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## Global Forum on Competition

### CRISIS CARTELS

#### Contribution from Germany

-- Session III --

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## CRISIS CARTELS

### -- Germany --

1. This submission summarizes the German experience with crisis cartels, provides an overview of recent enforcement activities and touches on the issues of international cooperation as well as the need for competition advocacy in times of an economic crisis.

#### 1. Introduction

2. In the recent financial and economic crisis, Germany suffered the most serious recession since the Second World War. Price-adjusted gross domestic product (GDP) slumped by 4.7%.<sup>1</sup> The adjustment process inevitably involved painful consequences for society, such as bankruptcies and mass layoffs. The reaction of the German government has been to cushion negative effects for employment and assist companies by means of labour market and social policy instruments such as subsidized short-time work. The German economy has shown an impressive rebound. With 3.5% the increase in the price-adjusted GDP in 2010 was larger than ever since German reunification.<sup>2</sup>

3. The enforcement of competition law has not been perceived as an obstacle but rather as a necessary condition for successful recovery. The *Bundeskartellamt* continued to vigorously enforce the prohibition of anti-competitive agreements as laid down in Section 1 of the German Act against Restraints of Competition (“*ARC*”) throughout the crisis.<sup>3</sup>

#### 2. Governmental policies towards cartels during crises

4. In the course of a business cycle, economy-wide fluctuations in production or economic activity occur around a long-term trend, typically involving shifts between periods of economic growth and periods of relative stagnation or decline. Market forces trigger an adjustment of available capacity which may in turn lead to the bankruptcies of affected companies. Distortive state interventions or the cartelization of certain sectors rarely offer a comprehensive, long-term solution to a business-cycle contraction (“recession”).<sup>4</sup>

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<sup>1</sup> Source: DeSTATIS.

<sup>2</sup> *Ibid.*

<sup>3</sup> In 2008 the German legislator enacted the “*Finanzmarktstabilisierungsgesetz*” (Act on the Stabilization of Financial Markets) which exempts certain rescue measures in the financial sector from the application of competition law, notably merger control; for further details see OECD DAF/COMP(2009)11, Germany.

<sup>4</sup> Statisticians often define a recession as negative GDP growth during two consecutive quarters.

## 2.1. Crisis cartels before the 7<sup>th</sup> Amendment of the ARC

5. The German Act against Restraints of Competition (ARC) has traditionally contained a general ban on cartels, providing only for narrowly defined exemptions.<sup>5</sup> Until the 7<sup>th</sup> amendment of the ARC in 2005, one of the possible exemptions from the general prohibition of cartels as laid down in Section 1 ARC was a so-called “structural crisis cartel” (“*Strukturkrisenkartell*”).<sup>6</sup> The underlying rationale was to avoid cut-throat competition in the event of a structural crisis – in which not necessarily the most efficient market participants but those with the deepest pockets would survive – and enable the affected companies to quickly reduce overcapacities. According to Section 6 ARC<sup>old</sup> the *Bundeskartellamt* could render an exemption decision: “[In] the event of a decline in sales due to a lasting change in demand, [...] provided the agreement or decision is necessary to systematically adjust capacity to demand, and the arrangement takes into account the conditions of competition in the economic sectors concerned.” It is important to note that Section 6 ARC<sup>old</sup> was not applicable to a mere business cycle contraction (“*recession*”), but only in circumstances where a long-term recovery was not to be expected because of a fundamental change of structural parameters (“*structural crisis*”).<sup>7</sup>

6. Although informal consultations took place on numerous occasions, in more than five decades the *Bundeskartellamt* has received merely ten formal applications based on Section 6 ARC<sup>old</sup>, two of which were finally approved.<sup>8</sup> In 1983 a cartel for the production and sale of welded steel mesh used in the construction industry was legalized for a period of three years and consecutively extended for another two years.<sup>9</sup> In 1987 a cartel for the production and sale of lightweight building boards, also used in the construction industry, was legalized for a period of six months.<sup>10</sup> Both cartels successfully contributed to the reduction of existing overcapacities in a relatively short time period.<sup>11</sup> Both cartels were extremely difficult to set up and involved the creation of various steering committees as well as a trustee in order to ensure that conditions of competition were not distorted.

