For Official Use **DAFFE/COMP/WP3/WD(2002)3**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

29-May-2002

English - Or. English

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAFFE/COMP/WP3/WD(2002)3
For Official Use

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.

JT00127170

English - Or. English

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 responsible persons within the company e.g. if the supervisory measures necessary to prevent infringements within the company were omitted wilfully or negligently.

2. In practice the fine imposed against legal persons is considerably higher than that against natural persons.

3. In both cases the fine may be up to EURO 500 000, and in excess of this, up to three times the additional proceeds obtained as a result of the violation. The amount of the additional proceeds obtained may be estimated. The concrete setting of the fines is governed namely by the (constitutional) principles of proportionality and the obligation of adequate sanctioning for unlawful behaviour. For administrative offence proceedings these principles are stated more precisely in the Administrative Offences Act. This law differentiates whether an infringement was committed wilfully or negligently. Negligently committed violations of our cartel law shall be punished in principle with a 50% reduced fine. We have to consider further, how serious the infringement was and how intense the accusation should be. Also the economic situation of the offender is to be taken into account.

4. As administrative offences hardcore cartels are in principle punished by imposing fines. Criminal sanctions are only possible in the exceptional case of collusive tendering (only for natural persons and not legal persons). This constitutes a criminal offence under the Criminal Code. Here the law prescribes a sentence of imprisonment of up to five years.

5. The deterrent effect of criminal sanctions under Criminal Law, in particular prison sentences, is greater than that of fines imposed under the Administrative Offences Act. Nevertheless, the mechanisms for imposing sanctions we have at our disposal are sufficient to achieve a deterrent effect. One thing which particularly needs to be taken into account here is that the Bundeskartellamt can skim off not just the net proceeds but up to three times the additional proceeds generated as a result of the violation. This is in itself a sufficiently deterrent sanction if one is to assume that not every cartel is uncovered. In contrast to criminal law the Administrative Offences Act offers more flexibility in uncovering a case and in evaluating the circumstances. Here the so-called opportunity principle applies, which allows the Bundeskartellamt wide discretionary powers in the prosecution of administrative offences and, which for example, has paved the way for the introduction of the leniency programme. Criminal offences, on the other hand, can only be prosecuted by the Public Prosecutor and are subject to more rigid rules of criminal prosecution.

II. Investigative tools – procuring testimony from witnesses

6. As mentioned above in Germany penalties are also imposed against natural persons in fine proceedings for infringements of the ban on cartels. The leniency programme is undoubtedly the most promising incentive for those concerned, i.e. natural and legal persons, to make a statement about a hardcore cartel. Whether a person can be exempted from making a statement on the alleged establishment of a cartel depends on whether he is the person concerned or a witness.

7. Persons concerned must be heard before a fine is imposed and have a right not to incriminate themselves (Section 55 Administrative Offences Act , in conjunction with Section 136 of the Code of Criminal Procedure).

8. Witnesses are obliged to appear before the competition authority and to make a statement (Section 161 a of the Code of Criminal Procedure in conjunction with Section 46 (1) and (2) of the Administrative Offences Act). If they refuse to appear without justification the competition authority can impose a fine (up to 500 Euro, Art. 6 I of the Criminal Code) and determine the costs that have resulted from such action. Examination under oath (rare in fine proceedings), the order to bring any witness who fails to comply with a summons before the prosecuting authority or the imposition of detention shall remain reserved for the judge (Section 46 (5) Administrative Offences Act in conjunction with Section 161 a (2) of the Code of Criminal Procedure). Witnesses have the right to refuse to testify (Sections 52 – 53 a Code of Criminal Procedure) and the right to refuse to answer any questions (Section 55 Code of Criminal Procedure). The relatives and persons closely associated with the accused have the right to refuse testimony (Section 52 Code of Criminal Procedure). Certain persons, to whom information is entrusted in their professional capacity, such as clergymen, lawyers, doctors, etc. can also refuse testimony (section 53 a Code of Criminal Procedure). Every witness has the right of refusal to give information who by answering questions would subject himself or one of the relatives to the risk of being prosecuted for a criminal or administrative offence. (Section 55 Code of Criminal Procedure) Those having the right to refuse to testify and give information shall be informed of their rights.

