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Economic Competition Regime: Raising Issues and Lessons from Germany

Contributions to Vietnamese-German Symposia

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Competition Law and Policy in Europe and Germany: Current Issues

Wolfgang Wurmnest

I. Introduction

German, European and Vietnamese Competition Law ("antitrust law" in the wording of U.S. law) essentially rest on the same three pillars. In all three jurisdictions there are rules prohibiting anti-competitive agreements, abusive practices of dominant firms and anti-competitive mergers. Although the pillars are the same, a closer look reveals that there are quite a number of differences between the three jurisdictions and thus plenty of room for the conference participants to discuss the "right" approach to competition law. The topic assigned to me, "Competition Law and Policy in Europe and Germany: Current Issues", is so broad that I could talk about many issues. Due to reasons of space, I want to focus on three issues that might be interesting for the Vietnamese competition law community.

First, I will briefly outline the general structure of competition law prohibitions in Europe as well as Germany and compare it with the rather new Vietnamese Competition Act (VCA) of 2005.[1] The European competition rules for undertakings are laid down in Articles 101-106 Treaty of the Functioning of the European Union (hereafter: "TFEU")[2] and additional Regulations, such as the Regulation 139/2004 (hereafter: "Merger Regulation").[3] Germany has laid down its competition rules in the Act Against Restraints of Competition (hereafter: "ARC"), which was substantially revised in 2013.[4] For reasons of space, a com-

1 An English translation of the Act is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=184460 (download of 28.4.2014).

2 Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326, p. 47. Additional rules for the control of state aids are laid down in Arts. 107 – 109 TFEU.

3 Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1.

4 Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of 26.6.2013, Bundesgesetzblatt 2013 I, p. 1738; a consolidated version was published in Bundesgesetzblatt 2013 I, p. 3245. The new Act is available in German at

parison of all prohibitions is not possible. The focus will therefore be on the prohibition of anticompetitive agreements.

Second, I will address the general interplay between law and economics in competition law. Over the last years, the EU Commission, i.e. the European body enforcing the EU competition rules, has implemented a new enforcement policy, the so-called "more economic approach". Taking abuse control as an example, I want to highlight key aspects and effects of this policy change.

Third, I will touch on the issue of leniency policy. Leniency programs grant cartel members that cooperate with the enforcement agencies immunity from or a reduction of fines. In Europe, competition authorities view these programs as an important enforcement tool to detect and sanction hard-core cartels. Their experience might be interesting for Vietnamese policy makers, as the Vietnamese Republic currently has no such program in force.

II. The general structure of competition law prohibitions for undertakings

1. Three pillars

The general structure of European and German competition law rests – as every modern competition law – on three pillars. There is, first, a broad prohibition of anticompetitive agreements covering both horizontal and vertical restraints (Art. 101 TFEU, Sec. 1-3 ARC). Second, there is a control device against exclusionary conduct of dominant firms (Art. 102 TFEU, Sec. 18-21 ARC). Third, the law has to prevent that the merger of two or more undertakings will lead to anticompetitive effects (Regulation 139/2004, Sec. 35-47 ARC). The necessity of these three types of prohibitions is rooted in historical experience and modern economic theory.

Vietnamese competition law also rests on the three pillars mentioned above. This does not come as a surprise as Vietnam consulted various foreign legal system before drafting its own Competition Act. There are however differences with regard to the reach of the prohibitions. This observation leads me to the second conventional wisdom in competition law: the necessity of general clauses.

http://www.gesetze-im-internet.de/gwb/BJNR252110998.html (download of 28.4.2014). On the reform see the contributions to *Bien* (ed.), Das deutsche Kartellrecht nach der 8. GWB-Novelle, 2013.

2. The necessity of general clauses for anticompetitive agreements

Markets and (anticompetitive) business practices are constantly evolving. Competition law prohibitions must therefore be sufficiently broad to catch all anticompetitive agreements. General clauses are thus common in competition law statutes throughout the world, especially with regard to anticompetitive agreements. Depending on their legal tradition and the point in time in which the prohibition was formulated (modern codifications tend to be more detailed than older statutes), some states have enacted very broad general clauses whereas others have complemented their general clauses with samples of illegal conduct. The European Union has a detailed general clause that is supplemented by some illustrating examples of anticompetitive agreements. Art. 101 TFEU reads as follows:

> "(1.) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> (2.) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> (3.) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> – any agreement or category of agreements between undertakings,
> – any decision or category of decisions by associations of undertakings,
> – any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

The German prohibition of anticompetitive agreements was aligned with European law some time ago and is therefore very similar to Art. 101 TFEU although the German prohibition does not give a list of illustrations.

