

EU-China Competition Week

Workshop on Basic Concepts and Principles
in Competition Law Enforcement

Chronicle of an Investigation A German Perspective



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Overview

- I. The Bundeskartellamt
- II. Starting an investigation
- III. Carrying out an inspection
- IV. Involvement of the parties
- V. Finalising the decision

I. The Bundeskartellamt (1)

In a nutshell:

- Established 1958 in Berlin
- Around 330 employees today (140 lawyers / economists)
- Annual budget around € 20 mio. (\approx ¥ 170 mio.)
- Revenues from fees and fines 2013: roughly € 400 mio. (\approx ¥ 3.4 bn)
- Independent authority
 - ⇒ Political / social issues play no role in case assessment
 - ⇒ Government cannot influence the outcome of cases



I. The Bundeskartellamt (2)

- Tasks:
 - Prosecution of cartels (since 1958)
 - Prosecution of abusive practices (since 1958)
 - Merger control (since 1973)
 - Review of public procurement (since 1999)
 - Sector inquiries (since 2005)
 - Monitoring of fuel and energy markets (since 2013)
- No enforcement of fair trading laws
- No criminal proceedings, but administrative fines proceedings against individuals and companies

I. The Bundeskartellamt (3)

Structure:

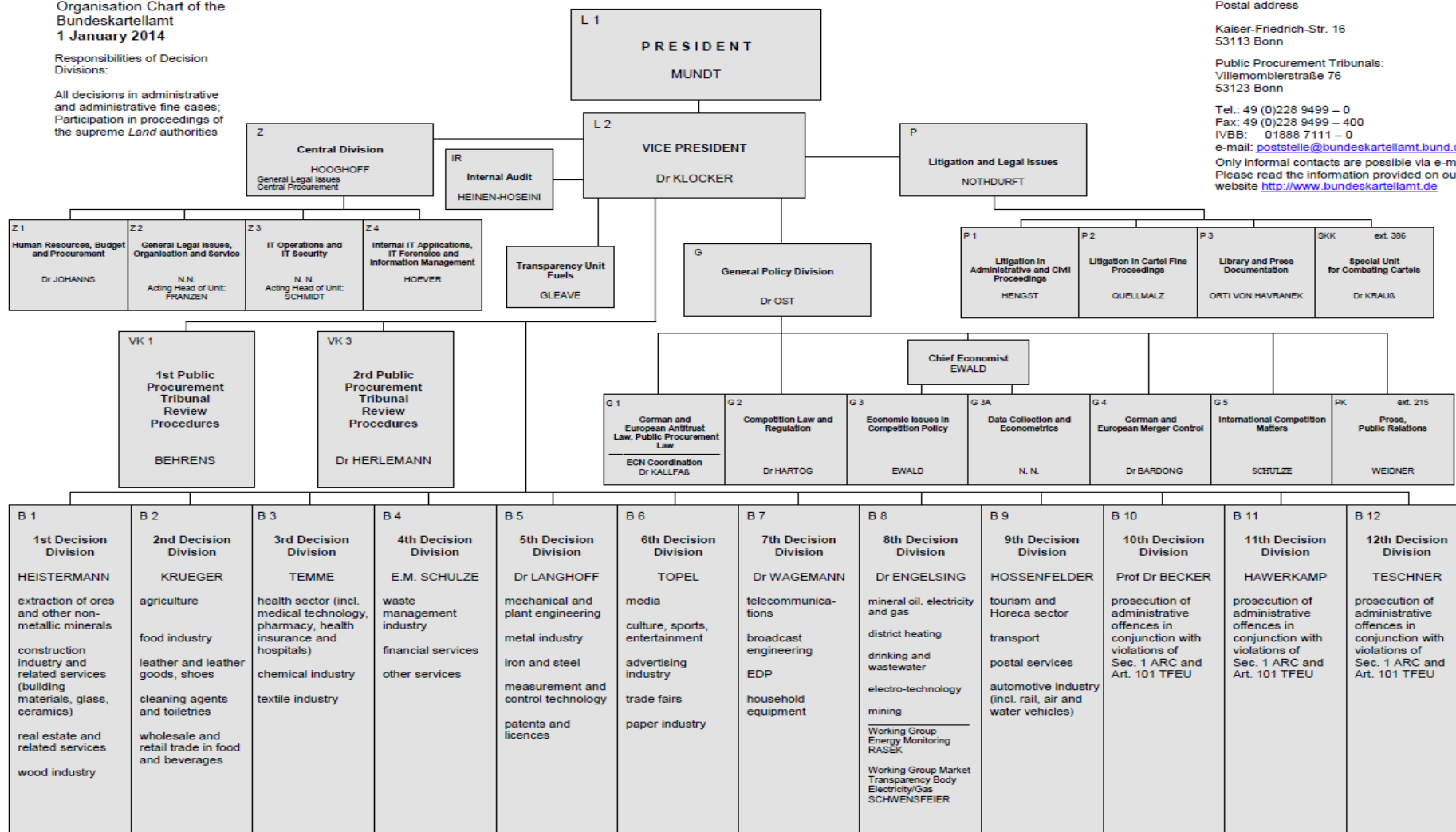
- 12 independent Decision Divisions
 - 3 divisions solely dedicated to the prosecution of hardcore cartels
 - 9 sector-specific divisions dealing mainly with merger cases, but also anticompetitive agreements and abuse cases
- 2 public procurement tribunals
- General policy division
- Litigation and legal issues unit
- Central division (= administrative support)
- New: market transparency unit for fuels

