

Cartel leniency in Germany: overview

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REGULATION

1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable laws and guidance

The applicable laws and guidance are:

- The German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (ARC).
- Leniency Notice (*Bekanntmachung Nr. 9/2006 - Bonusregelung*) (2006 Leniency Notice).

According to section 81(7) of the ARC, the German Federal Cartel Office (*Bundeskartellamt*) (FCO) is entitled to lay down general administrative principles on the exercise of its discretionary powers in determining fines in competition cases. On that basis, the FCO has published the 2006 Leniency Notice, which has replaced the 2000 Leniency Notice.

An English version of the 2006 Leniency Notice is available on the FCO's website (www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5).

Some of the regional competition authorities (*Landeskartellbehörden*) operate their own leniency programmes, which are structured in the same way as the 2006 Leniency Notice.

Regulatory authorities

A leniency programme is operated by the FCO and by several regional competition authorities, as follows:

- The FCO is responsible for the enforcement of German and EU competition laws, if the effect of a restricting practice (for example, cartel agreement) goes beyond the territory of a single German federated state (*Land*) (these states, of which there are 16, are partly sovereign constituent states of the Federal Republic of Germany).
- On a state level, the enforcement of competition law rests with the respective regional competition authorities.

The FCO and the regional competition authorities can impose fines on companies and individuals for wilful or negligent violations of German or EU competition law.

SCOPE OF APPLICATION

2. What infringements of competition law does the leniency programme cover?

The 2006 Leniency Notice applies to cartels only, that is, to severe horizontal restrictions of competition such as agreements and/or concerted practices between competitors relating to, in particular:

- Price fixing.

- Fixing of sales quotas.
- Market sharing.
- Bid-rigging.

Vertical restrictions of competition (for example, in the context of distribution agreements) are not covered by the 2006 Leniency Notice. However, the FCO has previously granted immunity also with respect to certain vertical restrictions, in particular in cases comprising both horizontal and vertical restrictions.

The 2006 Leniency Notice and the leniency programmes of the regional competition authorities apply to investigations by the respective competition authority only. Thus, the leniency programmes operated by the FCO and by the regional competition authorities do not apply to criminal investigations by the Public Prosecutor. If an infringement of German and/or EU competition law involves a criminal offence under applicable German criminal law (for example, in cases of bid-rigging or fraud), the competition authorities will refer proceedings against the individuals involved (as opposed to the companies) to the Public Prosecutor (see *Question 7*).

RECENT CASES

3. What notable recent cases have applied the leniency programme?

The 2006 Leniency Notice and its predecessor have been applied by the Federal Cartel Office (FCO) in a great number of cases. Leniency applications have been submitted in almost every cartel case handled by the FCO in recent years.

In 2017, the FCO received a total of 37 leniency applications from corporate entities and individuals. Since March 2017, the FCO adopted notable fining decisions in the following leniency cases, while other cases are still pending:

- **The Harbour Towing Service Provider case.** The FCO has imposed fines on three German and Dutch harbour towing service providers of approximately EUR13 million in total. The companies had divided orders and turnover earned from several German harbours among themselves. However, no fine was imposed on Unterweser Reederei and its subsidiary which both had also participated in the cartel agreement, but had reported the cartel to the FCO. The FCO has closely cooperated with the Dutch Authority for Consumers and Markets.
- **The Automotive Heat Shields case (B12-16/13).** Fines of approximately EUR9.6 million were imposed on three manufacturers of heat shields for involvement in anti-competitive agreements and concerted practices. The companies had coordinated the ancillary costs for aluminium they charged Volkswagen. The company "Carcoustics" received full immunity for its cooperation under the 2006 leniency notice.
- **The Industrial Batteries case (B11-13/13).** Fines of approximately EUR29 million were imposed on two manufacturers of industrial batteries. The companies had agreed on levying a "lead surcharge" as a major price



component for batteries. The proceedings had been triggered by a leniency application filed by a third participant in the cartel, followed by sector-wide dawn raids. No fine was imposed on this company in accordance with the leniency programme.

AVAILABILITY OF LENIENCY

Administrative liability

4. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

Under the 2006 Leniency Notice, full immunity from administrative fines may be available to the first applicant in the following circumstances:

- The FCO grants full immunity from administrative fines if the applicant satisfies all of the following conditions (*paragraph 3, 2006 Leniency Notice*):
 - it is the first cartel member to contact the FCO before the latter has sufficient evidence to obtain a search warrant;
 - it provides the FCO with verbal and written information and, where available, evidence, which enable the FCO to obtain a search warrant;
 - it was not the only ringleader of the cartel, and did not coerce others to participate in the cartel;
 - it co-operates fully (*see below*) and continuously with the FCO.
- At the point at which the FCO is in a position to obtain a search warrant, it will grant full immunity from fines if the applicant satisfies all of the following conditions, provided that no other cartel member is to be granted full immunity under paragraph 3 (*see above*) (*paragraph 4, 2006 Leniency Notice*):
 - it is the first participant in the cartel to contact the FCO before it has sufficient evidence to prove the offence;
 - it provides the FCO with verbal and written information and, where available, evidence, which enable the FCO to prove the offence;
 - it was not the only ringleader of the cartel, nor coerced others to participate in the cartel;
 - it co-operates fully (*see below*) and continuously with the FCO.