I find the European drafting technique very convincing. This type of general clause is broad enough to cover all forms of anti-competitive arrangements between undertakings, decisions by associations of undertakings and concerted practices. At the same time it gives the businesses in the market some guidance as to which forms of conduct violate the law.

Vietnam has taken a very different approach. Article 8 VCA contains a detailed list of anticompetitive practices among other price fixing agreements but not a general clause. Translated into English[5] it reads as follows:

> "Competition restriction agreements include:
>
> 1. Agreements on directly or indirectly fixing goods or service prices;
>
> 2. Agreements on distributing outlets, sources of supply of goods, provision of services;
>
> 3. Agreements on restricting or controlling produced, purchased or sold quantities or volumes of goods or services;
>
> 4. Agreements on restricting technical and technological development, restricting investments;
>
> 5. Agreement[s] on imposing on other enterprises conditions on [the] signing of goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts;
>
> 6. Agreements on preventing, restraining, [or] disallowing other enterprises to enter the market or develop business;
>
> 7. Agreements on abolishing from the market enterprises other than the parties of the agreements;
>
> 8. Conniving to enable one or all of the parties of the agreement to win bids for [the] supply of goods or provision of services."

In addition, Article 9 VCA clarifies that certain of these agreements are prohibited in all cases, whereas other agreements are legal as far as the parties have a market share below 30%.[6]

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5 Translation (with slight amendments by this author) by World Intellectual Property Organization (WIPO), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=184460 (download of 28.4.2014).

6 Article 9 reads (again in the slightly amended translation provided by WIPO) as follows: "1. Competition restriction agreements prescribed in Clauses 6, 7 and 8 of this Law are prohibited. 2. Competition restriction agreements prescribed in Clauses 1, 2, 3, 4 and 5, Article 8 of this Law [in which the parties have a] combined market share of 30% or more on the relevant market are prohibited."

The general idea behind the drafting technique of the Vietnamese legislature seems right, but not its implementation. As the spirit of market economy is relatively new in Vietnam, businesses do not have much experience with a competition order. It is therefore sensible to introduce relatively precise prohibitions. Such prohibitions can facilitate the spreading of the new Competition Act within the business community. But aiming at clear rules is not an excuse to have severe gaps in the law. Unlike in the EU where the list of prohibited practices is only of illustrative nature so that also anticompetitive agreements that are not mentioned in the list can be prohibited under the general clause, the Vietnamese legislator has decided to prohibit only the forms of specific conduct spelled out in the list contained in Art. 8 VCA.

The consequence of the gaps in the Vietnamese Competition Act is the danger that not all anticompetitive agreements can be prohibited in Vietnam. Take for example market information systems. Under such systems businesses of a certain trade report regularly their sold quantities plus prices to a business association which converts these figures for example into a statistic that can be consulted by all members of the association. If certain conditions are met, the members of the association can use the information drawn from these statistics to align their pricing. So the market information system constitutes the basis for a cartel.[7] Is such an alignment covered by Article 8 VCA? That depends of course on the interpretation principles applied by the courts in Vietnam. I do not know these principles but from the wording of the Act it is at least doubtful that such a behaviour is covered.

3. Conclusion

The current prohibition of anticompetitive agreements in the VCA strengthens on the one hand legal certainty as it provides rather clear-cut rules of prohibited forms of conduct. On the other hand it is doubtful whether the list of prohibited conduct catches all anticompetitive agreements. When the Vietnamese business community and the law enforcers have gained more experience with the application of the rules laid down in the VCA in a few years from now, it would there-

7 On the assessment of information exchange agreements among firms under EU law see *Wagner-v. Papp*, Information Exchange Agreements, in: Lianos/Geradin (eds.), Handbook on European Competition Law: Substantive Aspects, 2013, p. 130 et seq. For a comparative overview (EU law, US law, German law) see *Wagner-v. Papp*, Marktinformationsverfahren: Grenzen der Information im Wettbewerb, 2004, p. 314 et seq.

fore make sense to close possible gaps in the law. As all major competition law systems in the world operate with general clauses, also Vietnam should introduce such a clause for anticompetitive agreements. The current prohibitions could be integrated in such a clause as illustrative examples for prohibited conduct under the general clause.

