LIDC – VIENNA CONGRESS 2009

Question A: Should a competition authority enjoy an unfettered discretionary power in the context of the investigation of competition law infringements, or should its margin of discretion be subject to certain limits?

Preliminary Remark – The scope of this questionnaire is limited to infringements of Articles 81-82 EC and equivalent national law provisions. It thus does not cover (i) State Aid rules; (ii) infringements of procedural rules; (iii) infringements of merger control rules; and (iv) other competition-law related infringements.

1. General Questions

1.1 Please state your name and the country to which your report refers.

Prof. Dr. Meinrad Dreher,[1] Germany

1.2 How many competition authorities in your country are entrusted with the task of *investigating* infringements of competition law?

The Federal Cartel Office, FCO (Bundeskartellamt) and the Supreme *Land* Authorities (Oberste Landesbehörden, i.e. the Competition Authorities in each State of Germany) in the 16 Bundesländern (states).

Please indicate the names of these authorities and describe their functions and the types of competition law infringements they can investigate.

See above. They can investigate any type of competition law infringement which is covered by this questionnaire.

Please describe the institutional structure of these authorities and provide figures regarding their human and financial resources.

As regards the FCO see the organizational chart as **Annex 1**. As regards the Supreme *Land* Authorities no relieable data are available.

1.3 Please indicate whether the investigating authorities (i) are also competent to take decisions finding, terminating and sanctioning infringements;

yes

(ii) must refer the results of their investigation to a different administrative entity which, in turn, holds the duty to decide the case, and sanction infringements

no

or (iii) shall act otherwise (*e.g.* bring proceedings before a court).

no

[1] Supported by Dr. Stefan Thomas.

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1.4 Do competition authorities start investigations at the request of a complainant, *ex officio* or both?

both

Could you estimate the respective shares of investigations upon request and of *ex officio* investigations?

The vast majority seems to be ex officio. Yet no reliable data available.

1.5. If your country operates a leniency programme for hardcore cartel infringements: has the backlog of pending cartels cases increased since the introduction of the leniency programme?

No information available. However, the prosecution of hardcore cartels has become more important for the FCO. It is noteworthy that the FCO has implemented two decision divisions (Beschlussabteilungen) which exclusively deal with the prosecution of hardcore cartels.

To what extent has the leniency programme reduced the number of *ex officio* investigations started by the competition authority?

No reliable data available.

1.6 Can you list the various methods of referral to the authority of your country and, where applicable, provide details of the most common referral methods (third party complaints, applications for immunity by parties to an agreement, notification of a cooperation agreement by the parties, bounties for corporate individuals, referral by an executive body (Minister, etc..), referral by another authority (authority of a third country - ECN or other - or sectoral regulator))?

Most of the times competition authorities investigate and prosecute on their own initiative, at least as regards hardcore cartels. Also, parties to an agreement may seek informal guidance as regards the compliance of their contracts with competition law and contact the FCO for that purpose. However, referrals by non-competition authorities to the FCO do not play an important role. Furthermore, parties oftentimes bring civil antitrust-cases before the civil courts and in parallel complain to the competition authorities. But this is not a matter of referral.

2. The Preliminary Investigation – Procedural Issues

2.1 Does the competition authority systematically carry out a preliminary investigation before the opening of a formal investigation?

The competition authority will generally investigate whether there is an initial suspicion before opening proceedings.

If so, do the interested parties (for instance, the complainant or the company under investigation, or any affected third party) know about the existence and scope of the preliminary investigation, or does it remain it completely secret?

Generally the beginning of an investigation remains secret. Sometimes the authorities issue

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press releases.

2.2 What powers does the competition authority enjoy in the context of a preliminary investigation?

No specific powers different from the “normal” powers.