7. Because of the painful restructuring process, combined with a freeze of the market conditions during the cartel period, however, in most instances companies affected by an economic crisis do not reach a viable agreement to pursue a crisis cartel. One of the latest of the more substantial attempts to establish a structural crisis cartel dates from 2005. The *Bundeskartellamt* was approached by the ready-mixed concrete industry which is characterized by significant overcapacities due to gradually declining demand. Following informal discussions, however, the affected companies failed to submit a detailed plan on how they intended to reduce capacity without discriminating against individual companies. Given the stringent requirements to be met in establishing a structural crisis cartel, the project was abandoned.

<sup>5</sup> See Weitbrecht, *From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law*, in E.C.L.R [2008], p. 81 *et seq.*; Klocker, *50 Jahre Bundeskartellamt*, in: *Bundeskartellamt, 50 Jahre Bundeskartellamt – 50 Jahre Gesetz gegen Wettbewerbsbeschränkungen*, Bonn, 2008, p. 11 *et seq.*; Basedow, *Kartellrecht im Land der Kartelle*, WuW 2008, p. 271.

<sup>6</sup> See *Federal Ministry for Economics and Labour*, 12 August 2004, 7th amendment of the ARC, Statement of the bill, BT-Drucks. 15/3640, p. 27.

<sup>7</sup> See Braun in Langen/Bunte, nach § 2 para. 36f with further references.

<sup>8</sup> cf. *Bundeskartellamt*, Decision of 31 May 1983 “Betonstahlmatten”, published in WuW/E BKartA, 2049 *et seq.*; BKartA, Decision of 22 July 1987 “Leichtbauplatten”, published in WuW/E BKartA, 2271 *et seq.*

<sup>9</sup> cf. *Bundeskartellamt*, Decision of 31 May 1983 “Betonstahlmatten”, published in WuW/E BKartA, 2049 *et seq.*

<sup>10</sup> cf. *Bundeskartellamt*, Decision of 22 July 1987 “Leichtbauplatten”, published in WuW/E BKartA, 2271 *et seq.*

<sup>11</sup> cf. *Bundeskartellamt*, TB 1987/88, BT-Drucks. 11/4611, S. 28.

## 2.2. *Crisis cartels following the 7<sup>th</sup> Amendment of the ARC*

8. Considering that in a globalized economy a structural crisis will almost always affect inter-state trade and taking into account the supremacy of European competition law according to Article 3 Council Regulation (EC) 1/2003, the German legislator abandoned Section 6 ARC<sup>old</sup> in 2005, noting that the provision had rarely been applied in practice.<sup>12</sup>

9. Accordingly, since the 7th amendment of the ARC, any crisis cartel would have to satisfy the general conditions laid down in Section 2 ARC which correspond to the exemptions provided by Article 101 (3) of the Treaty on the Functioning of the European Union (TFEU). While European competition law does not provide for special provisions dealing with an economic crisis, however, the position of the European Commission appears not to differ significantly from the German practice under Section 6 ARC<sup>old</sup>.<sup>13</sup>

10. Since it is not excluded that a coordinated reduction of overcapacities may “contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”, it appears that under European as well as German law there is still room for a legal crisis cartel. Notably, the systematic adjustment of the available capacity in a structural crisis may create a more efficient market structure which ultimately benefits consumers more than a temporary, ruinous price war.

11. Even if the current crisis could be qualified as a structural crisis as opposed to a cyclical economic crisis, however, the discussion appears rather theoretical. Because of the inherent difficulties related to the creation and management of a crisis cartel, it remains to be seen whether affected industries are really interested in reducing overcapacities by forging a crisis cartel without discriminating against individual companies.