I. The Bundeskartellamt (4)

Organisation Chart of the Bundeskartellamt 1 January 2014

Responsibilities of Decision Divisions:

All decisions in administrative and administrative fine cases, Participation in proceedings of the supreme *Land* authorities



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Please read the information provided on our website <http://www.bundeskartellamt.de>

I. The Bundeskartellamt (5)

Case allocation:



- Mergers: clear thresholds
- Anticompetitive practices:

Commission normally deals with a case if

- more than three Member States affected or
- strong Community interest

I. The Bundeskartellamt (6)

Case allocation (2)



Bundeskartellamt



Regional
competiton
authorities?

- Mergers: Bundeskartellamt only
- Anticompetitive practices:

Bundeskartellamt deals with a case if the effects of an anticompetitive practice exceed the territory of a region

II. Starting an investigation

Considerations when setting priorities:

- Is there a solid theory of harm?
 - What is the economic impact of the alleged infringement?
 - What are the deterrent effects expected from taking up the case?
 - Could the case serve as a “pioneering case”?
 - How easy or difficult will it be to prove the infringement?
 - How can you “sell” the case to the public?
- ⇒ Overall assessment of all circumstances

II. Starting an investigation (2)

Reasonable suspicion of anticompetitive conduct?

- Information from
 - Sector inquiries
 - Leniency applications
 - Publicly available sources, e.g. press, TV, internet
 - Economic analysis (in theory)
 - Merger proceedings
 - Formal complaints
 - Anonymous reports
- ⇒ anything that can convince a judge to issue a search warrant
- Choice of appropriate proceedings / investigation tools

III. Carrying out an inspection

Preparatory phase (1):

- Determine the case-handler in charge of the case
- Determine locations to be searched
- Apply for appropriate search warrants
- Put together inspection teams and select team leaders
- Request support from police / other authorities
- Determine a coordinator who stays at the authority
 - ⇒ handles any questions from inspection teams
 - ⇒ handles leniency requests from suspects

III. Carrying out an inspection (2)

Preparatory phase (2):

- Provide every inspection team member with all essential information such as
 - Names of suspects, relevant products etc.
 - Description of evidence sought
 - Mobile phone numbers of all team members and support persons
- Inspection teams
 - How to get to the location to be searched?
 - Who are the target persons on site?
 - Who shadows which target person?
 - Who deals with IT?

III. Carrying out an inspection (3)

Before entering the premises:


- Make sure you know where the entry and relevant buildings are located
- Ensure that other teams have reached their target locations on time

Be aware that you are about to

- encroach private property and
- seriously disrupt office work at the target company
...even though you have very good reasons for doing so, of course.