2.3 Must the competition authority start a preliminary investigation by means of a formal decision?

no

If so, who is the addressee of this decision?

n/a

Must the competition authority inform other bodies, entities, authorities, of its decision to launch a preliminary investigation?

no

Is this decision published (publication of a press release, for example)?

n/a

Is the press generally informed of such decisions?

no

2.4 (1) Under which circumstances can competition authorities close a preliminary investigation?

There are no formal rules in that respect.

(2) Is the investigation closed by a formal decision or an informal letter?

n/a

(3) Is the competition authority required to state the reasons for its decision to close a formal investigation?

This depends on the type of proceedings. As regards administrative proceedings the authority can close without reasons. Yet generally the authority will inform interested parties about the reasons. Also, § 32c of the German Act against Restraints of Competition (hereinafter referred to as ARC) provides the authorities with powers equivalent to Art. 10 Reg. 1/2003 (finding of inapplicability). As far as fine proceedings are concerned the authority has to comply with he complex rules of the Administrative Offences Act and – as far as applicable – the Code of Criminal Procedure. As a general rule the authority is not allowed to close formal fine proceedings without stating the reasons.

(4) Are parties interested to the preliminary investigation (for instance, the complainant,

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the company under investigation or any affected third party) informed before the adoption of such decision and, where this is the case, are they given an opportunity to formulate observations?

There are no formal rules requiring to inform parties interested in a preliminary investigation before the investigation is closed. However, the authorities will generally inform complainants for the sake of good order.

(5) Is this decision made public?

Generally not.

(6) Can this decision be challenged (through appeal or annulment proceedings, for example)?

Generally not. As far as § 32c ARC is concerned this question is answered controversially in academic literature.

(7) If this is the case, before which authority/court and by who can this decision be challenged?

n/a

(8) What is the review standard applicable to the decision to close a preliminary investigation (marginal or extensive review)?

n/a

2.5 Can the competition authority keep the records of a preliminary investigation dormant?

Acces to the file is one of the most complex issues of German antitrust procedural law (See *Dreher*, ZWeR 2008, p. 325 et seqq.). There are no specific rules in the ARC dealing with this problem.

Could you provide an estimate of the number of dormant files pending before your authority?

n/a

Can the competition authority be sued for failure to act if it fails investigate a potential infringement for too long a time?

Theoretically this could be possible. However, such actions have no practical relevance in Germany.

3. The Opening of the Formal Investigation – Procedural Issues

3.1 Must the competition authority open a formal investigation by means of a formal decision?

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If so, who is the addressee of this decision? Within the competition authority, which officials are ultimately competent to adopt such decisions?

There is no general requirement to adopt a formal decision in this context. § 54 (1) ARC sets the legal standard as follows: "The cartel authority shall, acting on its own initiative or upon request, institute proceedings. If so requested, the cartel authority may, acting on its own initiative, institute proceedings for the protection of a complainant."

As regards administrative proceedings under the ARC there is no clear legal separation between preliminary investigations on the one hand and formal proceedings on the other.

Preliminary investigations can pass into formal proceedings without any official act, decision or communication. According to the ARC the authority is not required to document/communicate its intention to open proceedings. Yet, if the authority has initiated proceedings against an undertaking it will sooner or later inform it in order to guarantee the right to be heard § 56 (1) ARC: .. The cartel authority shall give the parties an opportunity to comment."

Is this decision made public?

Generally not.

Can this decision be challenged, (through appeal or annulment proceedings, for example)?

No. An undertaking cannot challenge the decision to open proceedings against it because this is not a formal decision with legal effects (see above).

If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to open a formal investigation (marginal or extensive review)?

n/a

3.2 Under which circumstances can the authorities close a formal investigation? Is the investigation closed by a formal decision or an informal letter? Are the competition authorities required to state the reasons for their decision to close a formal investigation?

See the answer on the identical question under 2.4. (3) ("Is the competition authority required to state the reasons for its decision to close a formal investigation?").

Are the interested parties (for instance, the complainant, the company under investigation or any affected third party) informed before the adoption of such decision and, where this is the case, are they given an opportunity to formulate observations?