III. The "more economic approach" to competition law

1. Background

At the end of the 1990s the European Commission initiated a dynamic discussion to remedy shortcomings in the application of competition law. This debate focused first on the law on vertical restraints and later extended to all other pillars of competition law.[8]

The reasons for this debate were manifold and cannot be explained here in detail due to space constraints. Put simply, the Commission had taken some decisions that rested on very shaky economic fundaments. This led to a flood of critique against the enforcement practice and also to the annulment of three merger decisions by the European Courts for lack of a thorough economic analysis.[9] Moreover, many commentators regarded the Commission's decision practice as too intervention friendly, and some critics even called for an alignment of EU law with US antitrust law. These critics portrayed US law sometimes as a legal system that had perfectly integrated modern economic insights. That was (and is) of course a very simplistic picture. Against this background the Commission, however, drew inspiration from concepts developed in US antitrust law and endorsed a new approach commonly labeled as the "more economic approach".[10]

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8 On this development see *Esteva Mosso*, The More Economic Approach Paradigm – An Effects-based Approach to EU Competition Policy, in: Basedow/Wurmnest (eds.), Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid, 2011, p. 11 et seq.

9 Case T-342/99, *Airtours v Commission* [2002] ECR II-2585; Case T-310/01, *Schneider Electric v Commission* [2002] ECR II-4071; Case T-5/02, *Tetra Laval v Commission* [2002] ECR II-4381 affirmed by the ECJ, Case C-12/03 P, *Commission v Tetra Laval* [2005] ECR I-987. On these decisions see *Christiansen*, Der "More Economic Approach" in der EU-Fusionskontrolle: Entwicklung, konzeptionelle Grundlagen und kritische Analyse, 2010, p. 59 et seq.

10 On the application of the "more economic approach" to EU competition law in the interpretation of Art. 101 TFEU see the contributions to *Bellis/Beneyto* (eds.), Reviewing vertical restraints in Europe: Reform, key issues and national enforcement, 2012; *Faella*,

2. General concept

The general concept of the new approach is – simply spoken – based on three pillars:[11]

The first pillar concerns the goal of competition law enforcement. According to the new approach, competition law should be interpreted and applied in a manner that serves the maximization of consumer welfare. This is a shift away from the traditional European practice. Traditionally the European courts have focused on the preservation of the competitive process and also on market integration. The maximization of welfare was only seen as a welcomed effect of competition.

As a second pillar, the EU Commission has endorsed the "effects based approach". This approach focuses on the effects of business practices on consumer welfare. It restricts authorities to prohibit only business practices that are likely to harm consumer welfare, for example by increasing prices. With this approach the Commission is reacting to the critique that earlier decisions sometimes focused too much on the form of business practices and not sufficiently enough on the question whether a practice had a detrimental effect on competition.

The third pillar of the "more economic approach" is the so-called "efficiency defence". If an undertaking can demonstrate that a business practice generates sufficiently large efficiencies for consumers, it may not be prohibited as far as it does not bring competition to an end. The focus on efficiencies aims to shield European enforcers against the criticism that they had prohibited practices in the past which modern economic theory regards as beneficial for consumers.

Vertical agreements, in: Lianos/Geradin (eds.), Handbook on European Competition Law: Substantive Aspects, 2013, p. 174 et seq. (on vertical restraints); *Morais*, Horizontal cooperation agreements, in: Lianos/Geradin (eds.), Handbook on European Competition Law: Substantive Aspects, 2013, p. 85 et seq. (on cooperation between actual or potential competitors). An overview of changes regarding the assessment of abuse of dominance cases under Art. 102 TFEU is provided by *O'Donoghue/Padilla*, The Law and Economics of Article 102 TFEU, 2nd ed. 2013, p. 55 et seq. (on all aspects of Art. 102 TFEU); *Wurmnest*, Marktmacht und Verdrängungsmissbrauch: Eine rechtsvergleichende Neubestimmung des Verhältnisses von Recht und Ökonomik in der Missbrauchsaufsicht über marktbeherrschende Unternehmen, 2nd ed. 2012, p. 283 et seq. (on dominance and exclusionary pricing conduct); see also the contributions to Basedow/Wurmnest (eds.), Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid, 2011 (on abuse of dominance and state aids). The "more economic approach" in the field of merger law is analyzed by *Christiansen* (note 9), p. 127 et seq.; *Schwalbe/Zimmer*, Law and Economics in European Merger Control, 2009, p. 41 et seq.