## 4. **Enforcement record on cartels during the recent crisis**

12. The *Bundeskartellamt* has not observed changes in the types of cartels formed or incentives of cartel participants to seek leniency as a result of the economic crisis. The number of leniency applications filed with the *Bundeskartellamt* remains high and the recent economic crisis has not softened the *Bundeskartellamt*'s enforcement practice towards cartels. With the assistance of the *Sonderkommission Kartellbekämpfung* (“Special Unit for Combating Cartels”), two Decision Divisions are exclusively dedicated to the prosecution of cartels and other hard-core infringements of competition law. Over the last two years, the *Bundeskartellamt* has conducted dawn raids at more than 170 companies and uncovered a large number of cartel agreements. Following administrative proceedings the *Bundeskartellamt* imposed fines totaling approx. € 300 million in 2009 and approx. € 170 million in 2010.

## 5. **International cooperation on cartels**

13. In a globalized economy with many multinational corporations, the topic of international cooperation among competition authorities is high on the agenda. Notably within the European Competition Network (“ECN”), close collaboration is commonplace and the *Bundeskartellamt* continues to

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<sup>12</sup> See *Federal Ministry for Economics and Labour*, 12 August 2004, 7th amendment of the ARC, Statement of the bill, BT-Drucks. 15/3640, p. 27.

<sup>13</sup> See European Commission, 12<sup>th</sup> Report on Competition Policy, 1982, p. 43 et seq. and 13<sup>th</sup> Report on Competition Policy, 1983, p. 53 et seq.; see also COM, OJ 1984 L 207/17, para. 25 et seq. “Kunstfasern”; OJ 1984 L 212/1 “BPCL/ICI”; OJ 1988 L 150/39 et seq. “Bayer/ BP Chemicals”; OJ 1994 L 131/18 et seq. “Stichting Baksteen”.

work closely with competition authorities around the world to the benefit of consumers. In addition, the *Bundeskartellamt* is actively involved in international organizations and fora such as the OECD but also UNCTAD and ICN, which provide valuable platforms to promote the adoption and enforcement of sound competition laws.

14. In times of severe economic downturns combined with lower liquidity levels, however, the problem has arisen that the successfully prosecuted participants of a cartel may have difficulty in paying a fine. If participants of a cartel are faced with fines from multiple agencies and/or for different infringements, the “*inability to pay*” also has an international dimension. Under these circumstances the question arises, whether and how the (potential) fines of other agencies have to be factored into the calculation of a given fine without risking under-enforcement.

15. In order to avoid a race among competition agencies to become the first to render and enforce an infringement decision, the *Bundeskartellamt* has the necessary flexibility and welcomes an open dialogue with all stakeholders in order to come to adequate solutions. According to its 2006 fining guidelines, “[T]he *Bundeskartellamt* takes into account the undertakings’ financial capacity. If an undertaking proves that it is unable to pay the fine in the short or medium term without jeopardizing its existence the *Bundeskartellamt* can issue a debtor warrant or allow payment of the fine to be deferred. A reduction of the fine, however, will only be considered in exceptional cases if a company proves that, even on a long-term basis, it would be unable to pay the fine without jeopardizing its existence.”<sup>14</sup>

## 6. Competition advocacy on cartel-related matters

16. Especially in times of economic crisis the *Bundeskartellamt* strongly supports competition advocacy as a counterweight to calls for government measures to protect certain sectors. In Germany, for example, independent experts such as the German Monopolies Commission (*Monopolkommission*), raised their voice to counter advocates of sectoral interests to ensure that the beneficial effects of competition such as innovation are not forgotten by those responsible for overall economic policy measures.<sup>15</sup>

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<sup>14</sup> *Bundeskartellamt*, 15 September 2006, Notice No. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the ARC against undertakings and associations of undertakings.

<sup>15</sup> See *Monopolkommission*, 22 January 2009, Press Release “Staatliche Reaktionen auf die Wirtschaftskrise stellen Marktwirtschaft und Wettbewerbsordnung in Frage”.