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Dear Reader!

Decisions of competition authorities and courts imposing fines for involvement in cartels have recently attracted increased public attention. The increased interest of the competition authorities in pursuing violations of the rules associated with the partly improved statutory possibilities to impose sanctions has resulted in a larger number of cases in which fines have been imposed. It has therefore become more and more important for companies and their managers to take preventative measures to eliminate or minimize the risks arising under competition law.

In this Newsletter we would like to give you an overview of the current German and European fining practice. Furthermore, we describe a recent decision of a German court concerning the enforcement of US damage claims and report about the demands of the EU Commission for an extension of its competences in merger cases. Finally, we take a look at an interesting development in the recovery of state aid and the enforcement of such claims.

If you have any queries please do not hesitate to contact one of the experts of our Competition Group.

We wish you all the very best for the festive season and a great start to 2006!

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New Trends in Fines

The current fining practice of the Federal Cartel Office

The decisions adopted recently by the German Federal Cartel Office were surprising, on the one hand because the amount of the fines imposed considerably exceeded those in previous cases, and on the other hand because the inaugural fine was imposed for the submission of incorrect statements in a merger notification.

Since 2003, fines totalling 702 million euros have been imposed on the participants in a cartel in the cement industry, and in 2004 the fines imposed for the punishment of price-fixing agreements in the paper wholesale business amounted to a total of 57.6 million euros. In spring 2005, fines in the total amount of 130 million euros were imposed on members of an industrial insurance cartel, which was followed in September with fines of 20 million euros imposed on public-sector insurance companies. Moreover, current proceedings against approximately 70 companies and persons engaged in the concrete transportation industry are nearing their termination: until now fines totalling 8 million euros have already been imposed on eight participants in this cartel. The decision concerning the price fixing agreements in the paper industry decisions were addressed to 46 persons – apart from the twelve undertakings involved.

In this connection it is interesting to note that in nearly all of these decisions the leniency program introduced by the Federal Cartel Office in 2000 was applied. Under the leniency program, it is possible to reduce the level of fines against undertakings or participants if they cooperate actively in disclosing a cartel. Whistleblowers may even be exempted entirely from any fine under certain circumstances. This program, which is not undisputed among lawyers, has thus been established in Germany as a solid element of the antitrust practice as far as the imposition of fines is concerned.

Fines for incorrect statements within the scope of a merger notification

In a decision of October 2005 against Invista Resins & Fibres GmbH, the Federal Cartel Office broke new legal ground. For the first time it imposed a fine of 250,000 euros for incorrect statements made in a merger notification filed in 2004. The Cartel Office found that persons responsible in the undertaking had intentionally

made incorrect statements concerning the market conditions in order to facilitate clearance of the merger. The Federal Cartel Office's suspicions and subsequent investigation were aroused after receiving information from a competitor. Invista's lawyers, who had filed the notification, were also originally under investigation for their involvement, but this was later abandoned.

The case led to an interesting discussion among experts about the obligation to evaluate information received from clients and the duty of care of the lawyers who in the case of a merger notification generally rely on the statements made by their clients. However, no general principles or rules of conduct beyond the actual case can be derived so far.

The merger notification underlying the proceedings was later withdrawn, as the transaction was abandoned.

The European Commission's current fining practice

The Commission has repeatedly and publicly demonstrated its determination to fight cartels – a fact also clear from the fines for involvement in antitrust infringements in recent years. Thus, in 2003/2004 fines totalling approx. 1.4 billion euros were imposed. The most recent decision (adopted November 30, 2005) saw 16 producers of industrial bags fined a total of 343.66 million euros for a cartel agreement. Here it should be noted that the whistleblower received total absolution from a fine of 52.95 million euros.

With its decision against Astra-Zeneca of June 2005 (fine: 60 million euros) the Commission further confirmed the seriousness of unilateral practices of a company which restrict competition, with fines equalling those imposed in many "classical" cartel agreements between competitors. According to the Commission, Astra Zeneca had sought to delay the market entry of competing products by making incorrect statements before patent offices.

However, the Commission has also had to accept a defeat in this field. A 72 million euro fine imposed on DaimlerChrysler in 2001 was reduced by the European Court of First Instance to 10 million euros. In its judgment of September 15, 2005 the Court stated, in particular, that unilateral orders which restrict competition, which are issued only between companies belonging to the same group (here: directions to the sales agents), are not covered by the prohibition against cartels.

According to the Commission, it is currently investigating cartels in 25 different industries. Thus, further fines raising public awareness of the issue can be expected in the near future.

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German Court refuses to effect Service of US Action for Damages

If competition law is violated within a US jurisdiction (which, traditionally, is interpreted very broadly), the parties damaged by that violation may assert claims in the form of a so-called class action before a US court. In case of success, the company or companies sued may face treble damages, i.e. punitive damages, a concept which is not recognised by German law.

If claimants lodge a claim before a court in the US against German defendants for violations of US antitrust law, the complaint must be served upon the company in Germany following the initiation of the action before the US Court. This service is a pre-requisite for an effective action in the USA. It is also required for the subsequent acknowledgment of the judgment pursuant to the German Code of Civil Procedure. Mutual assistance for the service of foreign complaints is governed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Remarkable, the Regional Appeal Court (OLG) of Koblenz recently service of a claim in a US treble damages actions. In so doing, the Court stated that these actions do not constitute civil disputes within the meaning of Hague Convention. Actions which pursue an order for the payment of treble damages and, thus, punitive damages have a public law emphasis. However, the Hague Convention applies exclusively to civil and commercial matters. Therefore, service under the Convention could not be effected.