11 *Basedow*, Introduction, in: Basedow/Wurmnest (eds.), Structure and Effects in EU Competition Law, 2011, p. 1 (4); *Wurmnest* (note 10), p. 203 et seq.

To implement the new approach, the European Commission created in 2003 the Office of Chief Economist. The Commission appoints a renowned – and non-Commission affiliated – economist for usually three years. The chief economist steers a large team of economists. These economists support the case handlers when dealing with cases and are further involved in shaping the general enforcement practice.[12]

In Germany, the new approach was first regarded very skeptically. Over the last years German competition policy has however opened up toward the "more economic approach", albeit with great care. To ensure economically sound decisions by the *Bundeskartellamt*, the German enforcement authority, also this authority created a position similar to a chief economist.

3. Practical implications: the case of abuse control

Let me now turn to the question what the new approach means for practice. As an example I want to look at the Intel-case of 2009 in which the Commission prohibited an abusive rebate scheme and imposed a fine of more than 1 billion Euro.[13] Although at the time of the decision the new guidelines on the "more economic approach" in abuse control[14] were not yet in force, the Commission essentially relied on it.

What was the case about? Put simply, Intel was a dominant supplier of computer processors, so-called central processing units. These parts have to be built into every computer. Intel's customers were computer producers. Intel granted them so-called "loyalty rebates"[15] – according to the Commission's findings –

12 For more information on the tasks of the chief economist and his team see *Röller/Buigues*, The Office of the Chief Competition Economist at the European Commission, available at: http://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf (download of 28.4.2014).

13 Case COMP/C-3/37.990, *Intel*. The case is currently on appeal (Case T-286/09, *Intel v Commission* [2009] OJ 2009 C 220, p. 41).

14 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45, p. 7.

15 "Loyalty rebates" is a kind of general term for various types of rebates possessing the common feature that the price discount is granted on the condition that the customer buys a high amount of his overall demand from the dominant firm within a given period that often exceeds the usual purchase frequency in the marked concerned. These rebates are contrasted with unconditional rebates that are given to customers without special conditions, see *O'Donoghue/Padilla* (note 10), p. 461.

under the condition that the producers purchased large amounts of their total demand from Intel and not from its much smaller competitor AMD in a certain period, sometimes up to 100% of their demand. The Commission was further convinced the rebate system was enforced in a way that customers had to buy large portions of their demand from Intel and held that the complex rebate scheme violated Article 102 TFEU – the European prohibition of abusive practices by dominant firms. The pricing policy was found abusive as it bound important customers to Intel and thereby foreclosed competitors from the market. In other words, the rebate scheme had a similar effect as a system of exclusive dealing contracts by which a dominant firm forecloses market access to competitors. So it was not discounts as such that were prohibited but only rebates that are given under the condition that a very large portion of the demand is purchased from the dominant firm within a certain time frame.[16]

The Commission had conducted a thorough market analysis to demonstrate the likely anticompetitive effect of the rebate system. It could prove, inter alia, that the processors were "must stock items", i.e. products that all computer producers needed to have at least in a large part of their computers,[17] that the rebate scheme was applied to all important producers in the market[18] and that the conditions of the rebate scheme were designed in a way to create a maximum loyalty effect as a computer producer who decided to purchase a certain amount of processors from a competitor would also lose the rebate for the share of demand that it had to buy from Intel.[19] The abusive nature of the rebate scheme was further demonstrated by the fact that Intel could not show that the use of conditional rebates generates efficiencies, such as scale economies.[20]

I think that the theory of harm the Commission relied on and the evidence presented to support this theory was sufficient to condemn Intel's low pricing policy as abusive.[21] Economic theory shows that loyalty rebates employed by dominant firms may foreclose competitors if only a very small part of the demand is flexible because the product of the dominant firm is a "must stock item". "Flexible" refers to the limited part of a customer's overall demand which can be shifted to a competitor, whereas the majority portion of the demand – which has

16 On the economics of loyalty rebates see *O'Donoghue/Padilla* (note 10), p. 464 et seq.; *Wurmnest* (note 10), p. 593 et seq.