There are no formal rules requiring to inform parties interested in a formal investigation before the investigation is closed. However, the authorities will generally inform complainants for the sake of good order. If interested persons or undertakings have become parties to the proceedings formally they have to be informed.

Is this decision it made public?

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Not necessarily.

Can this decision be challenged (through appeal or annulment proceedings, for example)?

Generally not. As far as § 32c ARC is concerned this question is answered controversially in academic literature.

If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to the decision to open a formal investigation (marginal or extensive review)?

n/a

3.3 Can the competition authority keep the records of a formal investigation dormant? Could you provide an estimate of the number of dormant files pending before your authority? Can the competition authority be sued for failure to act if it leaves the formal investigation pending for too long a time?

The answer to question 2.5 applies also in this context.

4. Substantive Criteria Governing the Initiation/Termination of a Preliminary Investigation

4.1 Does the law or the case-law lay down criteria that should guide the competition authority's decision to initiate a preliminary investigation? Is there any formal or informal guidance in this regard?

The competition authorities enjoy a broad discretion. The FCO has published a de minimis notice (Bagatellbekanntmachung) which serves the same purposes as the EC-Commission's de minimis notice.

4.2 To what extent may a change in the prevailing economic conditions (including the emergence of an economic crisis), induce the competition authority to (i) reshuffle its sectoral investigation priorities; and (ii) recalibrate the intensity of its interventions on the basis of the competition rules (hardening or softening)?

This question cannot be answered in the abstract. It is possible that the competition authorities change their priorities with respect to a change of the economic situation but it is not clear if and in which way they will do so.4.3 Does the existence of a sector-specific regulatory and institutional framework (e.g. the regulation of electronic communications) influence, in one way or another, the investigation priorities of the competition authority?

As far as a certain business conduct in certain business sectors (as is the case for some activities in the energy-sector) come under sector-specific regulation so that the competition authorities are not competent to act, they will generally not investigate such activities with priority. Rather, they leave this task up to the competent sector-specific surveillance authority, which is the Bundesnetzagentur in Germany.

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4.4. Does the competition authority have to give reasons for the opening or closing of a preliminary investigation?

See the answers to the questions in 2.3 and 2.4.

4.5 Does the law or the case law lay down the criteria that should guide the authorities' decision to close or discontinue a preliminary investigation (or, in the alternative, the decision to open a formal investigation file)? Is there any formal or informal guidance in this regard?

See the answer to question 4.1.

4.6 What are those criteria? To what extent are they discretionary? If so, how is discretion defined in your country? Does your national law distinguish between a discretionary and an arbitrary decision, or similar?

The competition authorities enjoy a broad discretion. The standard of discretion is comparable to the one applicable to the EC-Commission.

4.7 What are the limits to any such discretionary powers?

The limit is arbitrariness. The authority must not act without reasons or for reasons not in compliance with its duty to protect free competition.

5. Substantive Criteria Governing the Opening/Termination of a Formal Investigation Procedure

5.1 Does the law or the case-law provide for criteria that should guide the competition authority's decision to start a formal investigation? Is there any formal or informal guidance in this regard?

See the answer under 3.1 and 3.2.

5.2 Must the competition authority open or close a formal investigation procedure in all circumstances?

See the answer under 3.2

5.3 Must the competition authority provide reasons for opening or closing a formal investigation procedure? What is the rationale behind the opening of the formal investigation procedure (evidence gathered is deemed sufficient, priority-setting, etc.)?

See the answers to the questions under 3.1 and 3.2.

5.4 Does the law or the case-law provide for criteria that should guide the competition authority's decision to close or discontinue a formal investigation procedure? Is there any formal or informal guidance in this regard?

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See the answer to question under 4.5.

5.5 What are those criteria? To what extent are they discretionary? If so, how is discretion defined in your country? Does your national law distinguish between a discretionary and an arbitrary decision, or similar?