Furthermore, the Court regards the service of the complaint as a violation of the German *ordre public*. In particular, the impending treble punitive damages would be inconsistent with the principles of German law. According to the Court treble damages serve to punish the infringing

party, to deter future infringements and to reward the plaintiff for having instituted the action in the public interest. Accordingly, the effect is to focus on prevention under competition law which is not recognised under German civil law as a legitimate purpose for a sanction. Furthermore, according to the Court, treble damages have a punitive character. Punitive sanctions on the instigation of private plaintiffs constitute, in principle a violation of the German government's monopoly over penal sanctions and, therefore, have to be considered a violation of the German *ordre public*.

With its categorical denial refusal to grant the service of the claim, the decision of the Regional Court of Koblenz is commensurate with the critical opinion of the Federal Constitutional Court expressed in its Bertelsmann decision of 2003 (Fn.1). However, the decision is inconsistent with the former practice of German courts which - as a rule - considered such service as appropriate and lawful. It remains to be seen whether this most recent decision will make German authorities more reluctant to serve foreign claims for such actions.

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EU Commission demands Extension of Competence in Merger Control Procedures

EU Competition Commissioner, Ms. Neelie Kroes, has demanded the reform of the division of competence between the national antitrust authorities and the EU Antitrust Authority in the field of merger control.

The present rules provide in Art. 1 of the Merger Control Regulation (Fn.2) that insofar as both undertakings involved in the merger achieve two thirds of their turnover in one and the same Member State, the national competition authority of that Member State has jurisdiction insofar as the national provisions provide for an intervention.

These demands have been sparked in particular by the take-over of Endesa by Gas Natural. Both undertakings generated at least two thirds of their Community-wide turnover in Spain in the

2004 financial year. Accordingly, the Spanish competition authority in Madrid is responsible for the review of this merger. The application of this rule in the past has meant that, in particular, the EU Commission was not responsible for the review of the mergers between E.ON and Ruhrgas in 2003 or BNP and Paribas in 1999.

The EU Commission is demanding these additional competences in particular in the energy and financial sectors. The Commission's current investigation into the liberalize of electricity and gas markets carried out under the Energy Commissioner Andris Piebalgs increases the explosiveness of the application of the 2/3 rule in this sector, as there is insufficient liberalization on a national level.

The EU Commission is now concerned that certain mergers – such as in the "E.ON/Ruhrgas" case, where the merger was cleared after a ministerial decree possible only at national level – will continue to make it possible to promote powerful national players without obtaining the consent of the EU Commission. The consequence is that it will become more difficult for competitors to establish themselves in that national market. That the European dimension of such a merger would be entirely forgotten justifies the reforms sought by the Commission.

However, it remains to be seen whether, in the end, the national authorities or the EU Commission prevail in this jurisdiction war. As the unanimous agreement of the Member States is required under Art. 1 of the Merger Control Regulation, a change is not foreseeable for the time being.

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Claim for the Recovery of unlawful Aid by Administrative Order?

In Germany, unlawful subsidies, which have been granted by administrative decision, are recovered by the issuance of a repayment order (Sections 48, 49 a Administrative Proceedings Act). The advantage of this approach is that the authority need not sue for repayment but is able to use an administrative

1 Federal Constitutional Court, Decision of July 25, 2003 – 2 BvR 1198/03

2 Regulation (EC) No. 139/2004 of the Council of January 20, 2004, Official Gazette of January 29, 2004, L 24/1.

order as enforceable legal title for the recovery. If the recipient of the aid fails to comply with the repayment order, the authority is immediately entitled to institute enforcement proceedings.

The recovery of aid granted on a contractual basis is more difficult. According to the prevailing practice, the authority must resort to litigation, i.e. it will either submit a public law recovery claim before an administrative court or a civil law claim on the basis of unjust enrichment before ordinary courts of law. An administrative order cannot be used in the case of aid granted under an agreement.

In agreement with the European Commission, the German Federal Finance Ministry recently decided to use an immediately enforceable recovery order to recover all future unlawful aid. This also applies to contractually granted aid. The authority for this move is said to derive from the public law recovery claim in conjunction with the relevant decision of the Commission. The immediate enforceability follows from Section 80 (2) No. 4 of the Administrative Proceedings Act. The recipient of the aid is obliged to

immediately repay it, even if this has consequences for the solvency of the recipient.

By its judgment of August 15, 2005 the Administrative Court of Berlin stopped this new internal practice for the first time. It is stated in its judgment that where the aid is granted on the basis of a contract, the government and the aid recipient are equal-ranking contracting parties. An administrative action would not apply as the parties have equal status under the contract. Where recovery of unlawful aid is sought, the government would, therefore, have to resort to litigation.

The Administrative Appeals Tribunal of Berlin-Brandenburg rejected this view and allowed the prompt recovery of unlawful (contractually granted) aid by way of an administrative order. Accordingly, the government may use an administrative order to reclaim unlawful aid without having to commence the time-consuming civil law or public law proceedings. Recipients of unlawful aid can stop the immediate execution of the recovery order only if they succeed in launching a stay of enforcement order in cases where

recovery would threaten their economic existence.

It is evident that expediency of the recovery as a whole is the main purpose behind an administrative order.

It remains to be seen whether the European Court of Justice and/or the German Federal Administrative Court will share the view of the Administrative Appeals Tribunal of Berlin-Brandenburg. The case involved a decision of the EU Commission of October 2004, according to which the aid granted by the *Bundesamt für vereinigungsbedingte Sonderaufgaben (BvS)* in favour of the Rostock AKER WARNOW WERFT in the amount of 13.3 million euros distorts competition. Germany was ordered to recover this aid.

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