17 Case COMP/C-3/37.990, *Intel*, para. 867 et seq., 1010.

18 Case COMP/C-3/37.990, *Intel*, para. 1577 et seq.

19 Case COMP/C-3/37.990, *Intel*, para. 956 et seq.

20 Case COMP/C-3/37.990, *Intel*, para. 1635 et seq.

21 The following analysis is based upon *Wurmnest* (note 10), p. 593 et seq. For a critical view on the Commission's decision see *O'Donoghue/Padilla* (note 10), p. 476 et seq.

to be satisfied by the dominant firm – is termed as "non-flexible". Thus, the producers of processors compete only with regard to the flexible part of the demand for buyers. As the dominant firm can be sure that buyers will purchase their non-flexible demand from it in any event, it can offer very high price reductions on the flexible part of the demand. If the price discount is retroactive, i.e. covering sales of a certain period, or if it is contingent on a certain portion of the total demand, it can effectively foreclose even competitors that are in principle as efficient as the dominant firm.

In the Intel case, the Commission had analysed the market conditions very thoroughly. In my point of view, the theory of harm and the presented evidence showed the anti-competitive effect of the rebate scheme. But it seems that the chief economist was not satisfied by this analysis as low prices are usually good for consumers unless they are able to foreclose competitors which are in principle as effective as the dominant player in the market. His team therefore collected the necessary data to conduct various complex price-cost-tests to show in 150 pages that the discount granted by the dominant firm had priced the contestable portion below the average avoidable cost and therefore could foreclose smaller competitors that were as efficient as the dominant firm Intel. This shows how complex the "more economic approach" can make the analysis.

Moreover, the economists based their calculation in part on information gathered from Intel's competitors and customers. From a legal point of view this is problematic. It is a general principle that businesses must be able to assess whether their conduct violates the law or not.[22] The assessment whether a certain conduct is abusive should therefore not depend on information the dominant firm could not acquire. The Commission therefore should have demonstrated that Intel was able to assess the flexible and non-flexible part of the demand from its own sources of information.[23]

4. Summary and outlook

Summing up, the "more economic approach" is an attempt of the Commission to ameliorate the law. The problem with the approach is that effects on consumer welfare are often difficult to measure. Moreover, businesses need guidance on the question which practices are prohibited. A purely effects-based approach

22 Case C-280/08 P, *Deutsche Telekom v Commission* [2010] ECR I-9555 para. 202.

23 *Wurmnest* (note 10), p. 596 et seq.

cannot give this guidance. Finally, the economic analysis must be structured in a way that comports with legal standards and does not make law enforcement too complex.

So what kind of message can I convey to the Vietnamese competition law community with regard to the "more economic approach"? This approach refines a body of law that has slowly developed over the last 50 years. If applied correctly, it may help to improve the law without making law enforcement too complex. But it can only be applied in an environment in which agencies and courts are well equipped and enforcers and judges have knowledge about basic economic theories. If these conditions are not fulfilled in Vietnam – which I cannot assess from the outside – it might not be entirely wrong if Vietnam enforces its law based on a slightly "less economic approach" for some years (as Europe did in the past) and reshapes its enforcement policy at a later point in time. When following such an approach courts and agencies must of course be careful not to excessively prohibit conduct that is beneficial to competition.

IV. Leniency

1. Structure of the European and German leniency program

The EU and Germany both have a leniency program in force that applies to hardcore cartels. The enforcement agencies grant certain cartel members that cooperate with the enforcement agencies to uncover the illegal activity either full immunity or a reduction of fines. The EU introduced its program by ways of a notice in 1996[24] and revised it in 2002[25] and 2006.[26] The 2006 European Leniency Notice (hereafter: "EULN") is still in force today. Germany introduced its leniency notice in 2000[27] and aligned it in 2006 (hereafter "GLN")[28] with European

24 Commission Notice on the non-imposition or reductions in fines in cartel cases, OJ 1996 C 207, p. 4.

25 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45, p. 3. On this notice see *Jephcott*, The European Commission's New Leniency Notice – Whistling the Right Tune?, ECLR 2002, 378 et seq.

