sup>th</sup> ed. 2013, § 257c StPO, para 28). Accepting this reasoning, the same should apply in administrative offence proceedings before authorities as one of the aforementioned key requirements of the rule of law or via sec. 46 of the OWiG, *Vollmer*, E.C.L.R. 2011, 32(7), 350 and fn. 67; *Brenner*, WuW 2011, 590, 594. In any case, however, the FCO seems to have held the opinion already before the reform that a confession cannot be used as evidence after a settlement failed, see *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30. For a further change see below text accompanying fn. 123.

<sup>55</sup> *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 473.

<sup>56</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3 et seq.

<sup>57</sup> Cf. the description of the FCOs settlement practice in the authority's Activity Report 2007/2008, p. 35.

<sup>58</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3.

<sup>59</sup> *Bundeskartellamt*, Merkblatt: Das Settlement-Verfahren des Bundeskartellamtes in Bußgeldsachen.

- and in the Activity Report 2007/2008, p. 35.<sup>61</sup>

Most seems familiar from conventional practice. At present, it is difficult to assess to what extent the new guidelines are actually associated with a marked permanent modification of the practice of the independent Decision Divisions;<sup>62</sup> reports by officials tend to suggest that this may be the case.<sup>63</sup>

### 2.2.2.1 Scope of application

As such, all kinds of infringements may qualify for a settlement (i.e. horizontal and vertical agreements, abuse of dominance and violation of the prohibition to implement a concentration before clearance).<sup>64</sup> Settlement discussions are initiated predominantly in cases that are considered to be straightforward.<sup>65</sup> However, they are not excluded in complex cases or if the evidence is (still) insufficient to adopt a fully reasoned decision.<sup>66</sup>

There is no fixed time for settling during the proceedings. Corresponding initiatives may, and do, occur already during the investigative stage.<sup>67</sup> However, the Decision Division will, as a rule, start settlement discussions only after it has gained an overview about the infringement and the evidence.<sup>68</sup> Furthermore, it is crucial that the Decision Division considers the settlement interest of the party representative to be credible, i.e. not only purely tactical in nature.<sup>69</sup> It is not necessary that all parties are prepared to settle.<sup>70</sup>

### 2.2.2.2 Settlement discussions

The goal of the settlement discussions is to reach a mutual understanding about the infringement and its adequate sanctioning in a streamlined procedure, with benefits for or, in other words, concessions from both sides. During the discussions, the Decision Division informally discloses the main documents and pieces of evidence that it is prepared to use to establish an infringement.<sup>71</sup> That holds (at least) insofar as the parties do not otherwise know

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<sup>60</sup> The German version of this case summary was published on 14.01.2010.

<sup>61</sup> The explanatory notes to the Guidelines for the setting of fines in cartel administrative offence proceedings of 25 June 2013, p. 4 (Re: para 18, Note 2), mention only the latter two documents as the FCO's guidelines on settlement agreements; this is however explained by the fact that the fining guidelines predate the FCO's explanatory leaflet on the settlement procedure.

<sup>62</sup> The Bundeskartellamt does not mention details on the course and content of settlements in its case reports.

<sup>63</sup> See in particular *Vollmer*, E.C.L.R. 2011, 32(7), 350 et seq.

<sup>64</sup> *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 473; on the more recent practice see *Vollmer*, E.C.L.R. 2011, 32(7), 350, 350.

<sup>65</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 612 et seq.

<sup>66</sup> Cf. *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 105.

<sup>67</sup> In particular already shortly after a dawn raid, cf. *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 29; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 473; generally. *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 105.

<sup>68</sup> *Bundeskartellamt*, Tätigkeitsbericht 2007/2008, p. 35; *Vollmer*, E.C.L.R. 2011, 32(7), 350, 353.

<sup>69</sup> *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 105 et seq.; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 477.

<sup>70</sup> *Vollmer*, E.C.L.R. 2011, 32(7), 350, 350 et seq. reports that since the end of 2007 almost 1/3 of all settlement have been hybrid cases; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 476 et seq.

<sup>71</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613; *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3.

the objections or cannot sufficiently deduce them, for instance from the documents secured at their premises.<sup>72</sup> According to the current guidelines, the Decision Division shall disclose the essential elements of the infringement, including the main evidence, orally or in writing, announce an upper limit of the fine and hear the parties on these issues. The parties may put forward mitigating circumstances.<sup>73</sup> They are regularly expected to waive their right to full access to file;<sup>74</sup> but they are able to see the main evidence at a much earlier stage than in the standard procedure.<sup>75</sup> Where appropriate, the Decision Division will make a so called settlement-proposal in the form of a draft settlement declaration which includes a summary of the result of the investigation, thereby fulfilling the parties' right to be heard, and set a time-limit for acceptance.<sup>76</sup> A party that wants to settle must admit to the objections in the settlement declaration, which means that it has to acknowledge the facts including the circumstances that are relevant for determining the fine. Furthermore, a settling party is expected to accept a fine up to the previously announced limit.<sup>77</sup> According to the modified approach, the particulars of the settlement proposal as well as its acceptance or rejection by the affected parties and third parties shall be mentioned in the file.<sup>78</sup>

### 2.2.2.3 Settlement contents

An admission by the company arguably is an essential element of a settlement. The same applies, if need be, also to admissions by the natural persons involved. This enables the Decision Division to reduce the investigation effort and the effort in motivating the final order, which shortens the procedure.<sup>79</sup>

By contrast, it is more open which concessions from the part of the authority will become the content of a settlement. In practical terms, the options are conventionally very comprehensive.<sup>80</sup> First, settlement discussions usually centre around the impending fine and its addressees. Issues for negotiation include the adequate amount, reductions for positive post-offence conduct,<sup>81</sup> an upper limit of the expected fine,<sup>82</sup> if necessary, payment-facilities<sup>83</sup>

<sup>72</sup> *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; arguably also *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 473.

<sup>73</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613.

<sup>74</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3; *Vollmer*, E.C.L.R. 2011, 32(7), 350, 354; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 473; very critical *Prange/Schneider*, Handelsblatt No. 37 of February 23<sup>rd</sup> 2010, p. 8, 9 („Blindflug-Verfahren“).

<sup>75</sup> *Mundt* (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 17.

<sup>76</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3; *Vollmer*, E.C.L.R. 2011, 32(7), 350, 353 et seq.; critical *Prange/Schneider*, Handelsblatt No. 37 of February 23<sup>rd</sup> 2010, p. 8, 9.

<sup>77</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3; *Vollmer*, E.C.L.R. 2011, 32(7), 350, 354.

<sup>78</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 4; *Vollmer*, E.C.L.R. 2011, 32(7), 350, 354.

<sup>79</sup> *Bundeskartellamt*, Tätigkeitsbericht 2007/2008, p. 35, *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 105; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 476.

<sup>80</sup> For an overview see *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, p. 474–477.

<sup>81</sup> *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 104, 106; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 475.

<sup>82</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613.



and the closure of or limitations on proceedings against other parties, in particular natural persons involved.<sup>84</sup> Second, conventionally numerous aspects of the infringement as such and its legal assessment are “discussed”, e.g. its scope or whether it was committed intentionally or negligently.<sup>85</sup> Third, certain aspects of the subsequent administrative offence proceedings may be included, in particular elements of the reasons stated in the order and the authority’s case-related communication towards the public.<sup>86</sup>

Interestingly, in exceptional cases, the FCO also seems to be prepared to combine leniency, settlements and restorative measures that directly benefit victims, in an innovative and far-reaching resolution. The FCO has applied such an approach at least once in a case originating from a leniency application by a pharmaceutical company, Grünenthal GmbH, that had operated a price cartel with its competitor Infectopharm. As a result of the proceedings, the price agreements were abandoned, the FCO achieved price reductions for the drugs concerned, Grünenthal bringing its prices even to pre-infringement levels, and both companies reimbursed the health insurance funds for the extra costs incurred or made concrete offers. Grünenthal apparently did so on its own initiative, Infectopharm on the initiative of the FCO. In return, the FCO refrained from imposing a fine also against Infectopharm, pointing to this company’s low market share and the low financial importance of the price cartel.<sup>87</sup> Compensation payments to victims may indeed motivate discontinuation of administrative offence proceedings. Sec. 47(3) of the OWiG prohibits to make discontinuation to depend on, or relate to, payments to a charitable institution or other agency, but does not apply to compensation payments.<sup>88</sup>

#### 2.2.2.4 Conclusion and rewards

If settlement discussions lead to a provisional understanding, the Decision Division sends each party an agreed draft order imposing a fine on which the parties may give their views.<sup>89</sup> This step replaces the hearing following a statement of objections (*Beschuldigungsschreiben*) in the contentious standard procedure.<sup>90</sup> The order, if accepted by the parties, contains only

<sup>83</sup> *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 104, 106; *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 477.

<sup>84</sup> *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 104. The FCO stresses, however, that it is prepared to close or limit proceedings against other parties as part of a settlement only if there are further reasons supporting this.

<sup>85</sup> See *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 474; *Bundeskartellamt*, Tätigkeitsbericht 2005/2006, p. 35.

<sup>86</sup> *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 474, 476.

<sup>87</sup> See *Bundeskartellamt*, Case Summary, Retraction of Price Agreement for Colistin Antibiotics, B 3 - 144/08, available at [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2009/B3-144-08.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2009/B3-144-08.pdf?__blob=publicationFile&v=4). With respect to Grünenthal, the FCO also pointed to the extensive cooperation with the investigations.

<sup>88</sup> *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, para 210.

<sup>89</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613.

<sup>90</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 473 et seq. A statement of objections is not required by law as such, because sec. § 55(1) of



the information that is strictly mandatory pursuant to sec. 66 of the OWiG, i.e. a substantially reduced summary of the facts and a shortened legal analysis (so called *Kurzbescheid*).<sup>91</sup> This largely corresponds to the European Commission's approach and reflects the expectation that the addressee will not appeal the order (sec. 67 of the OWiG).<sup>92</sup> If the addressee does so nevertheless, the Decision Division will replace the short order (*Kurzbescheid*) with a fully detailed one, called *Zweitbescheid*.<sup>93</sup>

The settlement, more precisely the inherent cooperation that facilitates prosecution and spares public resources, is considered to be a mitigating circumstance in the form of positive post offence conduct justifying a discount on the fine. The size of the discount and/or the scope of other settlement benefits is larger the earlier the settlement is concluded, given that the procedural economies of the Decision Division are also larger at that time.<sup>94</sup> In cartel cases, benefits are however limited in order to preserve the attractiveness of the leniency programme and to account for the greater value of cooperation by successful leniency applicants.<sup>95</sup>

Conventionally, according to practitioners, given the wide range of topics, settlement discussions have not often led into a formal reduction of the fine so far. Instead, cooperation is said to have influenced the upstream calculation of the basic amount of the fine.<sup>96</sup> Apart from that, discounts of up to 15% have reportedly been available.<sup>97</sup>

According to the recent explanatory document and the case summary, the fine in horizontal cartel cases can be reduced by up to 10% in return for settling, depending on the timeliness of the settlement.<sup>98</sup> This appears to be slightly more restrictive than conventional practice and corresponds to the European Commission's approach. Conversely, when other forms of collusion or anticompetitive conduct justifying a fine are at stake, the FCO arguably does not exclude discounts greater than 10%.