9. It is disputed whether legal persons should be treated as the person concerned and so not have to incriminate themselves. In any case they should (via the executive body entitled to represent them) be given the so-called right of refusal to give information as accorded to witnesses (Section 55 Code of Criminal Procedure.)

III. International co-operation

10. A multilateral agreement on competition policy such as discussed in the WTO at present sets the world-wide standard in competition policy we can possibly achieve in the near future. A multitude of bilateral agreements may be the “second best” option even though these agreements do not yet allow the competition authorities any direct exchange of confidential data. Although agreements on judicial assistance concluded in the form of treaties between sovereign states and even the (German) Law on international judicial assistance in criminal matters (IRG) can in some cases be applied in the cross-border prosecution of cartels, these have in the past proved of little effect due to complicated procedural provisions.

11. Nevertheless the effect of closer co-operation based on bilateral agreements and in discussions at international level leads to a better understanding of the benefits of a competition law and opens up discussion on how the law in each country can be improved in view of ongoing globalisation.

12. In the long term the multilateral approach therefore seems the most promising one for improving cooperation. Even if the possibilities of close cooperation between the member states of the EU cannot be

easily transferred to the international arena this concept can nonetheless be taken as an example. As laid forth in the draft amendment to EC Regulation No. 17/62 proposing a future EU network of competition authorities, the competition authorities could be granted independent powers to pass on confidential data to foreign competition authorities or to request such from them and use this as evidence in their own proceedings. Prosecuting authorities could be requested to carry out investigations for proceedings conducted abroad.

13. Another practicable possibility, in particular with a view to improving cooperation with non-EU states, would be a respective amendment to the national law, which, similar to those of the Nordic states, France and the Netherlands, would empower the competition authority to pass on confidential data to other competition authorities and to use such confidential data from abroad for their own proceedings. Another possibility would be to take account of the different standards for data protection and a fair procedure in the individual jurisdictions by making the release of confidential information conditional upon the obligation to respect the national standards of the states issuing such information.

14. On the basis of the 1995 OECD Recommendation on Notification of Restrictive Business Practices Investigations the OECD is already contributing to furthering the exchange of reciprocal information between the competition authorities.

IV. Global cartels

Leniency programmes

15. The success of a leniency programme is conducive to the success of the prosecution of cartels within the jurisdiction concerned. The benefits which a leniency programme accords cartel members cannot exceed the power of the jurisdiction to impose sanctions. As a general rule, therefore, leniency programmes will remain limited to one state. One exception is the EU where the European Commission has the power to impose sanctions in cross-border cartel proceedings covering the geographical area of the 15 Member States.

16. Of course it is not very enticing for a principal witness to be granted an exemption or reduction of a sanction in one single state if at the same time he runs the risk of receiving a substantial sanction in other states. It would be possible to inform a principle witness in the first discussion with the prosecuting authoritiy that leniency can only be awarded within the one jurisdiction. Where the first prosecuting authority is entitled or obliged to pass on information received from a principle witness to foreign prosecuting authorities the witness could be given a fixed time limit within which he himself can approach the respective authorities of those states in order to avail himself of the benefits of any existing leniency programmes. Only then would the information be handed over to the foreign authority.

Prosecution and fining policies

17. It is not reconcilable with the principle of territoriality to sanction the damage caused by a violation of cartel law which took place abroad. The foreign state in question would be limited in its sovereignty to determine itself whether and how it wishes to protect its people from infringements of competitive law. It cannot simply avail itself of the sovereign power to exercise state authority on behalf of and in another state.

18. The only conceivable exception is if two or more states agree under international law that one national prosecuting authority is to conduct and sanction cross-border cartel proceedings For this

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.