26 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298, p. 17. On this notice see *Sandhu*, The European Commission's Leniency Policy: A Success?, ECLR 2007, 148 et seq.

27 On this notice see *Ohle/Albrecht*, Die neue Bonusregelung des Bundeskartellamtes in Kartellsachen, WRP 2006, 866 (867 et seq.). On the compatibility of a leniency program

standards. Both programs follow essentially the same structure although slight differences remain. These differences are mainly grounded on the different enforcement rules in Germany and Europe. Under German law, for example, companies and individuals can be fined for their involvement in cartel activity and may therefore apply for leniency, whereas under EU law, the EU Commission may only sanction companies and therefore individuals do not fall under the European leniency program.

a) Immunity from fines

Under both programs, full immunity from fines is granted only to the first applicant fulfilling the conditions for immunity. The conditions to be met to qualify for immunity vary according to the point in time in which the applicant approaches the enforcement authority. Two scenarios have to be distinguished.

The first scenario concerns cases in which the agencies had not obtained sufficient evidence that would have enabled them to search the offices of the cartel members. In such a case, the first applicant providing the agencies with information about a cartel that permits law enforcers to obtain a search warrant or to carry out such a targeted inspection will receive full immunity.[29] To put the agency in such a position, the applicant has to provide a corporate statement with detailed information on the cartel activities. This statement has to name the cartel participants, the affected products, the relevant markets, the methods of coordination and the duration of the cartel. In addition, the applicant has to give precise information about the location of the bureaus of persons that have participated in the cartel. Where available, evidence has also to be handed over to the agency.[30] As the applicant puts the agencies in the position to search premises and investi-

with the rule of law see *Wiesner,* Zur Rechtmäßigkeit einer "Bonusregelung" im Kartellrecht, WuW 2005, 606 et seq.

28 Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases (Leniency Programme). An English version of the GLN of 2006 is available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5. On this notice see *Ohle/Albrecht* (note 27), 869 et seq.

29 Point 8(a) EULN, Point 3(2) GLN.

30 Point 9(a) EULN. The German notice is less precise. It demands that the applicant provides the *Bundeskartellamt* with "verbal and written information and, where available, evidence which enables it to obtain a search warrant" (Point 3(2)). The applicant has further to "name all the employees involved in the cartel agreement (including former employees)" (Point 10).

gate the case, the evidential threshold for receiving leniency under this scenario is rather low.

In the second scenario, the evidential threshold is much more difficult to pass. Applicants may also seek leniency when the agencies have already collected sufficient evidence to obtain a search warrant or have even carried out an inspection. In this case the agencies will grant full immunity to the first applicant that provides sufficient information and evidence which proves prohibited cartel conduct.[31] This scenario concerns cases in which the enforcers did not have sufficient evidence to prove the competition law infringement and no company was granted immunity under the first scenario, i.e. there was no "whistle-blower" giving the agencies information to obtain a search warrant.[32]

In both scenarios, an applicant must fulfil additional requirements to receive full immunity. Most importantly, the applicant must not have coerced other cartel members to participate in the cartel.[33] The applicant must also cooperate fully and on a continuous basis with the agencies.[34] Moreover, participation in the cartel has to end at the request of the agencies. In order to protect the success of the inspections to be carried out after the leniency application, the agencies can request the applicant to continue its participation in the cartel.[35] In addition, under German law, the sole ringleader of a cartel cannot receive full immunity from fines but only a fine reduction.[36]

Even if the conditions to receive full immunity from fines are rather strict, in many cases applicants have qualified for that status and have not been fined by the EU Commission or the *Bundeskartellamt*.

b) Reduction of fines

Even if applicants cannot fulfil the requirements to receive full immunity, they might qualify for a reduction of the fine otherwise imposed on them. Such a fine reduction is granted if the applicant provides the agencies with evidence of the alleged infringement which represents "significant added value with respect to the evidence already in the Commission's possession" (EU law)[37] or "which