However, while the FCO's explanatory document on the settlement procedure from December 2013 deals only with a settlement discount on the fine, not mentioning other kinds

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the OWiG does not clearly specify how the person concerned shall be heard, cf. *Vollmer*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 81 GWB, para 158.

<sup>91</sup> *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 105; *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613.

<sup>92</sup> *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613.

<sup>93</sup> *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 472; *Burrichter/Zimmer*, in: *Ehlermann/Atanasiu*, European Competition Law Annual 2007, 2007, p. 611, 613; *ICN Cartel Working Group*, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30.

<sup>94</sup> *Bundeskartellamt*, Tätigkeitsbericht 2007/2008, p. 35, where it is indicated that the Decision Division will examine, depending on the timing of the settlement, to what extent it grants further reductions on account of procedural economies, for instance by not prosecuting minor parts of the infringement within the scope of its discretion in taking up a case.

<sup>95</sup> *Bundeskartellamt*, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), p. 103, 106.

<sup>96</sup> *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 474-477, in particular p. 475.

<sup>97</sup> *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 475.

<sup>98</sup> *Bundeskartellamt*, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11-18/08), p. 3; *Burrichter*, in: *Ehlermann/Marquis*, European competition law annual 2008, 2010, p. 471, 475; likewise already *Bundeskartellamt*, Tätigkeitsbericht 2005/2006, p. 35. At the same time, however, it still seems to be possible to make the scope of the (prosecuted) infringement a subject of settlement discussions, see suggestive of this *Vollmer*, E.C.L.R. 2011, 32(7), 350, 352. As this practice (as far as can be seen) has not been abandoned, it seems doubtful whether the decrease of the upper limit for fine reductions from 15% to 10% is effectively associated with lower overall benefits.

of concessions, the authority's fining guidelines as well as the case summary in the Coffee Roasters case both still refer to the Activity Report 2007/2008, p. 35, where it is said that the Decision Division will examine, depending on the time of a settlement, to what extent it will grant further reductions for spared administrative burden, e. g. by not further prosecuting minor parts of the infringement, in exercising its discretion in taking up a case. It should be noted that (even) this arguably does not conflict with the European Commission's approach to settling cartel cases. While the European Commission does not explicitly mention "non-prosecution at the margins of an infringement" as a settlement benefit, it stresses the advantage of "discussing" aspects of the infringement early in a constructive atmosphere.<sup>99</sup> The delineation between „negotiating“ and considering defence arguments or considerations of practical expediency is a key factor of every settlement procedure.<sup>100</sup> Both the Bundeskartellamt's settlement procedure and the one of the European Commission establish a setting that allows for discussions about administrative measures that are conventionally taken unilaterally, in particular the calculation of the fine.<sup>101</sup> According to practitioners, in the first cartel settlements with the Commission this has opened up previously unimaginable opportunities of dialogue.<sup>102</sup> Insofar as the defendant can better "convince" the case team to abandon certain aspects of the objections in settlement discussions (negotiations) than in the standard procedure, this comes close to charge or fact bargaining and will translate into a lower fine based on the calculation method of the Commission's fining guidelines.<sup>103</sup> Furthermore the first settlements by the European Commission created the impression that the Commission applied several fining variables unusually generously, in particular discounts pursuant to the Leniency Notice, for mitigating circumstances and because of inability to pay.<sup>104</sup> Summing up, there do not seem to be marked practical differences between German and European cartel settlements with regard to the scope of possible benefits.

### 2.2.3 Control and Transparency

Judicial control of a settlement occurs only if one affected party appeals the agreed order. As the settlement does not comprise a waiver, the settling party is not prevented from bringing an appeal. Usually, however, it should be rather unattractive from the settling party's

<sup>99</sup> See e.g. *Kroes*, Assessment of and perspectives for competition policy in Europe, Celebration of the 50th anniversary of the Treaty of Rome, Barcelona, 19th November 2007, SPEECH/07/722, p. 5 ("By introducing a settlement phase, the Commission increases companies' options to be informed earlier of potential objections and of the evidence supporting them. It is a unique opportunity to be informed of the likely range of fines prior to the adoption of the final decision. On the basis of these facts and documents, the parties will have the opportunity to express their views to the Commission, in line with the case-law of the Court of Justice as mentioned in particular in article 16 of the Commission's notice. This will allow companies to influence even the contents of the statement of objections and, thereby, of the decision itself.").

<sup>100</sup> With respect to the European settlement procedure *Joshua/Hugmark et al.*, Eur. Antitrust Rev. 2009, 23, 24 et seq.; *Lawrence/O'Kane u. a.*, Comp Law 2008, 17, 35.

<sup>101</sup> See with respect to the European settlement procedure *Bellis*, in: Gheur, Alternative enforcement techniques in EC competition law, 2009, p. 3, 5; *van Bael/Bellis*, Competition law of the European Community, 5<sup>th</sup> ed 2010, p. 1173; *Siragusa/Guerri*, in: Ehlermann/Marquis, European competition law annual 2008, 2010, p. 185, 198 et seq.

<sup>102</sup> Hirsbrunner, EuZW 2011, 12, 15.

<sup>103</sup> See in detail *Bueren*, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, p. 297-301.

<sup>104</sup> See *Stanbrook/Winterscheid*, International Securitization & Finance Report, Vol 13, No. 14, July 31<sup>st</sup>, 2010, p. 5; *Brankin*, E.C.L.R. 2011, 32(4), 165, 168 et seq.; *Ortega González*, E.C.L.R. 2011, 32(4), 170, 173; cf. also *European Commission*, IP/10/586 - DRAM; *European Commission*, IP/10/985 - animal feed phosphates; *European Commission*, IP/11/473 – washing powder, p. 2.

perspective: First, in case of an appeal the Decision Division will replace the short-form “agreed” order (*Kurzbescheid*) with a fully-fledged order (*Zweitbescheid*). This means that the appealing party would forego the de facto benefit flowing from the conciseness of the first order which provides a certain de facto protection against follow-on damages claims and reputational damage. Second, by filing an appeal, the undertaking and its lawyer might jeopardize their reputation as reliable partners for a settlement in any subsequent administrative offence proceedings. Third, the validity of the party’s admission is not affected by the appeal, which will therefore seem worthwhile only if the party believes that the FCO committed material procedural errors or that its cooperation has not been sufficiently rewarded. At least until 2007, appeals of settling parties had not occurred.<sup>105</sup>

On the other hand, a consensual resolution is not excluded after an appeal either. If the Decision Division upholds the order in view of an appeal, it refers the procedure to the public prosecutor (sec. 69(3), (4) of the OWiG).<sup>106</sup> The ensuing court proceedings which are governed by the German Act on Regulatory Offences (OWiG), involve a complete de novo hearing of the case. The FCO participates only in the role of a support body to the court.<sup>107</sup> Due to the cross-references in sections 46(1), 71(1) of the OWiG to the German Code of Criminal Procedure (Strafprozessordnung, StPO), the court, the public prosecutor and the appellant may reach an agreement on the further course and outcome of the proceedings pursuant to sec. 257c of the StPO,<sup>108</sup> i.e. in accordance with the statutory rules governing negotiated agreements in criminal proceedings. The legislator has explicitly recognized this option for (judicial) administrative offence proceedings in competition law cases.<sup>109</sup> As far as can be seen, no peculiarities apply in this regard.<sup>110</sup>

#### 2.2.4 Overall assessment

All in all, it seems more or less accepted that settlements in FCO administrative offence proceedings are in principle necessary to cope with the caseload in a reasonable time frame. The fundamental doubts whether settlements in FCO administrative offence proceedings are permissible at all<sup>111</sup> have largely lost their force since the legislator has created a statutory framework for negotiated agreements in criminal procedure.<sup>112</sup>

FCO president *Mundt* has even argued that settlements involve a win-win situation:<sup>113</sup> The companies benefit from a considerably shortened procedure, lower legal expenses and a lower

<sup>105</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 16.

<sup>106</sup> For more detail see *Hoffmann/Orth et al.*, in: *Terhechte*, *Internationales Kartell- und Fusionskontrollverfahrensrecht*, 2008, § 12 para 235; *Dannecker/Biermann*, in: *Immenga/Mestmäcker*, *Wettbewerbsrecht: GWB*, 4<sup>th</sup> ed. 2007, Vor § 81 GWB, para 249.

<sup>107</sup> *Vollmer*, in: *Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht*, Vol. 2, 2008, § 82a GWB, para 3; see further *Barth/Budde*, *WuW* 2010, 377.

<sup>108</sup> *Burrichter*, in: *Ehlermann/Marquis*, *European competition law annual* 2008, 2010, p. 471, 477.

<sup>109</sup> *Gesetzentwurf der Bundesregierung*, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18.03.2009, p. 15 et seq.

<sup>110</sup> At least before the statutory regulation of negotiated agreements in criminal procedure, such settlements before the Higher Regional Court of Düsseldorf seem to have been frequent and quite welcome from the part of the court, see *Bundeskartellamt*, in: *OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006* (22.01.2008), p. 103, 107.

<sup>111</sup> See *Zagrosek*, *Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen*, 2006, p. 180 et seqq.

<sup>112</sup> See below 3. (Negotiated) agreements on the further course and outcome in criminal proceedings.

<sup>113</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 15.

fine; the FCO reduces its procedural effort and obtains concessions that can be used as evidence as well as further witnesses in hybrid cases.<sup>114</sup> Even though victims may, compared to the standard procedure, be disadvantaged by the short order describing only essential elements of the infringement, the FCO argues that this is a price to be paid for effective public enforcement.<sup>115</sup>

The FCO's argumentation is in line with the one put forward by officials of the European Commission, other European competition authorities and some scholars, who argue that settlement procedures improve the efficiency and thereby ultimately the effectiveness of public enforcement to the benefit of society:<sup>116</sup> Settlements preserve the authority's resources, enabling the prosecution of more cases, and thereby prevent restraints of competition to a larger extent. The economic standard model of optimal enforcement behind this reasoning is however simplistic and would need significant extensions. Based on the current state of research, a stronger deterrent effect and better enforcement of competition law through settlement procedures cannot be verified.<sup>117</sup> Further, the argument that settlements improve the effectiveness of enforcement presupposes that outcomes in settled cases do not differ from outcomes in adversary cases except for the fine reductions, i.e. that settlements are not associated with more type I/II errors, agency costs, information asymmetries or (significant) negative external effects on private enforcement.<sup>118</sup> In order to work towards this result, settlement procedures should tightly limit all available benefits, including explicit (fine reductions) and implicit ones (scope of prosecution, publicity/reputational effects etc.), thereby also preserving the attractiveness of leniency, and should be sufficiently transparent to allow for external control.