III. Carrying out an inspection (4)

Once you have entered the location:

- Minimise the time gap between entering the building and effectively starting the search 
 - Ask to speak directly to the CEO (or his/her deputy in case of absence)
 - Take the quickest and safest way to the CEO
 - Start searching right away in case no company representative in charge can be found
 - No obligation to wait for an external lawyer to arrive

III. Carrying out an inspection (5)

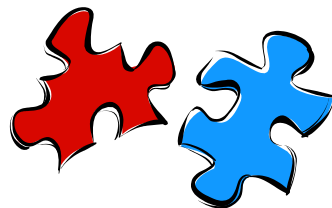
Speaking to the CEO (or deputy):

- Hand over search warrant
 - If applicable: Hand over and explain leniency notice
 - Allow telephone call to lawyer
 - Find out which target persons are present and where their offices are located
 - Request organisation chart (and have it explained to you, if necessary)
- ⇒ (Re-)divide tasks among team members and start searching
- ⇒ If necessary: seal offices, cars, safes...

III. Carrying out an inspection (6)

Gathering evidence:

- Where to look and what to look for
- Start with persons and personal belongings
- To take or not to take...?!?
 - Risk of “information overload”
 - Legal privilege
- Less is sometimes more, but
 - the order of documents in a file / entries in a book can tell a story
 - you’ll find puzzle pieces rather than smoking guns
- Make consecutively numbered inventory of all evidence gathered (including IT)



III. Carrying out an inspection (7)

Handling of evidence:

- Scanning of documents is a must
 - facilitates handling of the case file
 - facilitates access to the file at later stage
 - allows OCR based searches
- Scanning / data sifting on site or “back home”?
- Make sure evidence is kept safe at all times
 - Transport to the authority
 - Office
 - Access to computer files

IV. Involvement of the parties

- Access to the file
 - Be prepared from day 1
 - ⇒ file management must be coherent and transparent
 - Beware of separate binders or the like
 - Protect business secrets
 - but: in fines proceedings access is in principle unlimited for defense counsels (except internal memos)
- Statement of objections
 - ⇒ Hearing of the parties
 - Normally in writing
 - Oral hearing at the request of the parties

IV. Involvement of the parties (2)

▪ Settlement talks

⇒ Win-win situation

Company

- Gets up to 10 % discount on fine
- Gets brief decision
- Looks slightly better in the public opinion
- Saves lawyers' fees

Authority

- Saves a lot of work that may be better spent on other cases

- Right to appeal cannot be waived
- Authority must not sell itself short

V. Finalising the decision

- Beware of prescription:
 - How far back in time do you want to go with your investigation?
 - What are the relevant limitation periods?
 - Has prescription effectively been interrupted or suspended? When?
 - Are there any absolute time limits?
- ⇒ Your time frame for the case in hand

V. Finalising the decision (2)

- Involvement of litigation department (“milestone meetings”) and chief economist
- Decision blueprint
 - Which are the alleged infringements?
 - Which facts need to be proven?
 - Which pieces of evidence are available?
 - suspects’ / witness testimonies
 - documents (data)
 - expert opinions

V. Finalising the decision (3)

- Decision blueprint (2)
 - For each fact that needs to be proven:
 - Overall assessment of evidence:
 - What evidence can be used?
 - Legal privilege
 - Correct information of witnesses / suspects
 - Is the evidence sufficiently robust and persuasive?
 - Is there exculpatory evidence?
- Accompanying strategic memos whenever necessary

V. Finalising the decision (4)

If there is insufficient evidence to support a finding of anticompetitive conduct:

- Can gaps in evidence be closed?
 - ⇒ e.g. additional witness interviews
- If “reasonable doubt” persists: better (partially) close proceedings
- Impression of sloppy work could taint the rest of the case



V. Finalising the decision (5)

Calculating fines (in Germany):

- Step 1: Defining a frame for the fine
 - Lower limit: €5
 - Upper limit: 10% of total turnover, 5% if negligence
 - Lowering of upper limit:
 - Starting point: turnover achieved from the infringement
 - ⇒ domestic turnover from the sale of products / services linked to the infringement
 - ⇒ calculated over the duration of the infringement
 - Multiplication factor of up to 6 depending on company size
 - raised if obvious that significantly higher gain or harm potential

V. Finalising the decision (6)

Calculating fines (2):

- Step 2: Setting the fine
 - ⇒ Overall appraisal of all aggravating and mitigating factors:
 - Offence-related criteria, e.g.
 - Type and duration of infringement
 - Harm inflicted on competition
 - Geographic size of the market(s) affected
 - Degree of cartel discipline
 - Degree of remaining competition
 - Offender-related criteria, e.g.
 - Role of the company in the cartel
 - Importance of the company on the affected market(s)
 - Degree of intent / negligence
- Step 3: Discounts for leniency applicants + settlements