31 Point 8(a) EULN, Point 4 GLN.
32 Point 11 EULN, Point 4(5) GLN.
33 Point 13 EULN, Point 3(3), 4(3) GLN.
34 Point 12(a) EULN, Point 3(4), 4(4) GLN.
35 Point 12(b) EULN, Point 7 GLN.
36 Point 13 EULN, Point 3(3), 4(3) GLN.
37 Point 24 EULN.

makes a significant contribution to proving the offence" (German law).[38] Thus, the evidence must be very valuable for the law enforcers. The fine reduction can be up to 50% provided that the applicants cooperate fully with the agency and have terminated their involvement in the cartel.[39]

A fine reduction is not limited to the first applicant providing the agencies with such evidence but is also available to subsequent applicants who fully cooperate with the agencies on a continuous basis. The European notice even specifies the amount of reductions. For the first applicant providing evidence having a significant added value, the reduction ranges from 30-50%. The second applicant may receive a reduction of 20-30% and subsequent applicants may receive a reduction up to 20%.[40] The German leniency notice is more sibylline, as it declares that the "amount of the reduction shall be based on the value of the contributions to uncovering the legal agreement and the sequence of the applications".[41]

Fine reductions are granted in many cases as the lawyers of the cartel participants usually urge the persons involved in cartel activity to quickly produce evidence on the precise working of the cartel in order to avoid a high fine. Therefore, often more than one company receives a reduction.

c) "Marker system"

As cartel conduct is often complex, applicants may have to collect a lot of detailed information. A so-called "marker system" shall facilitate applications. Under this system, applicants may approach the agencies and indicate their willingness to cooperate even if they have not yet collected the information and evidence necessary to receive full immunity. Such contact serves as a "marker" if the applicant provides information about the type of cartel activity, its duration, its participants, the relevant product and geographic markets and parallel leniency applications in other jurisdictions.[42] If the agencies decide that the provided information suffices to set a "marker", they set a deadline (in Germany the maximum length is eight weeks)[43] in which the applicant has to provide all relevant information for a proper leniency application. If the applicant provides all rele-

38 Point 5(1) GLN.
39 Point 24 EULN, Point 5 GLN.
40 Point 26 EULN.
41 Point 5 GLN.
42 Point 15 EULN, Point 11 GLN.
43 Point 12 GLN. The EULN does not set forth a maximum length for the deadline.

vant information and fulfils the general conditions (full cooperation, no coercion of other members into the cartel etc.), the "marker" will be the decisive point in time to determine the status that the application has, for example as the first or second applicant. Under EU law[44] the marker system applies only to applications for full immunity, whereas under German law[45] the marker covers also applications for reductions of the fine.

2. Leniency in practice

Enforcement agencies in Europe regard leniency programs as a very good incentive for uncovering secret cartel activity. Over the last years, many cartels have been detected after leniency applications. Moreover, even where the enforcers have started an investigation on their own initiative and carried out inspections, many cartel members are willing to cooperate to reduce the fines.[46] The evidence presented by the various applicants facilitates considerably the work of the agencies in proving the infringement.

Despite these effects, leniency programs are not a perfect tool to end cartel behaviour as whistle blowers often report cartels that already have come to an end (and not active cartels), and there is also a danger that applicants exaggerate the participation of other firms in the cartel to receive a higher reduction of their fines.[47] These shortcomings have, however, not convinced the competition authorities in Europe to reduce the scope of the leniency programs. If one takes a look at the case figures of Germany, one understands why the *Bundeskartellamt* regards its bonus program as a very useful cartel detection tool.