It appears that the FCO's settlement practice up to now is rather opaque, which has led to doubts concerning the rule of law<sup>119</sup> and does not really allow to assess whether the aforementioned conditions for more effective enforcement through settlements are fulfilled. As explained above, neither the way to a settlement nor possible settlement contents are regulated through administrative guidelines. Both depend on the specific circumstances of the case at hand, and on the practice of the competent Decision Division. While the general approach is described in a case report and the Activity Report these publications arguably do not bind the Decision Divisions. Admittedly, the practical difference to e. g. the European

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<sup>114</sup> This is due to the fact as soon as the settlement decision against a potential witness has become final, the witness loses his right to refuse to answer any questions the reply to which would subject him to the risk of being prosecuted for a criminal offence or a regulatory offence (sec. 55 of the StPO).

<sup>115</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 16.

<sup>116</sup> See *Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions*, MEMO/08/458, p. 1; *Kroes*, *Settlements in cartel cases*, 12th Annual Competition Conference, Fiesole, 19th September 2008, SPEECH/08/445, S. 4; *Almunia*, *First cartel decision under settlement procedure – Introductory remarks*, Press conference – Berlaymont press room, Brussels, 19 May 2010, SPEECH/10/247, p. 2 et seq.; *Mehta/Centella*, *Comp. L. Int.* 2008, 11; *Mehta/Centella*, in: *Ehlermann/Marquis*, *European competition law annual 2008, 2010*, p. 391, 394 et seq., 421; *OFT*, in: *OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008)*, p. 137, 139; *Nikpay/Waters*, in: *Ehlermann/Marquis*, *European competition law annual 2008, 2010*, p. 499, 499, 501; *Motta*, *E.C.L.R.* 2008, 29(4), 209, 215.

<sup>117</sup> For an in depth treatment see *Bueren*, *Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 354 et seqq.

<sup>118</sup> For possible safeguards how to achieve this see *Bueren*, *Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 391 et seqq. In conjunction with p. 323 et seqq.

<sup>119</sup> *Brenner*, *WuW* 2011, 590, 600

Commission's settlement guidelines is not as large as it might seem at first, given that the latter contain many vague terms and flexible elements. In particular, neither procedure requires the objections to be set forth in writing before settlement discussion start, so that the true size of benefits including possible fact and charge bargaining cannot be verified. Likewise, both procedures allow at best for very limited access to file. The US approach to plea bargaining in antitrust cases, in comparison, seems quite transparent with respect to the abstract policy but is arguably even less transparent as far as outcomes of concrete cases are concerned.<sup>120</sup>

It should be noted, however, that the FCO's new policy advocated since end 2009/early 2010 has brought about two important improvements:

First, originally there were no formal minutes about a settlement agreement in a concrete case.<sup>121</sup> Nowadays, the particulars of the settlement proposal as well as its acceptance or rejection shall be mentioned in the file. This may allow for a certain degree of control by the judge and the parties affected. It remains however to be seen whether this turns out to be a sufficient safeguard in practice.

Second, originally the final order imposing a fine often did not even mention whether the case involved a settlement.<sup>122</sup> Nowadays, the decisions and case reports published on the FCO's homepage generally seem to mention if a case has been concluded via a settlement, including a rough sketch of the settlement terms. This change is arguably required by the Act on negotiated agreements in criminal proceedings. It follows from sec. 78(2) of the OWiG new version that a judicial decision in administrative offence proceedings must mention if a settlement has been concluded. There are good reasons to consider this as being one of the key requirements of the rule of law that also apply to settlements with an authority in administrative offence proceedings.<sup>123</sup>

### **3. (Negotiated) agreements on the further course and outcome in criminal proceedings**

Cartels that involve collusive tendering (bid rigging) are criminal acts pursuant to sec. 263, 298 of the German Criminal Code,<sup>124</sup> and punishable with a fine or imprisonment not exceeding five years, in especially serious cases up to ten years. Unlike in the USA, German law provides only for the criminal prosecution of natural persons, not of legal persons. The enforcement of sec. 263, 298 StGB in the context of anticompetitive conspiracies is the task of the public prosecutor. In terms of case numbers, it is quite important, but apparently concerns mostly local infringements.<sup>125</sup>

<sup>120</sup> See *Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 61 et seqq. with further references.

<sup>121</sup> *ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008*, p. 30.

<sup>122</sup> *Faruga, Concurrences* 2008, p. 210, 211 fn. 13; *Carlin/Martin Alegi et al., Cartels & Settlements*, <http://competition.practicallaw.com/2-243-6952>, p. 3 et seq.

<sup>123</sup> *Brenner, WuW* 2011, 590, 598 et seq.

<sup>124</sup> For details *Dannecker/Müller*, in: *Wabnitz/Janovsky, Handbuch des Wirtschafts- und Steuerstrafrechts*, 4<sup>th</sup> ed. 2014, chapter 18, B.III.2. p. 1026 et seqq., B.IV. p. 1031 et seqq. with further references also on the scholarly critique on the case law concerning sec. 263 StGB.

<sup>125</sup> The police crime statistics 2012, p. 60, provided by the German Federal Ministry of the Interior (Bundesinnenministerium) (available at <http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2013/PKS2012.html>), list 115 cases for 2012 and 53 cases for 2011; on previous data see also *Wagner-von Papp, WuW* 2009, 1236, 1243-1245, 1248.



With a view to minor offences (principle of proportionality), procedural economies and practicability, several provisions in the StPO allow for exceptions from two basic principles of German criminal procedure, i. e. mandatory prosecution (sec. 152 of the StPO) and the inquisitorial principle (sec. 244(2) of the StPO). These standard options apply to cartels as well.

Sec. 153 – 153b of the StPO (facultative prosecution)<sup>126</sup> allow the public prosecution (if required with the consent of the accused and/or the competent court) to dispense with prosecution or court action in cases of minor misdemeanours either without any measures (sec. 153 of the StPO), if the accused follows certain conditions and instructions (sec. 153a of the StPO),<sup>127</sup> or when the conditions under which the court may terminate the proceedings apply (sec. 153b of the StPO).<sup>128</sup>

Sec. 257c of the StPO permits negotiated agreements<sup>129</sup> with the parties on the further course and outcome of criminal proceedings at any stage of the trial. The provision has been incorporated in 2009 as part of the Act on negotiated agreements in criminal proceedings (*Gesetz zur Regelung der Verständigung im Strafverfahren*).<sup>130</sup> It codifies a long-standing informal practice of negotiated agreements<sup>131</sup> and builds on the related case law. The provision is highly controversial.<sup>132</sup> Critics argue that it transgresses the structure of German criminal procedure which generally aims at ascertaining the material truth.<sup>133</sup> The duty to the best possible exploration of the material truth, a result of principle of personal guilt (*Schuldprinzip*), the right to a fair trial, the presumption of innocence and the court's legal duty of neutrality are constitutionally guaranteed.<sup>134</sup> Therefore, it is essential to accurately respect the statutory limitations of agreements under sec. 257c of the StPO:

They may only comprise the legal consequences that could be the content of the judgment, procedural measures and the participants' conduct during trial. Regarding the legal consequences, however, only a range, not a distinct sentence may be agreed.<sup>135</sup> The accused's confession usually shall be an integral part (sec. 257c(2)2 of the StPO). By contrast, the guilty verdict, measures of rehabilitation or incapacitation (sec. 257c(2)2 of the StPO) and a waiver of the right to file an appellate remedy (sec. 302(1)2 of the StPO) are prohibited as part of a negotiated agreement.<sup>136</sup> In addition, sec. 257c(1)2 of the StPO clarifies that a negotiated

<sup>126</sup> *Beukelmann*, BeckOK StPO (28.01.2013), § 153 para 1.

<sup>127</sup> Critical on a widespread application of sec. 153a of the StPO to white collar crime even in case of large damage *Roxin/Schünemann*, *Strafverfahrensrecht*, 27<sup>th</sup> ed. 2012, § 14 paras 14.

<sup>128</sup> For overviews see *Bohlander*, *Principles of German criminal procedure*, Oxford 2012, p. 108 et seq.; *Roxin/Schünemann*, *Strafverfahrensrecht*, 27<sup>th</sup> ed. 2012, § 14 paras 5 et seqq.

<sup>129</sup> In general public discourse, such resolutions are sometimes also derogatory referred to as “deal”.

<sup>130</sup> The *Gesetz zur Regelung der Verständigung im Strafverfahren* of July 29<sup>th</sup> 2009 (BGBl 2009 Teil I No. 49 of 03.08.2009, p. 2353 et seq.) has regulated negotiated agreements in criminal proceedings statutorily in sections §§ 35a, 44, 160b, 202a, 212, 243, 257b, 257c, 267, 273, 302 of the StPO new version, sec. 78(2) of the OWiG new version. For an overview about the new rules see *Nistler*, *JuS* 2009, 916; *Jahn/Müller*, *NJW* 2009, 2625.

<sup>131</sup> On the stages of its development see *Meyer-Göfner*, *Strafprozessordnung*, 56<sup>th</sup> ed. 2013, Einl. paras 119b et seqq.

<sup>132</sup> Very critical e.g. *Roxin/Schünemann*, *Strafverfahrensrecht*, 27<sup>th</sup> ed. 2012, § 14 paras 19-32.

<sup>133</sup> *Meyer-Göfner*, *Strafprozessordnung*, 56<sup>th</sup> ed. 2013, § 257c para 3; *Bohlander*, *Principles of German criminal procedure*, Oxford 2012, p. 120.

<sup>134</sup> BVerfG judgment of 19.03.2013, 2 BvR 2628/10, BVerfGE 133, 168 = *NJW* 2013, 1058, paras 56-62, 104.

<sup>135</sup> See further *Meyer-Göfner*, *Strafprozessordnung*, 56<sup>th</sup> ed. 2013, § 257c paras 8-14, 16-17b, 19-22.