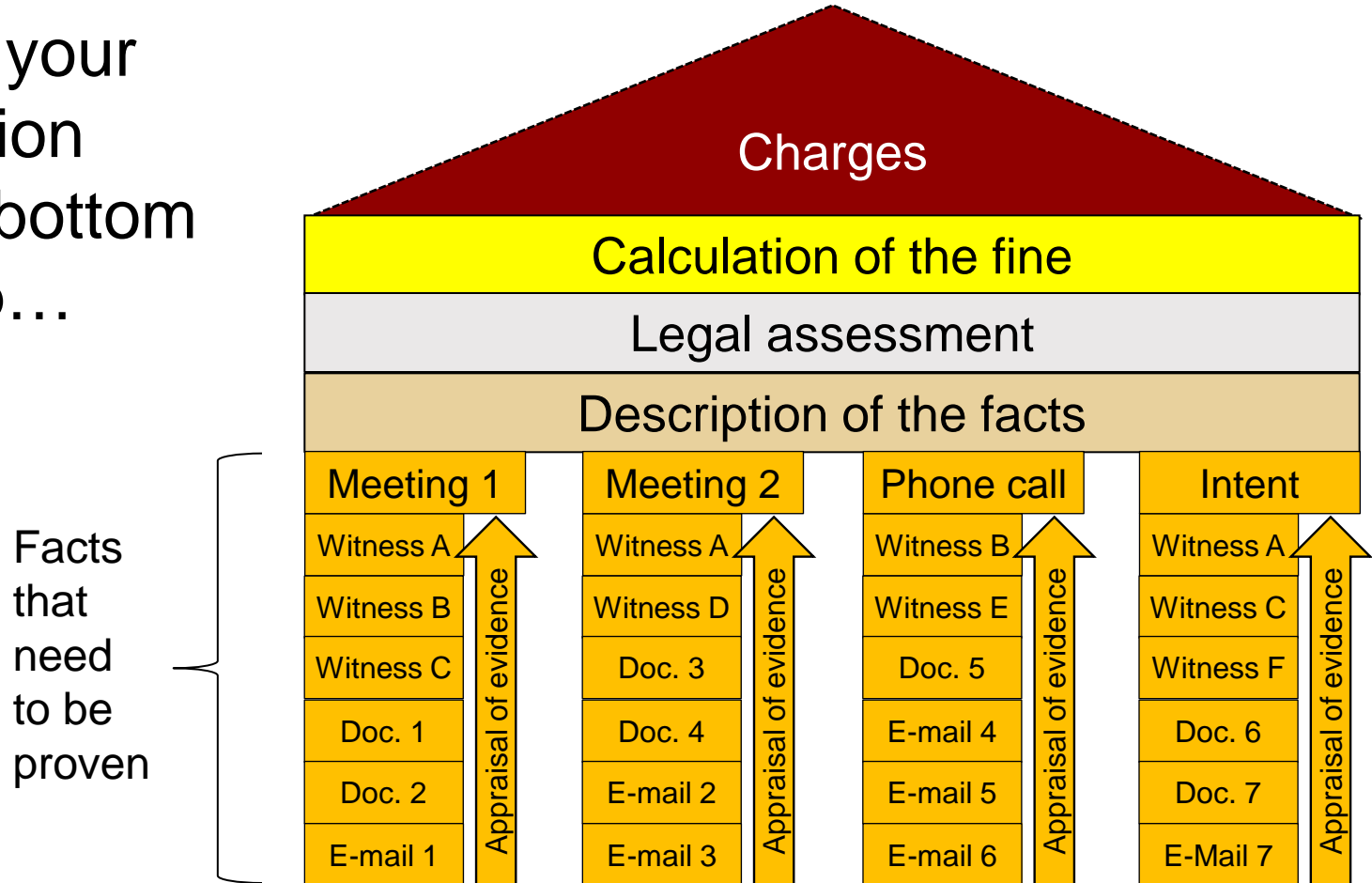
V. Finalising the decision (7)

Drafting the decision:

