



## Who watches the watchman?

Due process in cartel proceedings – Witness hearings and right of confrontation in German and EU law

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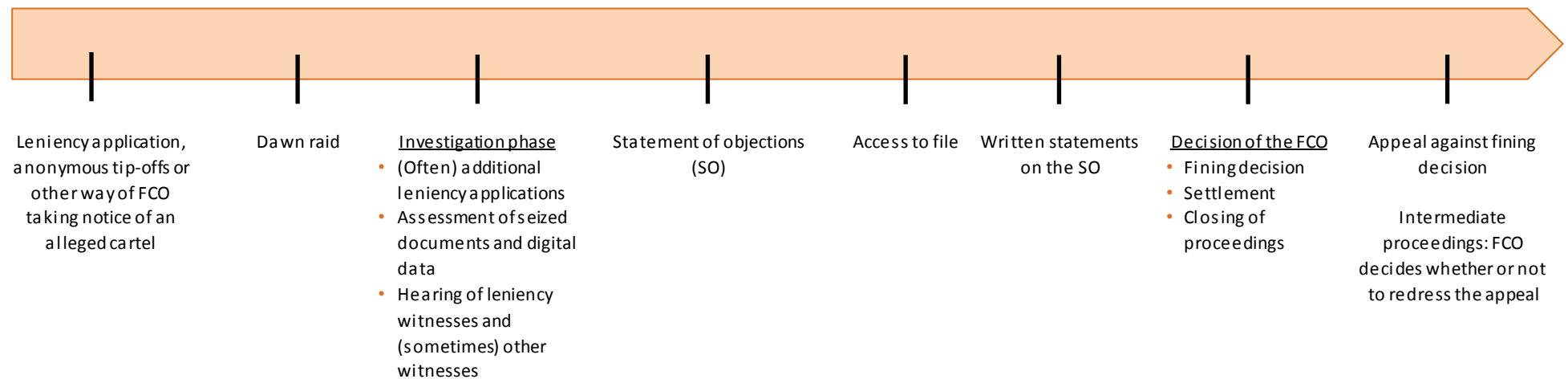
## Agenda

- I. Cartel proceedings imposing administrative fines and judicial review – Germany & EU
- II. Witness hearing and right of confrontation in the current system – Germany & EU
- III. Critics and suggestions for a reform of the German system of judicial review
- IV. Discussion

## **I. Cartel proceedings imposing administrative fines and judicial review – Germany & EU**

## German cartel proceedings imposing administrative fines and judicial review

- Cartel proceedings imposing administrative fines
  - Responsible authority: Federal Cartel Office (FCO); formally subordinated to the German Ministry of Economics
  - Typical procedural steps