<sup>136</sup> *Bohlander*, *Principles of German criminal procedure*, Oxford 2012, p. 120; *Eschelbach*, BeckOK StPO, Stand: 30.09.2013, § 257c paras 11 et seqq.

agreement does not exempt the court from the duty to extend the taking of evidence to all facts and means of proof relevant to the decision (sec. 244(2) of the StPO). In practice, however, this provision is often reduced to a mere plausibility check of the confession, given the goal of negotiated agreements is to streamline the procedure.<sup>137</sup>

The court shall cease to be bound by a negotiated agreement if significant circumstances have been overlooked or have newly arisen, and if the court therefore becomes convinced that the prospective sentencing range is no longer appropriate (sec. 257c(4)1 of the StPO). The same holds if the defendant shows a different conduct from what was originally expected from the court (sec. 257c(4)2 of the StPO).

In 2013, the Federal Constitutional Court has endorsed the new statutory framework as such, but expressed severe criticism of the deficient practical application and required the legislator to monitor whether the current safeguards are sufficient.<sup>138</sup>

## 4. Settlements in administrative proceedings

### 4.1 Settlements as part of administrative proceedings in general

In (cartel) administrative proceedings, i.e. administrative proceedings in which (“only”) a prohibition (cease and desist) order (without a fine) is at issue, settlements are just as possible as in administrative offence proceedings. However, a comparably specific practice has not evolved yet. Nevertheless, several aspects should apply *mutatis mutandis*, especially if the administrative proceedings end with a cease and desist order finding an infringement. The scope of possible settlement items is arguably larger and therefore more case-specific. In particular, administrative matters will regularly concern competition law infringements that are less severe or of a minor nature and that allow for discretionary termination of proceedings without a formal decision. This makes it possible to reach innovative agreements in return for closure, e.g. restitutionary measures for victims.<sup>139</sup>

### 4.2 Commitments

#### 4.2.1 Purpose and scope of application

Since the entering into force of the 7<sup>th</sup> amendment of the GWB on July 1<sup>st</sup>, 2005, the FCO has had the power to accept legally binding commitments, as is provided for in sec. 32b of the GWB. The provision is modelled after Art. 9 Reg. 01/2003<sup>140</sup> and pursues similar goals: It is designed to bring an apparent on-going infringement to an end, and to restore competition in the market in a quick and cost-effective way, while at the same time providing for more transparency and legal certainty than informal understandings.<sup>141</sup>

<sup>137</sup> *Eschelbach*, BeckOK StPO (30.09.2013), § 257c para 25; *BVerfG* judgment of 19.03.2013, 2 BvR 2628/10, BVerfGE 133, 168 = NJW 2013, 1058, para 49 summarizes the results of an empirical study, commissioned by the Federal Constitutional Court, which found that 38.3% of the judges surveyed admitted to examine the credibility of a confession made as part of a negotiated agreement either (only) often, sometimes, rarely or never, though the law requires the judge always to do so.

<sup>138</sup> *BVerfG* judgment of 19.03.2013, 2 BvR 2628/10, BVerfGE 133, 168 = NJW 2013, 1058; on this judgment see *Stuckenberg*, ZIS 2013, 212; *Globke*, JR 2014, 9.

<sup>139</sup> These are not excluded as part of administrative offence proceedings, see above 2.2.2.3 Settlement contents.

<sup>140</sup> Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Bundestags-Drucks. 15/3640, p. 34, 51 et seq.

<sup>141</sup> *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 1 et seq.

Similar to its EU equivalent, sec. 32b of the GWB allows for commitments only in administrative proceedings (fines not at issue), in particular if the FCO would otherwise envisage a prohibition order based on sec. 32 of the GWB to stop an infringement.<sup>142</sup> Commitment decisions are, in other words, a special way to close such proceedings.

#### 4.2.2 Procedure and content

After the FCO has formally initiated proceedings and come to the preliminary conclusion that competition law enforcement is warranted, it must communicate the concerns based upon preliminary assessment to the concerned undertaking or undertakings. In doing so, the FCO may, but need not propose to address the possibility of commitments instead of a prohibition order. It is then mainly up to the undertaking(s) to offer commitments, behavioural or structural in nature, that are capable of dispelling the concerns. The FCO must hear the undertaking(s) on the suitability of the proposed commitments and on the possible continuation of proceedings (sec. 56(1) of the GWB). The undertakings have a limited right to access to file (sec. 29 of the VwVfG).<sup>143</sup>

The (proposed) commitments may dispel competition law concerns in two ways:<sup>144</sup> First, being the usual solution, proposed commitments can address the legal concerns regarding the underlying behaviour, e.g. by discontinuing it in whole or in part or by promising to change certain parameters. Second, the proposed commitments may also try to influence how the FCO exercises its enforcement discretion. So far, this has been of particular importance if the undertaking(s) concerned had collected excessive prices from their customers, especially end consumers. In this respect, the 8<sup>th</sup> amendment of the GWB has clarified that the FCO may, as part of a cease and desist order pursuant to sec. 32 of the GWB, order the restitution of the economic advantages that the undertaking(s) obtained from the illegal conduct. Before the amendment, this has already been the view of the German Federal Court<sup>145</sup> but disputed in the literature.<sup>146</sup> Given that the FCO may order restitution as part of a “standard” cease and desist order, the restitution may also be part of a commitment decision. One high profile case in which the FCO made use of this option concerned proceedings against 35 gas suppliers on the suspicion of excessive gas prices initiated in 2008. 30 of these proceedings were discontinued on account of commitments made by the companies in which the companies pledged to reimburse their customers with a total of almost € 130 million in the form of credits or price reductions.<sup>147</sup> Subsequently, the FCO adopted a similar approach in a case concerning the market for heating current, where several proceedings were concluded with commitments that

<sup>142</sup> Cf. Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Bundestags-Drucks. 15/3640, p. 34. Originally, this was the only application. With the 8<sup>th</sup> amendment of the GWB in 2013, the legislator has extended the scope to abuse proceedings in the field of resale price maintenance for newspapers and magazines and to abuse proceedings against water companies, both of which are dealt with in special provisions of the GWB (sec. 30 to sec. 31b of the GWB).

<sup>143</sup> *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 9; on the limitations see above fn. 10.

<sup>144</sup> See *Bornkamm*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 32b GWB paras 7 et seq.

<sup>145</sup> *BGH*, Beschl. v. 10.12.2008, KVR 2/08, *Stadtwerke Uelzen*, para 16 = *BGH* NJW 2009, 1212 (1213), in an obiter dictum.

<sup>146</sup> See *Reher/Haellmigk*, WuW 2010, 513; *Fuchs*, ZWer 2009, 176.

<sup>147</sup> See further *Bundeskartellamt*, Case Summary, Abuse proceedings from 2008 against gas suppliers (“2008 gas price proceedings”) – examination by the Bundeskartellamt of commitments offered by suppliers and gas price developments, available at <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2009/B10-16-08.html>.

involved compensatory price measures – the companies pledged not to raise prices despite of increasing costs for a certain time – and sometimes additionally a direct restitution to customers.<sup>148</sup>

The FCO may declare the proposed commitments to be binding on the undertaking(s) in question where it considers that the commitments proposed would fulfil the purpose of bringing the suspected infringement to an end or make further action dispensable, and that the commitments are not (clearly) disproportionate to that purpose.<sup>149</sup> The decision may be limited in time (sec. 32b(1)3 of the GWB) and shall state that, subject to the exceptions stipulated in sec. 32b(2) of the GWB, the cartel authority will not make use of its powers under sections 30(3), 31b(3), 32 and 32a of the GWB. This means that, following the example of Art. 9 Reg. 01/2003, the FCO simply declares to have no reasons to act on the case; it does not make any substantive findings as to the existence of an infringement. The decision thereby does not preclude claims for damages by private parties that consider the undertaking to have infringed competition law. However, such plaintiffs cannot rely upon the commitment decision to prove an infringement.

#### 4.2.3 Enforcement

The binding character of the commitments refers to the FCO and the undertaking in question. If the undertaking implements the commitments, the FCO is in principle prevented from imposing fines or measures bringing the suspected infringement to an end.

The FCO can enforce commitments by way of administrative compulsory execution (Verwaltungszwang). In addition, if the company contravenes the enforceable order issued pursuant to sec. 32b of the GWB, it commits an administrative offence that can be sanctioned, with respect to natural persons with a fine of up to EUR 1 million and concerning an undertaking or an association of undertakings with a fine of up to 10 percent of the total turnover achieved in the business year preceding the decision of the authority (see sec. 81(2)lit. a, sec. 81(4)1 to 3 of the GWB). Furthermore, the FCO may rescind the decision and reopen the proceedings (sec. 32b(2) No. 2 of the GWB). Third parties that are negatively affected by the non-implementation of the commitments may claim damages pursuant to sec. 33(1)1 of the GWB.<sup>150</sup>

#### 4.2.4 Possibilities to rescind

The FCO may always rescind the decision and reopen the proceedings for the benefit of the company concerned, or with its consent.<sup>151</sup> By contrast it may do so for the disadvantage of the company only in three scenarios (sec. 32b(2) of the GWB): (1) the factual circumstances

<sup>148</sup> See e.g. Bundeskartellamt Decision of 29<sup>th</sup> October 2010, B 10 – 26/09, WEMAG AG; Bundeskartellamt Decision of 26<sup>th</sup> September 2011, B 10 – 31/10, Städtische Werke Aktiengesellschaft; Bundeskartellamt Decision of 11<sup>th</sup> November 2010, B 10 – 15/09, E.ON Westfalen Weser AG & E.ON Westfalen Weser Vertrieb GmbH.

<sup>149</sup> While the FCO has a margin of discretion whether to accept certain commitments, it must respect the principle of proportionality in making its decision, see *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 7. This means that the FCO must in principle not accept commitments that are excessive. However, the decision whether or not to accept certain commitments is based on a preliminary assessment; this applies also to the assessment of proportionality so that the test will arguably rather be that commitments are not clearly excessive.

<sup>150</sup> See *Bornkamm*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 32b GWB para 19.

<sup>151</sup> See *Bornkamm*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 32b GWB para 28, 33; *Bach*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 32b para 27.

have materially changed following the decision; (2) the undertakings concerned do not meet their commitments, or (3) the decision was based on incomplete, incorrect or misleading information provided by the parties.

If an undertaking making commitments considers the first scenario to be fulfilled, it may want the commitment to be altered and may ask the FCO to reopen proceedings. The FCO must then adopt a decision within its margin of discretion. In case that the FCO refuses and the undertaking considers this to be an abuse of discretion, it may appeal the decision pursuant to sec. 63(3) of the GWB.<sup>152</sup> Apart from this, it is open and disputed in literature whether, and subject to what conditions, the undertaking concerned may walk away from commitments on its own. While some maintain that this is impossible,<sup>153</sup> others favour an analogy to the provision in the Federal Act on Administrative Procedure (Verwaltungsverfahrensgesetz – VwVfG) regarding the adaption of and withdrawal from contracts governed by public law (sec. 60 of the VwVfG).