Full co-operation under the 2006 Leniency Notice means, in particular, that the leniency applicant must:

- Terminate its participation in the cartel immediately on the FCO's request.
- Submit any and all information and evidence available to him, including such information and evidence which became available to him following the submission of the leniency application.
- Keep its co-operation with the FCO confidential until the FCO exempts the applicant from that confidentiality obligation (which usually occurs once the FCO's dawn raids have been concluded).
- Name all current or former employees involved in the cartel.

5. Is there a sliding scale of available leniency from administrative penalties?

An applicant who does not qualify for full immunity (*see Question 4*) may still qualify for a fine reduction of up to 50%, if it both (*paragraph 5, 2006 Leniency Notice*):

- Provides the FCO with verbal or written information and, where available, evidence, which significantly contribute to proving the offence.
- Co-operates fully (*see Question 4*) and continuously with the FCO.

Contrary to full immunity, more than one applicant can receive a reduction of fine under paragraph 5 of the 2006 Leniency Notice. However, there is no fixed sliding scale of available leniency from fines. The actual percentage of reduction granted by the FCO depends on:

- The value of the applicant's contribution towards the uncovering of the cartel.
- The chronological order of the leniency applications received by the FCO.

6. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

Immunity from administrative fines and reduction of such fines (*see Question 4 and Question 5*) are available to individuals and corporate entities.

The FCO usually considers a company's leniency application as being made on behalf of the applicant's current and former employees as well, unless otherwise indicated either in the application or through the conduct of the leniency applicant (*paragraph 17, 2006 Leniency Notice*). As a consequence, those employees also benefit from any decision on immunity or reduction granted to the corporate entity.

If a current or former employee does not co-operate with a corporate leniency applicant, this could, in theory, result in the corporate leniency applicant's disqualification under the 2006 Leniency Notice, because any such corporate leniency applicant must ensure that all employees from whom information and evidence can be requested co-operate fully and continuously (*paragraph 10, 2006 Leniency Notice*). In practice, however, the FCO may still grant the corporate leniency applicant (full or partial) immunity if the applicant satisfactorily shows that it made sufficient efforts to ensure such co-operation.

Criminal liability

7. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

Circumstances

Under German law, companies cannot be subject to criminal prosecution; only individuals can. In relation to the latter, no immunity or leniency from criminal prosecution is available under German law (*see Question 2*). In particular, the FCO's 2006 Leniency Notice is not binding on the Public Prosecutor and/or the criminal courts.

Proceedings against employees

Criminal proceedings can be brought against individuals even if their current or former employers have been granted immunity from fines or a reduction of the fine under the 2006 Leniency Notice. Immunity or reduction of fines granted to individuals under the 2006 Leniency Notice does not prevent them from being criminally prosecuted (*see above, Circumstances*).

However, co-operation of an individual with the FCO during the administrative proceedings may be considered by the criminal court to be a mitigating circumstance.

Employees' interests

There is no universal answer as to how employees' and/or managers' interests can best be protected when a company decides to apply for leniency. Generally, the interests of the company and its senior management are treated equally in the context of a leniency application (see *Question 6*).

A company applying for leniency under the 2006 Leniency Notice must ensure that all employees from whom information and evidence can be requested co-operate fully and on a continuous basis with the FCO during the proceedings (*paragraph 10, 2006 Leniency Notice*).

The employees' rights (for example, under applicable data protection laws and employment laws) must be observed during the preparation of any leniency application.

If an individual refuses to co-operate with a corporate leniency applicant, the company may enforce such co-operation by means of employment law, but only to the extent that the requested co-operation does not result in the employee incriminating himself.

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

A leniency application can be submitted at any time, even following a dawn raid by the German competition authorities. Naturally, the timing is of essence, since full immunity is granted to the first leniency applicant only (see *Question 4*). Subsequent applicants may benefit from a reduction of fines (see *Question 5*).

9. What are the procedural rules for leniency applications?

Relevant authority

The leniency application must always be submitted to the FCO. In cases that potentially affect the territory of one federated state only, a parallel leniency application should be submitted to the competent regional competition authority (see *Question 1, Regulatory authorities*).

If the cartel may have affected trade between EU member states (that is, if it may have violated EU competition law), parallel leniency applications should be submitted to the European Commission (Commission) and to any relevant national competition authority within the EU, including the FCO. This is because, in principle, both the Commission and the national competition authorities within the European Competition Network (ECN) are competent to prosecute violations of EU competition laws and a leniency application to one competition authority within the ECN does not have any legal binding effect on prosecutions of other ECN competition authorities (see ECJ Case C-428/14 – *DHL Express Italy vs. Autorità Garante della Concorrenza e del Mercato*).