See the answer to the question under 4.6.

5.6 What are the limits to the competition authority's discretionary powers?

See the answer to the question under 4.7.

5.7. Can the competition authority close formal investigations by taking *positive decisions* that declare the competition rules inapplicable, whether by formal decision or through *sui generis* acts (guidance letters, etc..)? Has the competition authority ever made use of this possibility?

Yes, § 32c ARC. The provision was introduced in 2005 and is equivalent to Art. 10 Reg. 1/2003. § 32c ARC stipulates the following:

§ 32c
No Grounds for Action

The cartel authority may decide that there are no grounds for it to take any action if, on the basis of the information available to it, the conditions for a prohibition pursuant to §§ 1, 19 to 21 and 29, Article 81 paragraph 1 or Article 82 of the EC Treaty are not satisfied. The decision shall state that, subject to new findings the cartel authority will not make use of its powers under §§ 32 and 32a. It does not include an exemption from a prohibition within the meaning of sentence 1.

The FCO has not yet made extensive use of its powers under § 32c ARC. One case concerned regional brick-markets (BKartA, WuW/E DE-V 1142 f. – Hintermauerziegelkartell).

6. Negotiated Termination of Proceedings – Settlements and Commitments

6.1 Does your national legal order provide for the negotiated termination of investigation proceedings?

Yes, § 32b ARC. § 32b ARC stipulates the following:

§ 32b
Commitments

(1) Where, in the course of proceedings under § 32, undertakings offer to enter into commitments which are capable of dispelling the concerns communicated to them by the cartel authority upon preliminary assessment, the cartel authority may by way of a decision declare those commitments to be binding on the undertakings. The decision shall state that subject to the provisions of paragraph 2 the cartel authority will not make use of its powers under §§ 32 and 32a. It may be limited in time.

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(2) The cartel authority may rescind the decision pursuant to paragraph 1 and reopen the proceedings where:
1. the factual circumstances have subsequently changed in an aspect that is material for 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.

6.2 Is such a system of negotiated termination of proceedings based on (i) the adoption of a formal decision finding an infringement with a discounted fine in exchange for a guilty plea (so-called "*settlement*" procedure); (ii) the adoption of a decision terminating proceedings (no finding of infringement) in exchange for certain commitments previously negotiated with the authority (so-called "*commitments*" decisions); (iii) both; or (iv) other?

The law of § 32b ARC is practically identical with Art. 9 Reg. 1/2003.

6.3 What are the requirements and limits for such negotiated termination? What is the authorities' margin of discretion to accept or refuse to engage in either of these negotiated termination procedures?

See 6.2

6.4 In the context of a procedure leading to the negotiation of *commitments*, what types of remedies may the parties offer to eradicate concerns of unlawful agreement and/or abuse of dominance (behavioral and/or structural)? Can you please provide an overview of the record of your competition authority in the field of commitments decisions?

See. 6.2. To date there have been very few § 32b ARC-Decisions. The most prominent cases concerned long term gas supply-contracts. The FCO accepted certain commitments according to which the gas suppliers agreed to terminate long term contracts and to supply only certain quantities for short periods of time in the future (See one of the decisions as **Annex 2**).

6.5 In the context of a procedure leading to the negotiation of *commitments*, does the decision to accept commitments limit the competition authority's subsequent freedom to re-open proceedings? How does the competition authority ensure compliance with its commitments decisions (*e.g.* reporting obligations, etc.)?

See 6.2

6.7 Is the decision to negotiate the termination of proceedings made public?

Generally yes.

6.8 To what extent must the final decision be reasoned in the context (i) of a settlement procedure; and (ii) of a commitments procedure? Is the final decision published and, if so, does it provide an accurate, and exhaustive, factual and legal analysis?

See 6.2

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6.9 To what extent can such decisions be challenged, by whom and on what grounds? What is the review standard applicable to such decisions (marginal or extensive review)? Have such decisions already been challenged? Can you give an overview of the key judgments in this area?