#### 4.2.5 Appeal

It is largely open in the case law and disputed in literature to what extent the company offering the commitments can appeal the decision that declared the commitments binding. The majority view arguably is that it can successfully do so only in exceptional circumstances, in particular if there is disagreement about the correct interpretation of the commitment or if the concerned undertaking was induced to propose commitments by force or deceit.<sup>154</sup> By contrast, the concerned undertaking is thought to be unable to reopen the question whether the behaviour in question was illegal or not, as this would jeopardize the transactional character of commitments. This restriction is however in dispute. A rather generous opinion contends that the concerned undertaking may appeal the decision declaring the commitments binding based on the argument that the behaviour in question did not violate competition law, or that the commitments are more far-reaching than necessary and therefore disproportionate to remove competition-law related concerns.<sup>155</sup> A probably convincing intermediate position is that the concerned undertaking is not prevented from advancing these arguments, but will be successful only insofar as the FCO's assessment of the alleged competition law concerns and/or the adequate commitment was clearly unjustifiable.<sup>156</sup>

Third parties are usually considered to be unable to appeal a commitment decision by arguing that the FCO should issue a prohibition of at least seek harsher commitments, due the FCO's broad discretion whether to act on suspected competition law infringements and if so, in what way.<sup>157</sup> Third parties may however appeal a commitment decision if it significantly affects their rights so that therefore they were or should have been admitted to the proceedings.<sup>158</sup>

<sup>152</sup> *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 20.

<sup>153</sup> *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 20.

<sup>154</sup> See *Bornkamm*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 32b GWB paras 35 et seq. with further references; *Keßler*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 32b para 24; *Bach*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 32b para 33.

<sup>155</sup> *Klose*, in: Wiedemann, Kartellrecht, 2<sup>nd</sup> ed. 2008, § 51 para 46.

<sup>156</sup> *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 16.

<sup>157</sup> *Keßler*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 32b para 24; more generous *Klose*, in: Wiedemann, Kartellrecht, 2<sup>nd</sup> ed. 2008, § 51 para 46.

<sup>158</sup> *Rehbinder*, in: Löwenheim/Meessen/Riesenkampff, Kartellrecht, 2<sup>nd</sup> ed. 2009, § 32b GWB para 17.



#### 4.2.6 Overall assessment

The FCO argues that commitments enable the authority to react in a flexible and quick way to different circumstances in markets. They allow for solutions with a widespread effect and direct benefits for victims, making it possible to open encrusted markets and to back up merger control decisions.<sup>159</sup>

Though the German provision has been modelled after Art. 9 Reg. 01/2003, the FCO's practice has not been subject to similar critique as has been the Commission's practice. In particular, the Commission has demanded very intrusive structural commitments on the energy markets after it was not able to push through corresponding legislation, giving rise to criticism that it implemented regulatory measures via competition law.<sup>160</sup> Furthermore it is doubted whether the Commission's practice respects the parties' rights of defence or rather threatens high fines to obtain far-reaching commitments.<sup>161</sup> It appears that there are no such reservations with regard to the German practice, though the danger of regulatory measures is acknowledged as such.<sup>162</sup> FCO president *Mundt* has indeed indicated that he understands the concerns against the Commission's practice and advocates a more cautious approach.<sup>163</sup>

The FCO's occasional practice to use commitments and settlements to assure restitution for victims of competition law infringements is a rather innovative approach in Europe which has previously already been put in practice in Australia, the USA and occasionally in the UK (*independent schools* case<sup>164</sup>) as well as in the Netherlands.<sup>165</sup> That approach can be linked to the idea of *Restorative Justice*, i.e. the goal of restoration and compensation for the victim. A flexible settlement procedure makes it possible to implement both concepts to quite a large extent. In this respect, according to the theory of Responsive Regulation & Restorative Justice, the option to settle, being a consensual element in the enforcement pyramid, should have priority over contentious repressive procedures.

On the one hand this may be an attractive solution to assure swift compensation even where victims are unlikely to sue, thus obviating a need for class actions mechanisms. In the gas price case described above, restitutionary commitments were an effective and efficient way to provide redress for consumers without numerous costly civil claims.

On the other hand, it might seem questionable to accept restitutionary commitments that presuppose an infringement without making a respective finding. Furthermore, intricate legal questions could arise if a victim is not satisfied with this solution or the amount of compensation. Finally, one should bear in mind that restitutionary commitments or

<sup>159</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 11.

<sup>160</sup> See in detail *Bueren*, *Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 473 et seqq.

<sup>161</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 11 et seq.; *Bueren*, *Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 467 et seqq.

<sup>162</sup> See briefly *Georgii*, *Formen der Kooperation im öffentlichen Kartellrechtsvollzug im europäischen, deutschen und englischen Recht*, p. 186.

<sup>163</sup> *Mundt* (FCO president), *Alternative Instrumente der Kartellbehörden*, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 11 et seq.

<sup>164</sup> Decision of the Office of Fair Trading v. 20.11.2006, No. CA98/05/2006, Exchange of information on future fees by certain independent fee-paying schools, (Case CE/2890-03), paras 36-38, and the press release OFT, 166/06 - final decision. See further on this case *Lawrence/Sansom*, *Comp Law* 2007, 163, 168 et seq.; *Lawrence/O'Kane et al.*, *Comp Law* 2008, 17, 34; *Bueren*, *Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 95 et seq.

<sup>165</sup> See in detail *Bueren*, *Verständigungen – Settlements in Kartellbußgeldverfahren*, 2011, p. 408 et seqq., 425 et seqq.

settlements imply a further increase of administrative discretion, which is already extraordinarily broad in competition law.

## 5. Transactional resolutions vs private enforcement: Access to file by third parties

### 5.1 The tension between transactional resolutions and private enforcement in the current legal framework

Private actions for damages from competition law infringements are on the rise worldwide.<sup>166</sup> In Europe, having remained in the shadows for long,<sup>167</sup> they are at the heart of the legal and policy debate since the Court of Justice (ECJ) held in the ground-breaking<sup>168</sup> *Courage* judgment that<sup>169</sup>

“The full effectiveness (...) and, in particular, the practical effect of (...) Article [101(1) TFEU<sup>170</sup>] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.<sup>171</sup>”

Currently, in the absence of community rules governing the matter, such claims are regulated by the member states, subject to guiding principles of European law. In particular, according to the ECJ, it is for the domestic legal system of each Member State, subject to the principles of equivalence<sup>172</sup> and effectiveness,<sup>173</sup> to designate the courts and tribunals having jurisdiction, and to lay down the detailed procedural rules governing actions for safeguarding EU law rights,<sup>174</sup> and to prescribe the detailed rules governing the exercise of those.<sup>175</sup>

This case law has spurred reform initiatives by the European Commission<sup>176</sup> and several member states<sup>177</sup> to facilitate actions for damages. In Germany, important changes to foster private enforcement were implemented with the 7<sup>th</sup> amendment of the GWB in 2005.<sup>178</sup> In particular, since 2005 the GWB provides for a right to damages for every person affected, defined as everybody who, as a competitor or other market participant, is adversely affected by the infringement.<sup>179</sup> Moreover, the GWB foresees that final decisions by European

<sup>166</sup> *Rubinfeld*, in: Elhauge, Research Handbook on the Economics of Antitrust Law, 2012, p. 378.

<sup>167</sup> *Whish/Bailey*, Competition Law, 7<sup>th</sup> ed. 2012, p. 319; *Romain/Gubbay*, The European Antitrust Review 2011, 47, 51. This is not to say that private enforcement had been negligible or even inexistent. However, many actions did and do relate to other remedies than damages (for Germany see *Peyer*, 8 J Comp L & Ec 331, esp. 348 et seqq.; concerning the UK *Rodger*, 29 E.C.L.R. 96-116).

<sup>168</sup> ECJ 20.9.2001, C-453/99 – *Courage*, ECR 2001, I-6297.

<sup>169</sup> On the ground-breaking character of this judgment see *Italianer*, Public and private enforcement of competition law, 5<sup>th</sup> International Competition Conference 17 February 2012, Brussels.

<sup>170</sup> At the time of the judgment article Article 85(1) EC.

<sup>171</sup> ECJ Case C-453/99 – *Courage*, [2001] ECR I-6297, para 26.

<sup>172</sup> The national rules must not be less favourable than those governing similar domestic actions.

<sup>173</sup> The rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.

<sup>174</sup> ECJ 20.9.2001, C-453/99 – *Courage*, ECR 2001, I-6297, para 29; Case C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619, paras 62, 71.

<sup>175</sup> Case C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619, para 64.

<sup>176</sup> The latest reform package at European level comprises i. a. a *Commission proposal for a directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU*, COM(2013) 404 final. For a critical review of earlier Commission's initiatives *Jindrich Kloub*, White Paper on Damages Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement, 5 ECJ 515, especially 516-518, 532-545 (2009).

<sup>177</sup> *Clifford A. Jones*, Editorial, After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement, 3 CompLRev 1, 2 (2006).

<sup>178</sup> See further *Wolfgang Wurmnest*, 6 German L.J. 1173-1190 (2005).

<sup>179</sup> Sec. 33(3)1 in conjunction with (1)3 of the GWB.

competition authorities and courts finding an infringement are binding.<sup>180</sup> The 8<sup>th</sup> amendment, in force since July 30<sup>th</sup>, 2013, has expanded private enforcement by consumer associations (sec. 33(2) of the GWB new version). As a result, the number of follow-on actions for damages in Germany has been steadily increasing over the last four years.<sup>181</sup>

Transactional resolutions of competition law proceedings are in tension with private enforcement, especially if they involve the finding of an infringement such as leniency and settlements.<sup>182</sup> Leniency applications entail confessions, admissions of all facts of the infringement and supporting evidence. By consequence, they are treasure troves for cartel victims to back up their damage claims. Those who contemplate applying for leniency will however consider the consequences. The FCO as well as the German government take the view that damage claims play an important role in this respect and are therefore wary of the risk that cartel members cooperating with the FCO might be put in a worse position vis à vis damage claimants, as compared to non-cooperating cartel members. Two aspects are especially important in this regard:

First, the FCO does not issue a decision against companies qualifying for full leniency.<sup>183</sup> This is due to the fact that a company having obtained full leniency would not appeal so that the decision against it would become final earlier than the decisions against non-cooperating cartel members. The cooperating company would thereby be the first target for damages claims because claimants can rely (only) on a final decision.<sup>184</sup>

Second, the FCO has consistently tried to exclude access of third parties to leniency applications to ensure that the attractiveness of the Leniency Programme is not impaired.<sup>185</sup> In particular, the FCO, as part of its Leniency Programme, promises applicants to use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.<sup>186</sup>

Nevertheless, damage claimants have repeatedly tried to obtain access. In current German law, so far mainly<sup>187</sup> two potential avenues have gained practical importance: The first

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<sup>180</sup> Section 33(4) of the GWB.