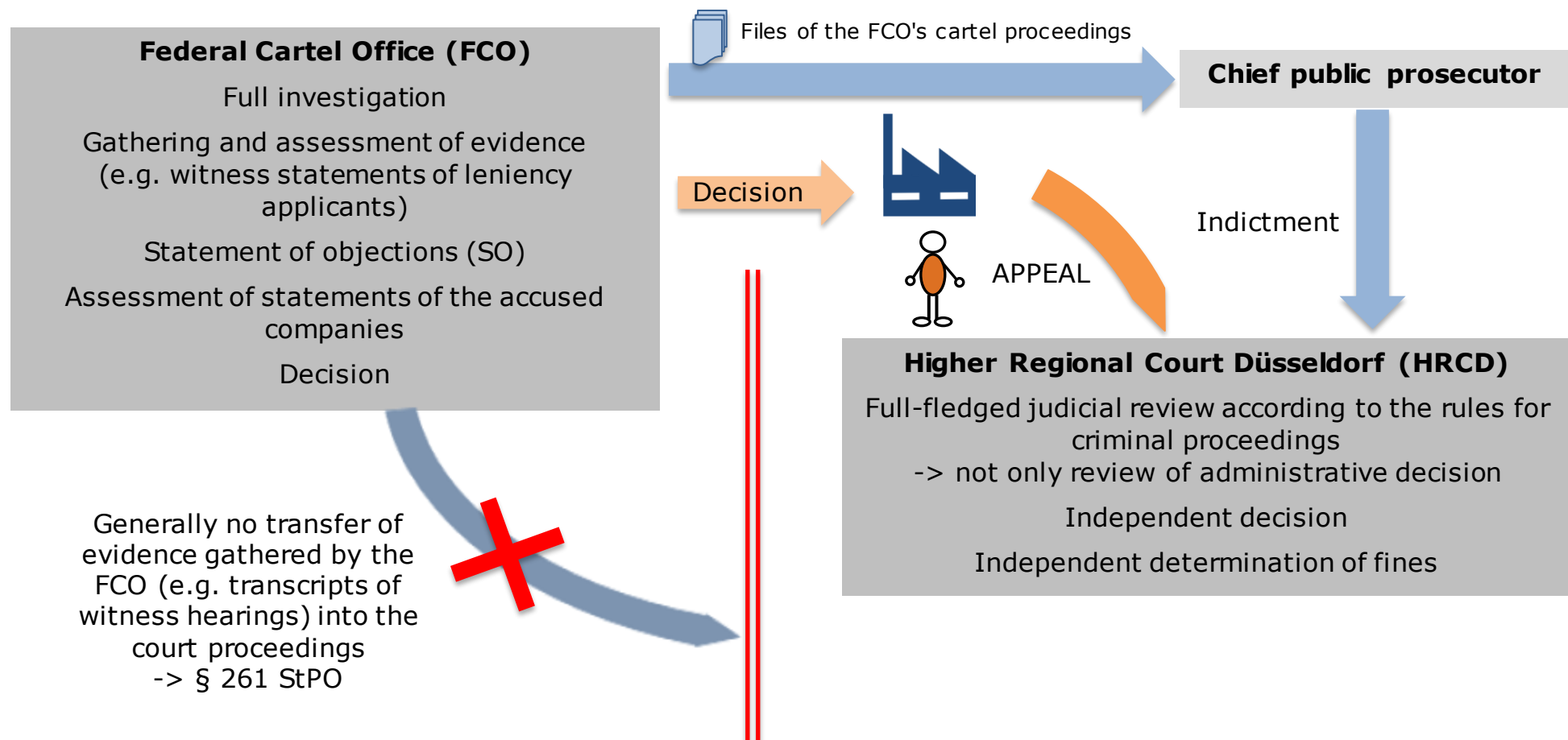
- Investigation, case handling and decision imposing fine by FCO

## German cartel proceedings imposing administrative fines and judicial review

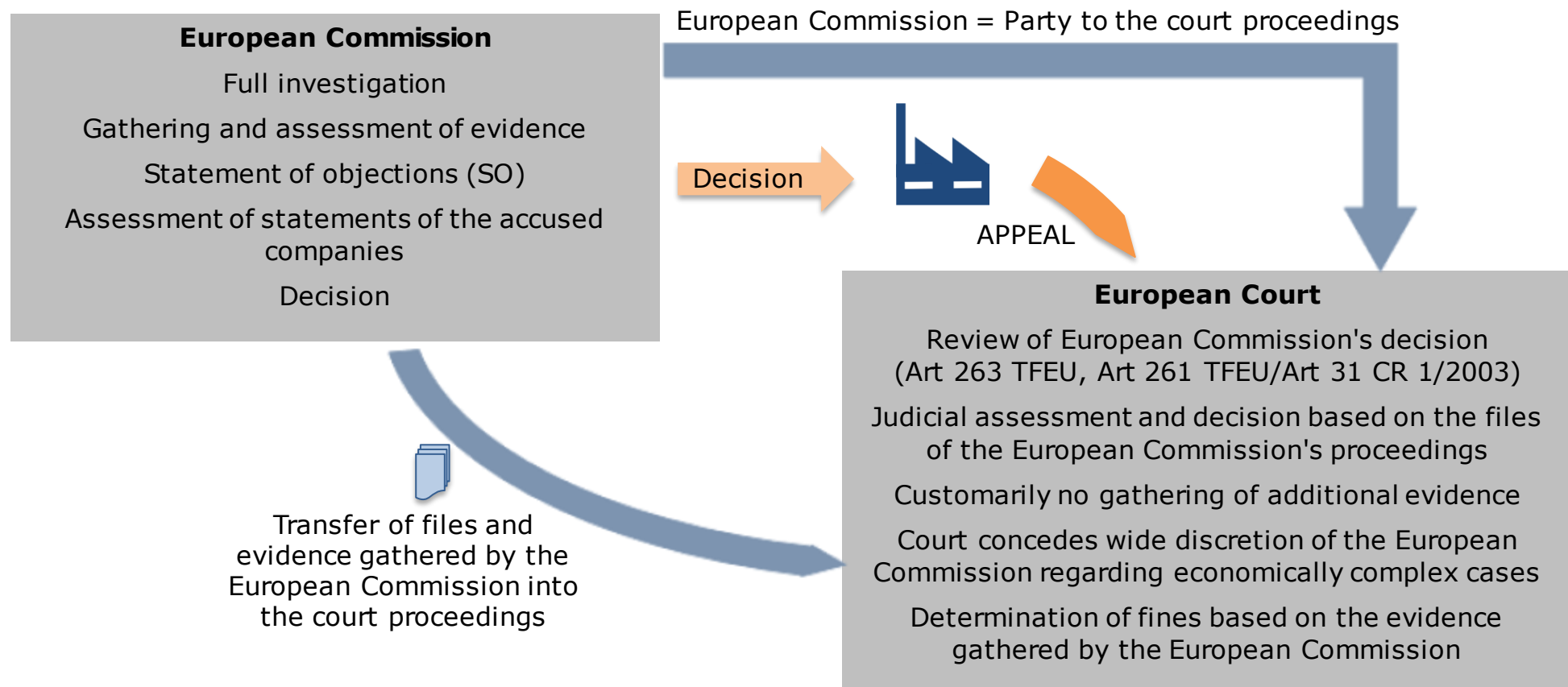
- Judicial review
  - Competent court: Higher Regional Court Düsseldorf ("HRCD")
  - Rules for criminal proceedings applicable (German *Code of Criminal Procedure*; StPO)
  - Files are handed over to the chief public prosecutor; fining decision = indictment
  - FCO = no active role; right to provide statements and right to ask questions
  - Full-fledged judicial review of the FCO's decision by the HRCD
    - Gathering and appraisal of evidence by the court (principle of formal immediacy)
    - Hearing of representatives of the accused companies and hearing of witnesses by the court (principle of orality)
    - Priority of witness hearings as opposed to written evidence (principle of material immediacy)
  - Court's own assessment leads to independent decision, which may differ from the FCO's decision in terms of material findings and the fine (fine may be upheld, repealed, reduced or increased)