- Decision comprises
 - Charges
 - Description of the facts
 - Presentation of evidence
 - Appraisal of evidence
 - Legal assessment
 - Calculation of the fine
- ⇒ Presentation / appraisal of evidence is paramount
- ⇒ Build decision upon sound evidence

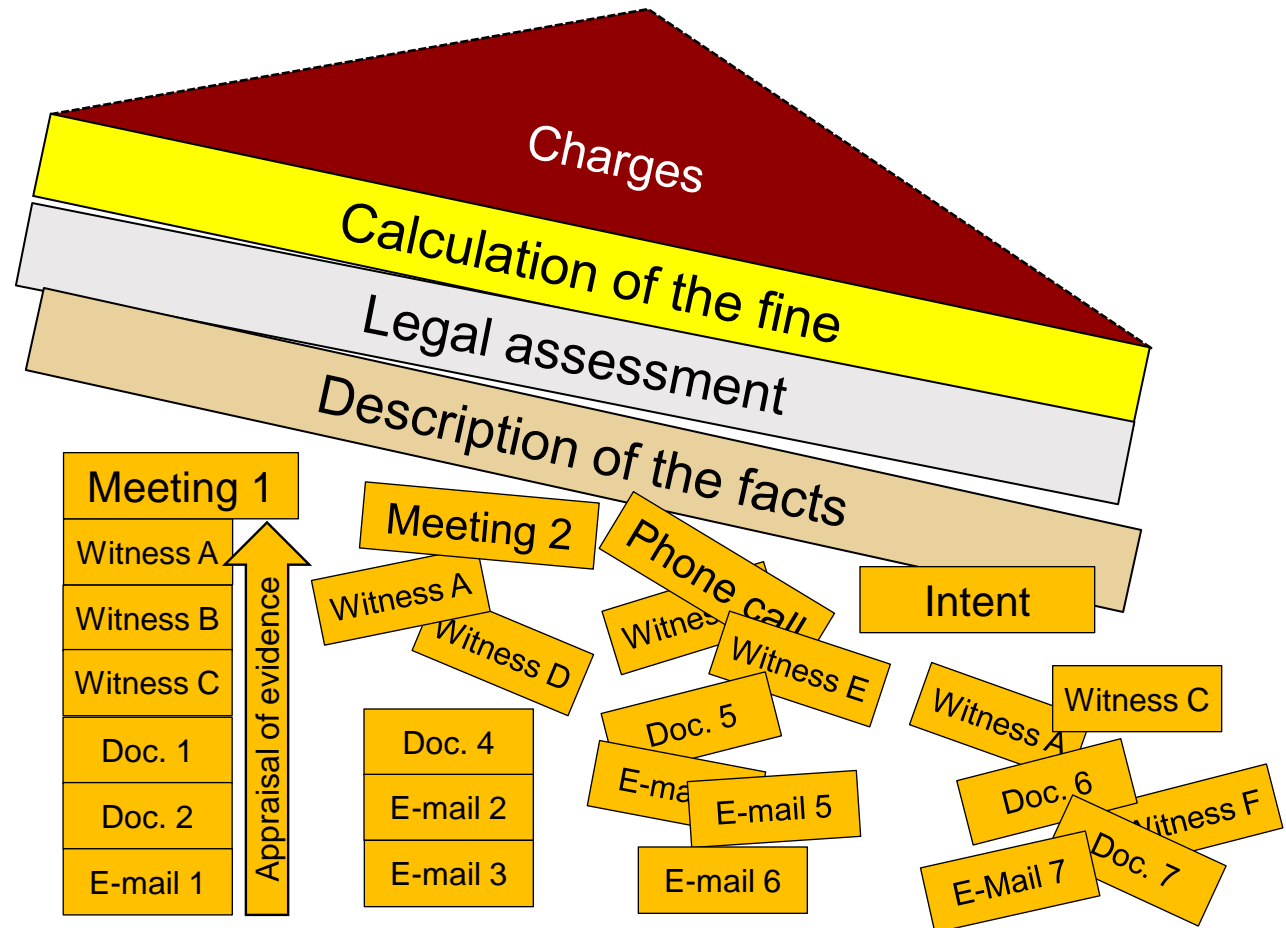
V. Finalising the decision (8)

Build your decision from bottom to top...



V. Finalising the decision (9)

Or else...



Thank you very much for your attention!

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