<sup>181</sup> *Bundeskartellamt, Tätigkeitsbericht 2011-2012*, BT-Drucks. 17/13675, p. 42; *Mäger/Zimmer/Milde*, WuW 2009, 885, 886.

<sup>182</sup> *German Federal Government*, statement about the FCO's activity report 2011-2012, BT-Drucks. 17/13675, p. VII para 49.

<sup>183</sup> *Burrichter/Ahlenstiel*, in: *Lowe/Marquis*, European competition law annual 2011, 2014, p. 95, 100.

<sup>184</sup> This issue remains important for companies that obtain "only" second or third order leniency (substantial discount). In at least one case, such a company has indeed been sued for damages before all other cartel members, see *Burrichter/Ahlenstiel*, in: *Lowe/Marquis*, European competition law annual 2011, 2014, p. 95, 99.

<sup>185</sup> *German Federal Government*, statement about the FCO's activity report 2011-2012, BT-Drucks. 17/13675, p. VII para 50.

<sup>186</sup> *Bundeskartellamt*, Notice no. 9/2006 of the *Bundeskartellamt* on the immunity from and reduction of fines in cartel cases - Leniency Programme - of 7 March 2006, para 22.

<sup>187</sup> Apart from the two avenues explained in the following, it is at least theoretically possible for cartel victims to obtain evidence directly from a cartel member via a right to information based on sec. 242 BGB, see further Dreher, *ZWeR* 2008, 325, 332 et seqq. Furthermore, the court may direct the defendant in an action for damages to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference, sec. 142(1) of the ZPO. However, as far as can be seen so far both options have played no significant practical role so far. In particular, the cartel victim cannot obtain access via these avenues if the defendant has not retained a copy of the leniency submission or made it orally at the FCO's premises.

concerns access to file by the victim in the run-up to a damage claim, the second access to file by civil courts ruling on a pending damage claim at the instigation of (at least) one party.<sup>188</sup>

## 5.2 Access to leniency applications and settlement declarations in current German Law

### 5.2.1 Direct access to file by the cartel victim pursuant to sec. 406e of the StPO, 46(1) of the OWiG

Pursuant to sec. 46(1), (3)4 of the OWiG in conjunction with sec. 406e(1) of the StPO, a cartel victim's lawyer can inspect the FCO's case file if the victim can show a legitimate interest. The same possibility exists when the FCO has transferred a cartel case including the file to the public prosecutor, (e.g.) after an FCO order imposing fines has been appealed in court.<sup>189</sup> The victim may then seek access from these authorities. However, pursuant to sec. 406e(2) of the StPO, inspection of the files shall be refused insofar as there are overriding interests worthy of protection, either of the accused or of other persons. It may be refused insofar as the purpose of the investigation, also in another criminal proceeding, appears to be jeopardized, and if the proceedings could be considerably delayed. So far, the courts have interpreted this provision to exclude access to leniency applications and the accompanying evidence:

The *Pfleiderer* case before the Lower District Court of Bonn concerned an appeal (sec. 62 of the OWiG) by a cartel victim against an FCO decision granting only partial access to a non-confidential version of the file, excluding in particular leniency applications and the evidence provided by the leniency applicants. The Lower District Court of Bonn, after an initial decision that generous access to file should be granted, asked the ECJ for a preliminary ruling whether the provisions of European Union competition law, and in particular Regulation No 1/2003, must be interpreted as precluding damage claimants from getting access to leniency applications and evidence provided therein.<sup>190</sup> The ECJ denied, adding, however, that it is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law on a case-by-case basis.<sup>191</sup> Subsequently the Lower District Court of Bonn granted access excluding information provided voluntarily by leniency applicants, business secrets and FCO internal documents. Within these limits, the claimants could inspect the FCO orders, many of which were however short-form orders after a settlement (*Kurzbescheid*)<sup>192</sup>, a list of evidence secured during dawn raids and access to file.<sup>193</sup> The court mainly argued in an abstract way that access to leniency applications would detract from the attractiveness of the programme, thereby possibly deter future applications and for this reason interfere with future investigations in the sense of sec. 406e(2)2 of the StPO.<sup>194</sup>

<sup>188</sup> For a comprehensive overview also on the relevant EU case law see *Heinichen*, NZKart 2014, 83.

<sup>189</sup> See *OLG Düsseldorf*, judgment of 22.08.2012, V-4 Kart 5/11 (OWi) and others, *coffee rosters*, para II.1 = WRP 2012, 1596, 1597 et seq.

<sup>190</sup> OJ C 297, 5.12.2009, p. 18.

<sup>191</sup> ECJ, case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECR 2011 I-5161.

<sup>192</sup> See *Kapp*, WuW 2012, 474, 480.

<sup>193</sup> *AG Bonn*, judgment of January 18<sup>th</sup> 2012, 51 Gs 53/09, *Pfleiderer II*, NJW 2012, 947.

<sup>194</sup> *AG Bonn*, judgment of January 18<sup>th</sup> 2012, 51 Gs 53/09, *Pfleiderer II*, para II.3.a., NJW 2012, 947; for a very critical view on this line of reasoning *Kapp*, WuW 2012, 474, 477 et seqq.; also doubting whether the abstract reasoning conform with the requirement of the ECJ *Fiedler/Huttenlauch*, NZKart 2013, 350, 352.

In a similar vein, the Higher Regional Court of Düsseldorf decided in the *Coffee Roasters case*, which involved several leniency applications and one settlement. The Court granted cartel customers access to non-confidential versions of the FCO orders and a list of exhibits, but refused access to leniency applications and the information in the case file provided voluntarily by leniency applicants. The Court argued that para 22 of the FCO's Leniency Programme gave rise to legitimate expectations of the leniency applicants that the information provided voluntarily will not be disclosed to third parties. The FCO's assurance, according to the Court, is justified by the public interest in safeguarding the attractiveness and thereby the effectiveness of the leniency programme as an investigative tool. The interest of the victims in further backing up of their damage claims were considered to be less important, given that a civil court is bound by a final decision finding an infringement anyway (sec. 33(4) of the GWB) and given that leniency applications do not contain statements on the size of overcharges.<sup>195</sup> The Court further denied access to a non-confidential version of the remaining case file arguing that eliminating all confidential information from the voluminous file, including an additional hearing of all parties affected, would considerably delay the proceedings.<sup>196</sup>

While the Court's decision seems defensible as such, the reasoning which accords the FCO's guidelines a quasi-binding character for the judge has rightly been criticized.<sup>197</sup> Besides, it seems hard to deny that leniency and settlement statements, though not dealing with the size of overcharges, might nevertheless contain helpful information for claimants to determine their damages.

### **5.2.2 Access to file by a civil court (Sec. 142(1), 273(2) No. 2 or 432 of the ZPO in conjunction with sec. 474(1) of the StPO)**

Instead of seeking access to file based on sec. 406e of the StPO before instituting civil proceedings, cartel victims can also first file a claim and then try to take advantage of means available within the framework of civil procedure to access contents of the FCO case file via the civil court.<sup>198</sup> In this respect, German law has adopted a so called 'model of double doors' (*Doppeltürenmodell*), meaning that access to file by civil courts into investigation files of the public prosecution or an authority conducting administrative offence proceedings such as the FCO requires on each side a specific legal basis for the corresponding encroachments upon (fundamental) rights.<sup>199</sup>

On the side of the civil court, three important possibilities are particularly important:

- Sec. 142(1) of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) enables the court to order that one of the parties or a third party produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference.

<sup>195</sup> *OLG Düsseldorf*, judgment of 22.08.2012, V-4 Kart 5/11 (OWi) and others, *coffee rosters*, para II.2.c.bb.(2) and para II.2.c.cc.(2)(a) = WRP 2012, 1596, 1599-1601.

<sup>196</sup> *OLG Düsseldorf*, judgment of 22.08.2012, V-4 Kart 5/11 (OWi) and others, *coffee rosters*, para II.2.c.cc.(2)(b) = WRP 2012, 1596, 1601.

<sup>197</sup> See e. g. *Dohrn/Liebich*, WRP 2012, 1601-1603; with respect to a similar additional argument advanced by the Lower District Court of Bonn in *Pfeiderer II Kapp*, WuW 2012, 474, 480. For a more positive overall view of the judgment *Yomere*, WuW 2013, 34, 38.

<sup>198</sup> *Heinichen*, NZKart 2014, 83, 85.

<sup>199</sup> *Federal Constitutional Court* (BVerfG), decision of 06.03.2014, case 1 BvR 3541/13 et al., para II.1. a) and II.1.b)bb)(1), juris version paras 18, 25.



- Sec. 432 of the ZPO stipulates that where, according to the allegation made by the party tendering evidence, the record or document is in the hands of a public authority, evidence shall be offered by filing a petition with the court that the public authority or the civil servant be requested to provide the record or document.<sup>200</sup>
- Sec. 273(2) No. 2 of the ZPO states that by way of preparing for the hearing, the judge may request that public authorities or public officials communicate records or provide official information; this requires that a party has referred to the respective records or information.<sup>201</sup>

The corresponding legal basis for the authority providing the records is sec. 474(1) of the StPO<sup>202</sup> which provides that courts, public prosecution offices and other judicial authorities shall be able to inspect the files if this is necessary for the purposes of the administration of justice. In this respect, according to sec. 477(6)1 of the StPO, the recipient, if being a public agency or attorney, is responsible for the transmission being admissible. The transmitting agency shall in principle only review whether the transmission request is within the parameters of the recipient's tasks. The transmitting agency must however examine whether information from files and inspection of the file has (exceptionally) to be denied pursuant to sec. 477(2)1 of the StPO, i.e. when the transmission is contrary to the purposes of the criminal proceedings, or also would endanger the purpose of an investigation in another criminal proceeding.

These provisions have been subject of a thoughtful judgment by the Higher Regional Court of Hamm in late 2013.<sup>203</sup> The case originated out of a claim for damages pending before the District Court of Berlin against members of the elevators and escalators cartel, which had been fined by the European Commission in 2007. Some cartel members had filed leniency applications not only with the Commission, but also with the FCO, which was barred from prosecuting the case against the companies (Art. 11(6) Reg. 01/2003). Due to the suspicion of criminal offences by natural persons involved, the FCO transferred the case to the public prosecutor who subsequently terminated the criminal proceedings. The District Court of Berlin, based on sec. 273 of the ZPO, requested the public prosecutor to provide the case file. When the public prosecutor announced to meet the demand, the cartel members requested a judicial decision (sec. 23(1)1 EGGVG).