## German cartel proceedings imposing administrative fines and judicial review

Summary: German system of judicial review of cartel proceedings



## Overview: EU system of cartel proceedings



## **II. Witness hearing and right of confrontation in the current system – Germany & EU**



## Witness hearing and right of confrontation in the current system – Germany & EU

### Cartel proceedings imposing administrative fines

#### Germany (FCO)

- Witness hearing
  - Hearing of representatives of leniency applicants and other prosecution witnesses at the discretion of the FCO
  - Hearing of defence witnesses?
    - Requests for (witness) evidence according to Sec 55 para 1 of the German *Act on Regulatory Offences* (OWiG), § 163a para 2 StPO
    - Decision at authority's due discretion; no right to appeal in case of rejection (Sec 62 para 1 sentence 2 OWiG)
- Right of confrontation
  - No right of confrontation in the administrative cartel proceedings
  - Review of witness statements by the accused companies only via access to file (which is usually granted for the first time after the issuing of the SO)

#### EU (European Commission)

- Witness hearing
  - In some cases hearing of representatives of leniency applicants
    - Usually only written corporate statements presented by lawyers
  - Hearing of defence witnesses?
    - Discretion of the European Commission; normally regarded as not necessary for the case -> No hearing of defence witnesses
- Right of confrontation
  - No right of confrontation in the administrative proceedings; arg: Art 6 CPHR not applicable as European Commission is no court
  - Review of witness statements by the accused companies only via access to file (which is usually granted for the first time after the issuing of the SO)

## Witness hearing and right of confrontation in the current system – Germany & EU

### Judicial review

#### Germany (HRCD)

- Witness hearing
  - Hearing of representatives of leniency applicants and other prosecution witnesses
  - Hearing of defence witnesses
    - Right to request for (witness) evidence is embedded in the right to a fair trial (Art 103 para 1 of the German Constitution)
    - Rejection of request for (witness) evidence only based on the reasons listed in Sec 244 para 3 StPO:
      - Inadmissible request
      - Obvious facts that do not require evidence
      - Insignificance of the facts to be shown by the evidence
      - Facts that have already been proven
      - Inappropriateness of the evidence
      - Unavailability of witness
      - Request intends solely to delay the process
      - Assumption of the court that the facts to be proven are true (no evidence required)