As is true for Art. 9 Reg. 1/2003 this question is discussed controversially in Germany. There are good reasons to assume that third parties – as far as they are affected – as well as the addressees of the decision can challenge it before the courts. However, so far no § 32b-ARC-decision has ever been challenged.

6.10 Negotiated procedures are often said to generate significant administrative efficiency benefits. Can you provide figures of the average duration of (i) settlement and (ii) commitments procedures, as opposed to conventional antitrust procedure?

No such data available.

7. Sector Inquiries

7.1 Does your law establish a sectoral inquiry procedure which targets certain branches of industry as a whole?

Yes, § 32e ARC:

§ 32e Investigations into Sectors of the Economy and into Types of Agreements

(1) If the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted, the Bundeskartellamt and the supreme Land authorities may conduct an investigation into a specific sector of the economy or – across sectors - into a particular type of agreement.
(2) In the course of this investigation the Bundeskartellamt and the supreme Land authorities may conduct the inquiries necessary for the application of this Act or of Articles 81 or 82 of the EC Treaty. They may request information from the undertakings and associations concerned, in particular information on all agreements, decisions and concerted practices.
(3) The Bundeskartellamt and the supreme Land authorities may publish a report on the results of the investigation pursuant to paragraph 1 and may invite third parties to comment.
(4) §§ 57 and 59 to 62 shall apply mutatis mutandis.

Which authority is competent to conduct a sectoral inquiry?

See 1.2

7.2 Are there mandatory criteria for the initiation of a sectoral inquiry? What is the margin of discretion of the authority when it comes to the launching of a sectoral inquiry (for example, does it have to carry out an *ex ante* impact study)?

In that respect § 32e ARC is practically identical to the law of Art. 17 Reg. 1/2003 – except for the criterion of "the trend of trade between Member States".

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Can the decision to open a sectoral inquiry be challenged (through appeal or annulment proceedings, for example)? If this is the case, before which authority/court and by who can this decision be challenged? What is the review standard applicable to such decisions (marginal or extensive review)?

The decision is deemed not be challengeable.

7.3 Can you indicate which sectors have so far been the subject of such inquiries and, if so, whether it is possible to draw general conclusions as to the markets that are prone to be subject to a sectoral inquiry?

The FCO has not yet made extensive use of its powers under § 32e ARC. One case concerned advertising panels (OLG Düsseldorf, WuW/E DE-R 1993, 1995 – Außenwerbeflächen). In this case the Higher Regional Court Düsseldorf decided that the initiation of a § 32e ARC-investigation does not require a formal decision. Rather, the authorities can directly apply § 32e ARC and take appropriate measures.

7.4 What powers of investigation does the competition authority have within the framework of a sectoral inquiry? Do companies have to comply with measures taken pursuant to an inquiry?

In the course of the sectoral investigation the FCO and the supreme *Land* authorities may conduct the inquiries necessary for the application of the ARC or of Articles 81 or 82 of the EC Treaty. They may request information from the undertakings and associations concerned, in particular information on all agreements, decisions and concerted practices. The competition authorities also may carry out dawn raids. The companies have to comply with these measures.

7.5 What types of measures does the competent authority take upon completion of a sector inquiry (publication of reports, adoption of formal decisions, remedial orders, legislative/regulatory proposals, etc.)? In practice, have sector inquiries in your country been followed by public intervention, be it on the basis of the competition rules, or on other grounds?

The FCO and the supreme *Land* authorities may publish a report on the results of the investigation and may invite third parties to comment. Also, they may initiate proceedings against individual undertakings.

7.6 Could you identify the main practical shortcomings/advantages of sector inquiries for firms and their counsels, as well as for competition authorities?

Since the authorities have only very reluctantly made use of their new powers under § 32e ARC there is not yet sufficient practical experience to be reported about.

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