The Higher Regional Court of Hamm upheld the prosecutor's decision. The court emphasized that access to file by a court pursuant to sec. 474 of the StPO is subject to less strict rules than access to file by private parties. As a rule, only the recipient examines whether access is necessary for the purposes of the administration of justice, whereas the transmitting agency examines the recipient's competence only in abstract terms. The court held that, in the case at hand, no exception applied because the leniency statements were as such not different from other "ordinary" confessions by the persons concerned in administrative offence proceedings.<sup>204</sup> Furthermore, the court denied the exception of the transmission being contrary to the purposes of the criminal proceedings or endangering the purpose of an

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<sup>200</sup> The relationship of sec. 142(1) of the ZPO and sec. 432 of the ZPO is in dispute. Some argue that, if the third party in the sense of sec. 142(1) of the ZPO is an authority, only sec. 432 of the ZPO applies, see *Dreher*, ZWeR 2008, 325, 337; *Greger*, in: Zöller, 30<sup>th</sup> ed. 2014, § 142 para 11.

<sup>201</sup> *Heinichen*, NZKart 2014, 83, 86.

<sup>202</sup> Concerning administrative offence proceedings in conjunction with sec. 49b of the OWiG.

<sup>203</sup> *OLG Hamm*, decision of 26.11.2013, III-1 VAs 116/13 and others, NZKart 2014, 107.

<sup>204</sup> *OLG Hagen*, decision of 26.11.2013, III-1 VAs 116/13 and others, NZKart 2014, 107, 109.

investigation in another criminal proceeding. According to the court, the abstract possibility that the transmission of a leniency application might lower other cartel members' propensity to cooperate does not suffice; there must rather be a concrete case whose investigation may be endangered.<sup>205</sup> On a constitutional complaint against the decision by the cartel members, the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) recently confirmed the decision of the Higher Regional Court of Hamm.<sup>206</sup>

Importantly, however, the fact that the file including the leniency applications is submitted to the civil court does not necessarily mean that the parties of the civil action will get (complete) access. Rather, the district court will have to examine on its own, weighing all legitimate interests at stake, to what extent the data can be used as evidence in the civil proceedings. The parties in the civil proceedings will be able to demand information about the content of the file submitted only insofar as it is actually used as evidence.<sup>207</sup>

Moreover, the Federal Constitutional Court has stressed that the file cannot be used as evidence insofar as the transmitting agency restricts access to file by the parties of the civil proceedings.<sup>208</sup> The recipient court cannot override such a restriction, but only submit a remonstrance or a disciplinary complaint.<sup>209</sup> In this way, the FCO can exempt leniency documents and will arguably be required to do so to keep the promise in para 22 of its Leniency Programme. If the claimant had submitted an application to take evidence pursuant to sec. 432 of the ZPO and if that taking of evidence is thwarted by the restriction, the claimant is however able to request a judicial decision (sec. 23(1)1 EGGVG).<sup>210</sup> It remains to be seen to what extent an FCO restriction will be accepted at this stage.

### 5.3 Changes due to the Damages Directive

The preceding overview shows that the emerging German case law arguably leaves some room for cartel victims to obtain (limited) access to case files. Access to leniency applications is not generally excluded, though there are many obstacles, with several aspects still unsettled.

It is important to note that the latest private enforcement reform package at European level will decisively alter the picture. At the time of writing, the *Commission proposal for a directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU*<sup>211</sup> has just been adopted by the European Parliament.<sup>212</sup> The

<sup>205</sup> *OLG Hagen*, decision of 26.11.2013, III-1 VAs 116/13 and others, NZKart 2014, 107, 110.

<sup>206</sup> *Bundesverfassungsgericht*, decision of 6.3.2014, cases 1 BvR 3541/13 and others.

<sup>207</sup> *OLG Hagen*, decision of 26.11.2013, III-1 VAs 116/13 and others, NZKart 2014, 107, 108

<sup>208</sup> *Bundesverfassungsgericht*, decision of 6.3.2014, cases 1 BvR 3541/13 and others, juris version para 29; see also BGH NJW 1952, 305 et seq.

<sup>209</sup> BGH NJW 1952, 305 et seq.; *Heinichen*, NZKart 2014, 83, 91 with further references.

<sup>210</sup> See OLG Hamm, NJW-RR 2009, 420; *Mayer*, in: *Karlsruher Kommentar zur Strafprozessordnung*, 7<sup>th</sup> ed. 2013, § 24 EGGVG para 4; *Heinichen*, NZKart 2014, 83, 92.

<sup>211</sup> COM(2013) 404 final.

<sup>212</sup> European Parliament legislative resolution of 17 April 2014 on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)) (Ordinary legislative procedure: first reading), Provisional edition P7\_TA-PROV(2014)0451; see also the Report by the European Parliament's Committee on Economic and Monetary Affairs (rapporteur: Andreas Schwab) from February 2014 (Report on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)).

proposal still needs final approval from the Council of the European Union, which is however a mere formality given that the final compromise text of the proposed Directive was agreed between the European Parliament and the Council during the ordinary legislative procedure.<sup>213</sup> The directive will entail a transposition period of two years (Art. 21(1) Damages Directive, in the form of the European Parliament's legislative resolution of 17<sup>th</sup> April 2014). The European legislator is *inter alia* going to prescribe a form of discovery ("disclosure of evidence", Art. 5 et seqq. Damages Directive) which could entail a paradigm shift in German civil procedure.<sup>214</sup> On the other hand, the Damages Directive will require absolute protection of leniency and settlement submissions: As a general rule, national courts shall not order a party or a third party to disclose in any form leniency statements or settlement submissions (Art. 6(6) Damages Directive). The Damages Directive will thereby prohibit access to leniency and settlement submissions as such, while leaving room for access to other evidence, i.e. pre-existing documents and exhibits not specifically produced for the sake of a leniency-application or a settlement submission (see Art. 4(16) and (17) in conjunction with Art. 6(6) Damages Directive). Cartel victims will moreover still be able to obtain access to exhibits that are not part of leniency applications and to non-confidential versions of decisions imposing fines.

Compared to current German law, the damages directive will enhance the protection of leniency and settlement submissions while facilitating access to evidence against non-cooperating cartel members.

## 6. Commitments (remedies) in merger control

### 6.1 Background and current legal basis

Sec. 36(1)1 of the GWB provides that a concentration shall be prohibited if it would significantly impede effective competition, in particular by creating or strengthening a dominant position. Pursuant to sec. 36(1)2 No. 1 of the GWB an exception applies if the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impeding effect. According to the prevailing opinion, sec. 36(1)1 of the GWB does not, in principle, allow for the partial prohibition of a concentration, so that the FCO must prohibit a proposed concentration completely if it significantly impedes effective competition in only one affected market, even if other affected markets do not give rise to competition concerns.<sup>215</sup> Sometimes it is possible for the parties to modify the proposed concentration before the final decision of the FCO is adopted ("Vorfristzusagen", commitments fulfilled before the statutory decision time limit expires),<sup>216</sup> but the economic circumstances often do not allow for such a swift

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<sup>213</sup> Cf. Council of the European Union, New rule to facilitate damages claims for antitrust law violations, 26/3/2014 (English) - Press: 182 Nr: 8136/14, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/intm/141926.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141926.pdf)

<sup>214</sup> *Fiedler/Huttenlauch*, NZKart 2013, 350, 353.

<sup>215</sup> BGHZ 155, 214 = NJW 2003, 3776, 3797 – *HABET/Lekkerland; Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 7, 23; *Becker/Knebel*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36 para 114 et seqq.

<sup>216</sup> To gain additional time, the parties may withdraw their notification and resubmit it with changes later, see BGH WRP 2010, 937, 939 et seq. – *Phonak/GN Store*.

solution.<sup>217</sup>

Against this background, the FCO has, for proportionality reasons, developed since 1975 the practice to clear mergers subject to the condition that the undertakings concerned had, in a contract governed by public law, promised remedies whose implementation would remove the criteria for a prohibition.<sup>218</sup> It was in dispute and has never been clarified in court whether this practice was admissible and whether the contracts were (completely) valid and enforceable.<sup>219</sup> For this reason, the sixth amendment of the GWB, in force since January 1<sup>st</sup> 1999, introduced an explicit legal basis. In mid-2013, the 8<sup>th</sup> amendment of the GWB has brought the provisions more in line with the EU Merger Regulation, though some differences remain.<sup>220</sup> Sec. 40(3) of the GWB not provides that clearance may be granted subject to conditions and obligations in order to make sure that the companies concerned fulfill the commitments given to the Bundeskartellamt to avoid a prohibition. Conditions and obligations shall not aim at subjecting the conduct of the companies concerned to a continued control.

## 6.2 Procedure in case of commitments

German merger control requires companies to notify concentrations exceeding certain turnover thresholds<sup>221</sup> to the FCO before implementation. The procedure before the FCO is administrative (sec. 54 et seq. of the GWB), the authority's obligations and powers being the same as in other administrative proceedings.<sup>222</sup> The procedure involves up to two phases with short time limits: After the FCO has received the complete notification documents, the competent Decision Division has one month to examine the project ("pre-examination proceedings" or "first phase", sec. 40(1)1 of the GWB). If the merger proves unproblematic, it is cleared informally. If the Decision Division considers further examination to be necessary, it must notify the companies (so-called "one-month letter"), thereby instituting the "main examination proceedings" ("second phase").<sup>223</sup> The Decision Division must then take a formal decision in principle within four month from the notification; otherwise the concentration is deemed to be cleared (sec. 40(2)2 of the GWB). The adoption of obligations or conditions requires a formal decision and thus comes into consideration only in the second phase.<sup>224</sup>

Before the FCO may prohibit a merger or clear it only subject to obligations or conditions, it

<sup>217</sup> *Becker/Knebel*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36 para 114.

<sup>218</sup> For a detailed report with short descriptions of all cases with commitments from 1975 until the reform in 1998 see *Zwölftes Hauptgutachten der Monopolkommission 1996/1997*, Bundestags-Drucks. 13/11291 of 17.07.1998, paras 373-390, p. 238-255; for a brief overview *Becker/Knebel*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36 para 118.