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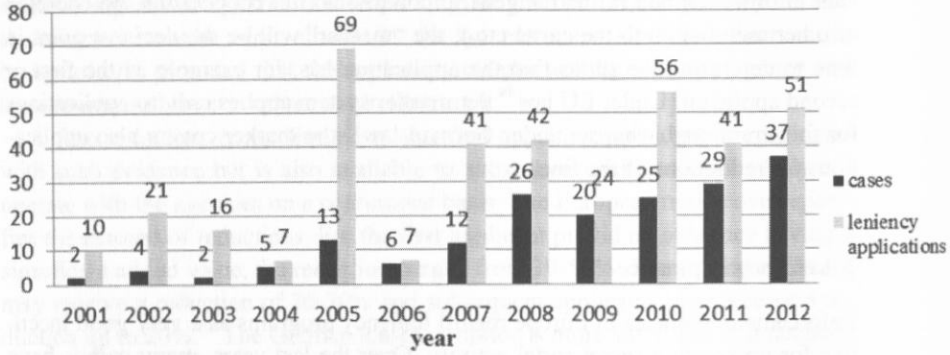
44 Point 25 EULN.

45 Point 19, 20 GLN.

46 *Stephan*, Cartels, in: Lianos/Geradin (eds.), Handbook on European Competition Law: Substantive Aspects, 2013, p. 217 (227), states: "In the EU, two-thirds of the cartel investigations completed since 2001 were revealed by a cartel member who in return received immunity from fines. In addition, leniency discounts in return for cooperation by firms who missed the immunity prize have been granted to at least one firm in 90 percent of cases. Leniency is not simply a tool for improving administrative efficiency; it is the principal detection tool in cartel enforcement".

47 *Stephan* (note 46), p. 229 et seq.



Number of cartel cases with leniency applications and total number of leniency applications in Germany[48]

The diagram shows that the number of cartels detected and fined after leniency applications has increased significantly after 2006, the year in which Germany reshaped its leniency policy inter alia by introducing the marker system. Over the last years the number of applications (black column) remains on a very high level. The number of leniency applications received by the *Bundeskartellamt* (grey columns) shows that if the enforcers start investigating a case based on the information received by the "whistle blower", it very often occurs that also other cartel members hand in leniency applications and provide the agency with further evidence in order to receive a reduction in fines. That is why the total number of leniency applications received by the *Bundeskartellamt* is much higher than the number of detected cartels.

In sum, leniency is an integral part of a working competition law enforcement policy in Europe. That is why the agencies are very keen to protect information given in the context of leniency applications against demands from private parties to receive this information to be able to sue the cartel participants for damages.[49] Leniency shields cartel members from fines, but not from "follow-on"

48 This diagram was published in Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2011/2012 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet, Drucksache des Deutschen Bundestags 17/13675, p. 28. I thank Simon Jahn for reproducing it for the purposes of this contribution.

49 On the protection of corporate statements against demands of disclosure at the request of damaged parties see *Dück/Eufinger/Schultes*, Das Spannungsverhältnis zwischen kartellrechtlicher Kronzeugenregelung und Akteneinsichtsanspruch nach § 406e StPO, EuZW 2012, 418 et seq.; *Jüngten*, Zur Verwertung von Kronzeugenerklärungen in Zivilprozes-

claims for damages brought by private parties. If private parties were able to rely on all information supplied to the agencies by leniency applicants, the success of the program could be hampered and as a consequence fewer cartels would be detected.

3. The situation in Vietnam

If my information is correct, Vietnam currently has no leniency program. Based on the experience we have had in Europe and Germany with the revised leniency programs, I think it would make sense for Vietnam to adopt such a program. Its structure should be similar to the European/German-models which follow to a large extent the U.S.-model.

V. Conclusion

1. Europe and Germany have drafted a general clause to enable the competition authorities to combat all forms of anticompetitive agreements, whereas Vietnam has opted for an exhaustive list of prohibited forms of conduct that cover the most important agreements that may have anticompetitive effects. The Vietnamese approach is reasonable given the little experience markets and enforcers have with competition law. In some years' time, when the usual "starting difficulties" of the newly implemented competition order have been overcome, Vietnam should however adopt a general clause to avoid gaps in the protection of markets.

2. The EU Commission has adopted the "more economic approach" to competition law. Against the background of certain excesses the European Commission has made when applying it to abusive conduct, I would rather be cautious about counselling my Vietnamese colleagues to align their law with this approach in the short term.

3. The current European and German leniency programs significantly help to detect and sanction cartels. I think such a program would have a similar effect in Vietnam. Vietnam should therefore adopt a leniency program to strengthen its combat against cartels.

sen, WuW 2007, 128 et seq. On this issue see also the contribution of *Möllers* in this book.