

**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on International Co-operation

FURTHER DISCUSSION OF SELECTED CARTEL TOPICS

-- Germany --

This document is submitted by the Delegation of Germany to the Working Party No. 3 FOR DISCUSSION at its next meeting on 4 June 2002.

HARD CORE CARTELS – DIFFERENT TOPICS RELATING TO ANTI-CARTEL ENFORCEMENT

I. Sanctions – Liability of natural persons

1. Under German law natural persons are the addressees of decisions imposing fines in hardcore cartels, legal persons are only so-called “indirectly concerned”. It is even a condition for setting a fine against legal persons or associations of persons that the executive body entitled to represent them, the board of directors or authorised signatories etc. have themselves committed a criminal or administrative offence. Such an administrative offence can however already lie in the breach of supervisory duties by the

clarification is needed on how the prosecuting authority can conduct (sovereign!) investigations on foreign territory, whether or to what extent the state affected by the foreign investigations can initiate its own proceedings, whether obstacles to the proceedings such as the “ne bis in idem” principle apply or whether at least the sanctions imposed abroad have to be taken into account.

19. So far as such far-reaching powers of intervention by a foreign state authority have not been agreed in international agreements and there is no supranational power, such as to some extent the European Commission in competition law, which is responsible for the cross-border prosecution of cartels, the principle of territoriality should continue to be observed. It therefore remains at the liberty of each prosecuting authority to consider whether the cartel is a cross-border or even a global cartel. In such case the worldwide turnover of the company involved in the cartel can be taken as a basis for calculating fines. However, the sanction itself may only be directed at and penalise the anti-competitive effects or the risk to competition (the consumer) within the state’s own sovereign territory.

V. Recovery of money damages

20. Claims for damages under civil law by the injured parties of a cartel are possible in Germany but are rarely made in practice. One problem for potential claimants could be the exact calculation of the damage incurred to them by the cartel. In principle, according to our Code of Civil Procedure the claimant is obliged to indicate the extent of damage when filing a claim. Although the Bundeskartellamt can impose a fine on a cartel member of up to three times the additional profit generated by the cartel it could still be unclear to the individual party injured e.g. a buyer of the products, just how high the damage incurred to him actually is, in spite of his knowing the amount of additional profit calculated by the Bundeskartellamt. Nonetheless it is still possible to litigate even in cases where the exact extent of damage is not clear. Neither are the civil courts bound to the findings of the Bundeskartellamt. No doubt the reserve shown by the injured parties is to some extent based on the fact that they wish to or even have to continue their good business relations with the company involved in the cartel after the cartel proceedings.

21. A good transparency and information policy on the part of the competition authorities certainly helps to make it easier for the injured party to detect the possibilities of an action to recover damages. The injured parties can ultimately learn much about the functioning of a cartel from an open and clear press policy.