<sup>219</sup> See *Schulte*, in *Schulte, Handbuch Fusionskontrolle*, 2<sup>nd</sup> ed. 2010, paras 656-659; *Becker/Knebel*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36 para 117 et seq., 120; *Zwölftes Hauptgutachten der Monopolkommission 1996/1997*, Bundestags-Drucks. 13/11291 of 17.07.1998, para 374 et seq., p. 238. The Federal Court had however held that the FCO is generally precluded from prohibiting a concentration after the statutory time limit has expired, even if the contract governed by public law was illegal, except for deliberate deceit by the company concerned, see BGH NJW 1979, 2563, 2564.

<sup>220</sup> See further Monopolkommission, Sondergutachten 63, Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht, 2012, paras 64-69, p. 28-31.

<sup>221</sup> Defined in sec. 35, 38 of the GWB.

<sup>222</sup> *Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 2.

<sup>223</sup> *Bundeskartellamt*, The Bundeskartellamt in Bonn, Organisation, Tasks and Activities, Sept. 2011, p. 24.

<sup>224</sup> *Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 32.

must inform the participating companies of the main grounds for the decision, giving them an opportunity to comment (sec. 56(1) of the GWB).<sup>225</sup> If a prohibition is impending, this is done by way of a statement of objections (Abmahnschreiben).<sup>226</sup> The companies have the opportunity to put forward counterarguments. In practice, the undertakings concerned take the initiative to propose commitments if the FCO puts forward competition concerns that prevent clearing the merger.<sup>227</sup> Pursuant to sec. 40(2)7 of the GWB, the four-month time limit is extended by one month if a notifying company proposes conditions or obligations for the first time. Further extensions of the time limit are possible with the notifying undertakings consent, sec. 40(2)4 No. 1 of the GWB. According to practitioners, commitments indeed usually require additional time,<sup>228</sup> because they involve a careful crafting of the conditions the details of which may be controversial.<sup>229</sup> The undertakings concerned actively participate in this process.<sup>230</sup>

It is in dispute whether the FCO is obliged to remove obstacles to clearance (also) on its own initiative by encouraging the undertakings concerned to offer remedies or even by developing and imposing suitable conditions and obligations on its own. The FCO rejects this view at least where the undertakings concerned refuse conditions and obligations from the beginning. It points out that, from a practical perspective, conditions or obligations cannot be imposed without the parties' cooperation. The FCO therefore considers that it can be obliged to suggest remedies, if at all, only in exceptional cases.<sup>231</sup> Many scholars share this view, saying that it is at the FCO's due discretion whether to suggest commitments.<sup>232</sup> Since the 8<sup>th</sup> amendment, the new wording of sec. 40(3)1 of the GWB can be interpreted as explicitly backing the FCO's position: The law states that conditions and obligations are to make sure that companies fulfil the commitments given to the FCO. This shows that clearance subject to conditions or obligations requires some element of support by the companies, in the sense that they must be prepared to give certain commitments if this is the only way to obtain clearance.<sup>233</sup>

On the other hand, if the parties offer commitments which would exclude a prohibition of the transaction, the FCO has no discretion to refuse. It must then clear the merger with

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<sup>225</sup> *Bundeskartellamt*, The Bundeskartellamt in Bonn, Organisation, Tasks and Activities, Sept. 2011, p. 24.

<sup>226</sup> *Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 2.

<sup>227</sup> *Becker/Knebel*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36 para 122.

<sup>228</sup> *Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 15, 18; in a similar vein *Gesetzentwurf der Bundesregierung*, Entwurf eines Achten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (8. GWB-ÄndG), BT-Drucks. 17/9852, p. 19.

<sup>229</sup> For an instructive example from the FCO's recent practice in this respect see *Krueger*, NZKart 2013, 130, 134.

<sup>230</sup> *Becker/Knebel*, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36 para 122.

<sup>231</sup> *Bundeskartellamt*, Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2001/2002, BT-Drucks. 15/1226 of 27.06.2013, p. 22.

<sup>232</sup> *Emmerich*, Kartellrecht, 12<sup>th</sup> ed. 2012, p. 542; *Mestmäcker/Veelken*, in: Immenga/Mestmäcker, Wettbewerbsrecht: GWB, 4<sup>th</sup> ed. 2007, § 40 GWB, para 61; more strict *Bergmann/Burholt*, in: Kölner Kommentar zum Kartellrecht Vol. 2, 2014, § 40 GWB para 82 and *Schulte*, in: Schulte, Handbuch Fusionskontrolle, 2<sup>nd</sup> ed. 2010, para 667, who argue that, while the FCO has a certain discretion, it must not prohibit a concentration if it is certain that prohibition criteria can be removed via conditions or obligations.

<sup>233</sup> Similarly *Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 34.



obligations or conditions following the commitments.<sup>234</sup>

### 6.3 Possible content

Obligations and conditions to a clearance decision are admissible only insofar as the concentration would have to be prohibited otherwise.<sup>235</sup> This is a likely outcome if the merger affects several markets whereas competition concerns relate only to some of them. Commitments must be suitable and necessary either to prevent a significant impediment of competition, in particular a dominant position, or to improve the conditions of competition in another market and those improvements must outweigh the impeding effect on competition (see sec. 36(1)2 of the GWB).<sup>236</sup>

In principle, only structural measures that affect the conditions of competition may come into consideration, not the behaviour of the undertakings concerned. However, as changes of market structure usually require a certain behaviour by the undertakings concerned, there is no clear dividing line between influencing the conditions of competition and influencing competitive behaviour. Rather, it is central whether the measures achieve a structural effect that is sufficiently effective and sustainable to prevent or compensate a deterioration of the conditions of competition ensuing from the concentration.<sup>237</sup> Insofar as commitments contain behavioural elements, the FCO can adopt them only if it is able to control their implementation effectively; commitments that would necessitate a continued control are inadmissible.<sup>238</sup>

Commitments with a behavioural character may include e.g. a grant of special rights of termination in large contracts, the abandonment of exclusivity clauses or the relinquishment of certain ownership rights. Structural commitments usually centre on the sale of an undertaking, parts of an undertaking, of holdings or of assets to a certain category of eligible buyers within a specified time frame.<sup>239</sup>

In the decision, commitments can figure as

- *suspensory conditions*,<sup>240</sup> meaning that the merger is cleared and may be implemented only as soon as the conditions are fulfilled
- *resolutive conditions*,<sup>241</sup> meaning the clearance becomes invalid if the commitment are not implemented in due time, with the consequence that the merger must be dissolved,
- *obligations*,<sup>242</sup> which are, from a technical point of view, independent administrative acts that impose a certain duty on the addressee.

The FCO offers templates for these options on its homepage.<sup>243</sup> The Higher Regional Court of Düsseldorf, which is competent to review the FCO's decision at first instance, generally

<sup>234</sup> BGH WRP 2010, 937, 948 et seq. – *Phonak/GN Store; Kallfaß*, in: Langen/Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12<sup>th</sup> ed. 2014, § 40 GWB para 33.

<sup>235</sup> BGHZ 166, 165 = NJW-RR 2006, 836, 842 - *DB Regio/üstra*.

<sup>236</sup> BGHZ 166, 165 = NJW-RR 2006, 836, 842 - *DB Regio/üstra*.

<sup>237</sup> BGHZ 166, 165 = NJW-RR 2006, 836, 842 et seq. - *DB Regio/üstra*.

<sup>238</sup> *Gesetzentwurf der Bundesregierung*, Entwurf eines Achten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (8. GWB-ÄndG), BT-Drucks. 17/9852, p. 30.

<sup>239</sup> For an exemplary overview of the FCO's recent practice see *Krueger*, NZKart 2013, 130, 132 et seqq.; a comprehensive list of merger cases between 1999 and 2008 where conditions or obligations were imposed is available in *Schulte*, in: *Schulte*, Handbuch Fusionskontrolle, 2<sup>nd</sup> ed. 2010, para 675.

<sup>240</sup> Sec. 36(2)No. 2 of the VwVfG.

<sup>241</sup> Sec. 36(2)No. 2 of the VwVfG.

<sup>242</sup> Sec. 36(2)No. 4 of the VwVfG.

<sup>243</sup> [http://www.bundeskartellamt.de/EN/AboutUs/Publications/Furtherdocuments/furtherdocuments\\_node.html](http://www.bundeskartellamt.de/EN/AboutUs/Publications/Furtherdocuments/furtherdocuments_node.html).

prefers suspensory conditions, as they exclude the risk that an anti-competitive situation is tolerated until the commitments are fulfilled.<sup>244</sup>

#### 6.4 Enforcement and appeal

Pursuant to sec. 40(3a)1 of the GWB, clearance may be revoked or modified inter alia in case of the non-performance of an obligation attached to the clearance. Furthermore, the FCO may enforce its orders pursuant to the provisions applying to the enforcement of administrative measures, the amount of the penalty payment being at least EUR 1,000 and not above EUR 10 million (sec. 86a of the GWB). Finally, parties that act contrary to an enforceable obligation pursuant to § 40(3)1 of the GWB commit an administrative offence. They may be sanctioned with fines of up to EUR 1 Million for natural persons and up to 10% of annual turnover in case of an undertaking (sec. 81(2) No. 5, (4)1 of the GWB).

The undertakings concerned are able to appeal a clearance subject to conditions or obligations although they have offered corresponding commitments, at least if they have expressed the opinion towards the FCO to accept remedies only with reservation. This may be the case if they accept remedies only if the case does not allow for unrestricted clearance while they still adhere to the opposite view.<sup>245</sup>

Third parties that are negatively affected by the clearance decision may appeal it if they participated in the proceedings or if they are directly and individually concerned, and if they had applied to participate but were refused by the FCO for reasons of procedural economy.<sup>246</sup> Importantly, if the clearance decision has not become final due to an appeal by a third party, the FCO takes the view that it is possible to partly revoke a clearance pursuant to the Federal Law on Administrative Procedure (sec. 48(1)1, 50 of the *Verwaltungsverfahrensgesetz*, *VwVfG*) by adding further obligations or conditions at least if such partial withdrawal is to redress the complaint.<sup>247</sup>

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<sup>244</sup> See further *Krueger*, NZKart 2013, 130, 131.

<sup>245</sup> BGHZ 166, 165 = NJW-RR 2006, 836, 837 - *DB Regio/üstra*.

<sup>246</sup> BGHZ 169, 370 = NJW 2007, 607, 608 paras 18 et seq. – *pepcom*; see in detail Neef, GRUR 2008, 30 ; Bechtold, NJW 2007, 562.

<sup>247</sup> *Bundeskartellamt*, 09.03.2009, B 1-243/08, *Werhan & Nauen*, p. 10 et seqq.; critical *Bergmann/Burholt*, in: *Kölner Kommentar zum Kartellrecht* Vol. 2, 2014, § 40 GWB para 90.