

## CLIENT ALERT

### Review of Competition Law Fines by German Courts - Differences to the Review by European Courts?

Apr.23.2013

- German court increases fines against members of liquefied gas cartel

- German Federal Supreme Court clarifies 10% fine limit

In a decision of 15 April 2013, the Higher Regional Court of Düsseldorf increased the cartel fines on liquefied gas suppliers to a total of EUR 244 million or to up to 85% more than what has been previously imposed by the German competition authority in its administrative decision. In addition, in a decision of 26 February 2013, the German Federal Supreme Court held that the 10% limit for fines imposed on undertakings constitutes the upper limit of the applicable scale of fines, not just a capping threshold as the 10% limit is interpreted to be under EU competition law. These two decisions highlight differences that still prevail in Europe between the enforcement of competition laws at European and at national level.

#### Increased risk of *reformatio in peius*? – The decision of the Düsseldorf court

The Higher Regional Court of Düsseldorf confirmed the findings of the Bundeskartellamt that the undertakings concerned had concluded agreements not to poach customers from one another for a period of approximately 9 years. In its extensive hearings (over 130 days) the court gained additional insights. As a consequence, the court estimated the additional proceeds ("Mehrerlös") caused by the cartel agreement as well as the duration and gravity of the offences differently from the Bundeskartellamt and ultimately imposed substantially higher fines than the Bundeskartellamt. The companies can appeal against this decision to the Federal Court of Justice (Bundesgerichtshof).

In principle, the risk that the appeal of a company against a fining decision ultimately leads to an increase of the fine also exists at EU level. Art. 31 of Regulation (EC) 1/2003 states that the EU courts "may cancel, reduce or increase the fine or periodic penalty payment imposed." However, to date, the European courts have only very rarely increased the amount of fines previously imposed by the European Commission ("Commission"). For example, in its decision in cases T-101/05 and T-111/05 – BASF and UCB/Commission, ECR 2007, II-4949 of 12 December 2007 the General Court had increased the fine of BASF by EUR 54.000,- because it found the cartel period to be longer than determined by the Commission and the reduction based on the Leniency Notice to be too high.

Whilst the EU courts have unlimited jurisdiction to review decisions imposing fines their review of whether the infringement as such has been established was limited in the past. In particular with regard to complex economic appraisals made by the Commission, European courts have limited themselves to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (ECJ case 7/95 – John Deere/Commission, ECR 1998, I-3111 para. 34). Even though in recent decisions, the courts have emphasized that they not only have to establish whether the (economic) evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be

taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (e.g. ECJ case C-272/09 P KME et al/Commission, para. 94), the standard of review is still different from that under German law. In Germany, the court decision replaces the decision of the Bundeskartellamt and therefore requires an extensive fact finding as has been conducted before the Düsseldorf court.

### **10% rule is upper limit not just a cap in German competition law – The decision of the German Federal Supreme Court**

Both European and German competition law do not allow fines for competition law infringements to exceed 10% of the undertaking's worldwide turnover. Art. 23 (2) of Regulation (EC) 1/2003 reads "For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year." Section 81 (4) second sentence of the German Act against Restraints of Competition contains a similar wording and has in fact been introduced by the legislator to align European and German competition laws.

The German Federal Supreme Court has now nonetheless given the 10% rule a different interpretation than it has under EU law. The court held that the 10% limit for the fines imposed on companies constitutes the upper limit of the applicable scale of fines, not just a capping threshold as under EU competition law ([KRB 20/12 of 26 February 2013 \[in German\]](#)). The difference can be substantial. Whilst the Commission would calculate the fine on the basis of its guidelines and could come out at 10% of the undertakings' turnover even for less serious infringements, the Bundeskartellamt could only impose the maximum fine for the most serious infringements. In its calculation, the Commission might even exceed the 10% in less serious cases and would then cap the amount at 10%. The Bundeskartellamt on the other hand could for less serious infringements not impose fines that reach or come close to the 10% limit.

In reaction to the decision of the Federal Supreme Court, the Bundeskartellamt announced to revise its fining guidelines. While the Bundeskartellamt stresses that overall, it does not expect the level of fines to change significantly, it also admits that the new interpretation of the law given by the Federal Supreme Court could make a difference for the companies concerned.

This difference is also striking because since 2004, the national competition authorities are not only empowered to enforce national but also European competition law. Should the Commission refuse to investigate a German case that has cross-border effects in the EU and decide to leave the investigation to the Bundeskartellamt, the latter could in many cases only impose lower fines than the Commission. However, the undertakings who would ultimately be fined by the Bundeskartellamt would run a higher risk of their fine being increased on appeal to German courts than with appeals at European level.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.