#### EU (General Court)

- Witness hearing
  - Usually no witness hearing in front of the court
  - Backed by the ECJ decision whether to gather additional evidence lies at the discretion of the GC
    - *"No absolute right to call defence witnesses"* (e.g. GC decision of 16 September 2013, T-364/10, Sec 51 et seq and ECJ decision of 26 January 2017, C-609/13P, Sec 110 "Duravit"; ECJ decision of 16 February 2017, C-95/15 P, Sec 45 "H&R Chem Pharm")
  - Usually relies on the files and the evidence gathered by the European Commission
    - Wide discretion of the European Commission regarding economically complex cases
    - Rejections of calls for defence witnesses usually based on the court's conclusion that available evidence is sufficient

## Witness hearing and right of confrontation in the current system – Germany & EU

### Judicial review

#### Germany (HRCD)










- Right of confrontation
  - Sec 240 para 2 StPO
  - Based on Art 6 para 3 lit d) CPHR
  - Judge may reject questions in exceptional cases only (Sec 241 para 2 StPO)
    - Inappropriate questions
    - Questions unrelated to the subject matter of the case
  - HRCD normally very hesitant to reject questions of the accused

#### EU (General Court)

- Right of confrontation
  - GC (backed by the ECJ) usually exclusively relies on the files and the evidence gathered by the European Commission
  - Due to the lack of witness hearing the right of confrontation is undermined

## Witness hearing and right of confrontation in the current system – Germany & EU

Summary (most cases)

	Germany	EU
Cartel proceedings imposing administrative fines		
Hearing of defence witnesses	 	
Right of confrontation		
Judicial review		
Hearing of defence witnesses		
Right of confrontation		

### **III. Critics and suggestions for a reform of the German system of judicial review**

## Critics and suggestions for a reform of the German system of judicial review

- Critics on the German system for the judicial review of cartel decisions imposing administrative fines
  - Very long oral hearings and as a consequence long proceedings caused by the fact that the evidence gathered and assessed by the FCO may not be transferred into the court proceedings but the court must collect and assess a full set of new evidence
  - Principle of formal immediacy: Same evidence (e.g. witness hearings) is gathered two times -> contradicts the principle of procedural economy
  - Principle of material immediacy and principle of orality: witness statements in front of the court
    - Witnesses' memory decreases after long period of time
    - Written documents may be the more reliable evidence as compared to witness statements

## Critics and suggestions for a reform of the German system of judicial review

- Suggestions for a reform of the German system of judicial review
  - Judicial review according to the rules for administrative court proceedings (instead of the rules for criminal court proceedings)
    - Not necessary to gather the full set of evidence again
    - Court decision based on the findings of the entire proceedings (incl. FCO proceedings)
  - FCO files could be transferred into the court proceedings
    - Court decision could be based on evidence gathered by the FCO
    - Court could decide to hear additional witnesses/gather more evidence if required
  - Arg: more efficient and expeditious review of administrative cartel proceedings
- Change of judicial review system was discussed in the context of the reforms of the German *Act against Restraints of Competition* (ARC)
  - Has neither been included in the 8<sup>th</sup> (June 2013) nor in the 9<sup>th</sup> amendment of the ARC

## Critics and suggestions for a reform of the German system of judicial review

- Limits of a revised German system of judicial review
  - Right of confrontation is a constitutionally guaranteed right, Art 6 para 3 lit d) CPHR and Art 103 para 1 of the German Constitution
  - Right of confrontation must be guaranteed at least once during criminal proceedings
  - Also applicable in quasi-criminal proceedings (e.g. cartel proceedings)
    - ECHR, decision of 27 September 2011, 43509/08 "Menarini"
  - In the current system no right of confrontation in the administrative proceedings at the FCO
  - Right to confront prosecution witnesses would put limits to any change of the review system into administrative judicial system



## Critics and suggestions for a reform of the German system of judicial review

- Option 1: Right to call defence witnesses and right of confrontation already in the administrative FCO proceedings
  - Art 6 para 3 lit d) CPHR would be guaranteed at an early stage of the process
  - More efficient proceedings
    - Time saving and cost-effective
  - Accused have the chance to confront prosecution witnesses at an early stage and include outcome into their written statement on the SO
  - Fewer appeals since confrontation may help to clarify the facts of the case
  - Lower risk of "wrong" cartel decisions
    - Lower risk of prejudgement, e.g. by potential damage claimants
- Option 2: Keep right of confrontation in the judicial review
  - FCO = risk of bias; Court = neutral instance
  - Granting of right of confrontation at the stage of FCO proceedings may impede investigation

## **IV. Time for discussion!**

Thank you very much for your attention

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