Reform of Fines Proceedings in Germany: Critical Remarks from a Practitioner‘s View

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Mannheim Centre for Competition and Innovation

Prof. Dr. Albrecht Bach

Mannheim / Stuttgart

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RECHTSANWÄLTE

Overview

- FCO paper targets system in transition
- No duplication of evidence
- No European procedural model
- Administrative tribunals: the wrong model
- A curious general approach
- A lawyer’s wishful outlook

FCO Paper targets System in Transition

Transition regarding competition legislation

- Large amount of criticism due to proceedings applying outdated rules on fines in cartel cases:
  - calculation of fines linked to multiple (max 3x) of additional proceeds generated by cartel (infringement pre 2005)
- There will be no second "*Flüssiggas*" case
  - Determination of hypothetical market price based on oral testimony of market participants led to exorbitant # of hearings

German Criminal Proceedings in Need of Reform

Transition regarding rules on criminal procedure

- Large consensus on room for improvement
- Working program of current coalition government: modernize criminal proceedings
  - „system reboot“
  - Proceedings to be streamlined: „quicker, but not worse“
  - Without restricting the rights of „participants“
  - Increased transparency
- Expert report commissioned to prepare legislation in current election period

System overhaul likely to remedy apparent problems

- Large consensus on need to modify rules on written evidence in cases of white collar crime
- Principle of orality to be restricted regarding
  - Documentary evidence and
  - Expert opinions
- More flexible rules on the use of protocols regarding previous witness statements

No Duplication in Taking Evidence

Key argument of FCO: current system duplicates taking of evidence

- **Taking evidence by an administrative authority is no substitute for taking evidence in Court**
- Evidence is presented in court in order to persuade a neutral judge
- Evidence in court is always adversatorial:
  - Participants entitled to question witnesses and experts
  - Participants able to react on witness statements and to comment on evidentiary value
- FCO fought a long time to obtain own right to question witnesses and experts in court (now Sect. 82a ARC)

Taking Evidence in Times of Leniency Policies

FCO paper fails to address fundamental change caused by leniency policy

- **Practically all cartel cases are leniency cases**
- Evidence in leniency cases is carefully selected and presented by counsel to cartelists
  - Selected employees as potential witnesses
  - Selected documents to argue added value
- Witness hearings in leniency cases are targeted to confirm the FCO's "story" and may even include previously agreed questions and answers.
- Documentary evidence is selected to confirm leniency statements.

Significant Value Added by Evidence Taken in Court

FCO claims absence of value added by duplicating evidence it already obtained

- Fact findings by appellate Court practically always differ from those claimed by competition authorities.
- Applying different standards leads to different evidentiary results.
- FCO has no obligation to hear witnesses and was “lead” by Düsseldorf general prosecutors to introduce proper witness hearings.
- Nobody claims hearings by prosecutors to be substitutes for hearing witnesses in criminal court proceedings.

No European Procedural Model

FCO claims need to align to European Model

- European procedural approach is due to curious blend of (former) French administrative law and the absence of powers regarding criminal law.
- General Court claims full jurisdiction, but
  - *de facto* never hears witnesses,
  - is bound by the pleas brought forward by the parties in a strict timeframe (no new pleas based on hearing),
  - limits its review to legal aspects, procedural aspects and plausibility checks regarding facts.

Doubtful if European Model would stand a fair trial test in Strasbourg

No Need to Import European Procedural Model

FCO claims legal requirements to align to European Model

- Article 101 TFEU is to be applied effectively by national courts and authorities (minimum standard).
- Reg. 1/2003 leaves it to the domestic legal order to determine procedural rules for proceedings brought against decisions of NCA.
- In *VEBIC* EC confirms procedural autonomy of Member States.
- In *Schenker* EC requires conditions relating to intention or negligence to be at least as stringent as the conditions in Reg. 1/2003.

Administrative Tribunals: The Wrong Model

FCO claims procedure before administrative tribunals to be adequate substitute

	FCO claim	Reality check
Oral hearing	• All facts relevant for the decision are exposed orally in the hearing.	• A judge reads the findings of facts as part of the intended judgment. • In many first instance cases the tribunal „expects“ the parties to waive this obligation.
Evidence	• To the extent necessary the tribunals take evidence.	• Hardly ever does an administrative tribunal take evidence. • In particular complete absence of witnesses. • Judges take pride in these facts.
Integration of entire administrative file	• Exposing relevant facts orally allows delimitation of dispute • Possibility for parties to object findings of fact	• Facts are fixed as set out in file, no challenge of fact findings in hearing • If at all facts had been discussed in the administrative review proceedings (*Widerspruchsverfahren*)

Purported features fail the reality check.

Procedure of Administrative Courts inapt for Sanctions

Required: procedural framework to control fining power of administration

- Administrative court procedures never conceived for review and control of the administration's fining or sanctioning powers.
- Conceived for legality review regarding prohibitions and orders.
- To the extent administrative bodies impose sanctions and fines the respective laws typically refer to an application of criminal procedures:
  - Disciplinary tribunals for lawyers, doctors, pharmacists etc all apply (adapted) rules of criminal procedures as they decide on sanctions and files.

Fines reviewed applying criminal law standards.

A Curious General Approach

The FCO's paper explores the limits

- Looking at limits imposed by constitutional law and the ECHR is no appropriate starting point for reform.
- The absence of violations of minimum standards is not enough.
- The FCO as a sanctioning body is, of course, a legitimate participant in the debate on the best procedural setting.
- It is hardly for the entity to be controlled to judge the adequate level of control. The FCO is necessarily prejudiced.

A lawyer's wishful outlook

- The FCO imposes fines higher than any other German administration. Fines imposed against individuals are higher than most criminal monetary fines.
- FCO claims these fines to be necessary sanctions to deter future infringements. Fines are claimed to have a pure sanctioning function (*Ahndungsfunktion*).
- It is increasingly difficult to distinguish cartel fines from criminal monetary fines.
- The FCO claims to be functionally equivalent to public prosecutors and to have superior knowledge.
- The FCO should act as prosecutor, instruct a case, bring it to court and convince the judge of the appropriate fine.

Thank you very much for your attention!

Oppenländer Rechtsanwälte
Partnerschaft
Börsenplatz 1
70174 Stuttgart

T + 49 (0) 711 / 6 01 87 – 0
F + 49 (0) 711 / 6 01 87 – 222
www.oppenlaender.de

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