Applicant

A leniency application can be submitted by any authorised representative of the company (including its authorised external legal counsel). The FCO normally considers a company's application to be made on behalf of its employees as well (see *Question 6*). Moreover, the FCO accepts leniency applications submitted on behalf of all companies belonging to the same group of companies.

Joint applications by two or more cartel participants are not accepted.

Informal guidance

Leniency applicants can contact the Special Unit for Combating Cartels (*Sonderkommission Kartellbekämpfung*) or the Chairman of one of the competent Decision Divisions (*Beschlussabteilungen*) at the FCO for informal guidance before submitting a leniency

application. Such guidance can be obtained on a confidential and anonymous basis.

Form of application

There is no specific application form.

The application can either be made in writing or orally. An application in English will also be accepted, on the condition that the applicant subsequently provides a German translation without undue delay.

Markers

Markers are available under the 2006 Leniency Notice. The timing of the placement of the marker will determine the applicant's status (ranking).

Under the 2006 Leniency Notice, a marker is a declaration of the applicant's willingness to co-operate with the FCO. The marker can be placed orally (for example, over the phone) or in writing. It must be addressed to the Special Unit for Combating Cartels or to the Chairman of one of the competent Decision Divisions at the FCO. The marker can be filed in German or in English.

In its declaration, the applicant must provide the following basic information:

- Type and duration of the infringement.
- Product and geographic market(s) affected.
- Identity of those involved.
- Any other competition authorities where leniency applications have been submitted or are intended to be submitted.

Following the placement of a marker, the FCO confirms to the applicant the date and time of the placement of the marker and sets a time limit of up to eight weeks for the submission of a complete leniency application.

The FCO may provisionally exempt the applicant from the obligation to submit a complete application in Germany in addition to the marker if both:

- The FCO comes to the conclusion that the Commission is the best placed competition authority within the meaning of the Notice on co-operation within the network of competition authorities (*OJ 2004 C101/43*) (ECN Notice).
- The applicant has submitted a parallel leniency application to the Commission or intends to do so.

Information/evidence

The information/evidence that must be submitted by an applicant varies depending on which paragraph of the 2006 Leniency Notice the application is made under:

- Paragraph 3: information necessary to obtain a search warrant.
- Paragraph 4: information necessary to prove the offence.
- Paragraph 5: information that makes a significant contribution to proving the offence.

Leniency applicants are expected to provide the FCO with all relevant information/evidence available to them, including:

- E-mail correspondence.
- Meeting notes.
- Exchanged documents (for example, price lists, market share tables, sales figures).
- Diaries.
- Travel records and/or accounts of travel expenses.

In addition, the FCO expects leniency applicants to provide, where applicable, any information necessary to calculate a potential

(reduced) fine to be imposed on the applicant (such as the applicant's group turnover and the turnover achieved from the infringement).

The applicant must admit the infringement, in a general matter, at the earliest stage of the leniency procedure (for example, when placing the marker).

Oral statements

Oral statements are accepted by the FCO under the 2006 Leniency Notice in initial contact (markers are usually placed via phone) as well as main submission (via a face-to-face interview with the applicant itself or its defence lawyer).

Short-form applications

Short-form or summary applications within the meaning of the ECN Model Leniency Programme are accepted by the FCO and are handled in the same way as markers in cases where the Commission may be the best placed competition authority (*see above, Markers*).

10. What are the applicable procedures and timetable?

The FCO promptly (usually within three to seven days) confirms in writing that a marker has been placed and/or that the application has been received, stating the date and the time of the receipt (*paragraph 18, 2006 Leniency Notice*).

If the applicant qualifies for immunity under paragraph 3 of the 2006 Leniency Notice (*see Question 4*), the FCO confirms in writing that the applicant will be granted immunity from fines (subject to the fulfilment of its obligation to co-operate fully and continuously, and on the condition that he was not the only ringleader of the cartel and did not coerce others to participate in the cartel) (*paragraph 19, 2006 Leniency Notice*).

In the case of an application for immunity under paragraph 4 of the 2006 Leniency Notice or for a reduction of fine under paragraph 5 of the 2006 Leniency Notice (*see Question 4 and Question 5*), the FCO initially only informs the applicant about its current ranking and that it is, in principle, eligible for immunity or a reduction of fine, subject to the fulfilment of its obligation to co-operate. A decision on immunity or reduction of fine is made at the earliest opportunity following the review and examination of all information and evidence obtained by the FCO during the dawn raids (*paragraph 20, 2006 Leniency Notice*). However, the FCO informs the applicant about its final decision at a late stage of the proceedings, often close to the commencement of the settlement conversation.

After the placement of a marker, the applicant generally has a time limit of up to eight weeks before a complete leniency application must be submitted (*see above, Markers*). There is no fixed timetable for the next stages of proceedings. The duration depends on the complexity of the case and the personal resources of the FCO.

WITHDRAWAL OF LENIENCY

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

The FCO may decide at any stage of the investigation that a leniency applicant does not qualify for leniency, in particular if the applicant:

- Does not sufficiently co-operate with the FCO (*see Question 4*).
- Turns out to be the only ringleader of the cartel.
- Is found to have coerced others to participate in the cartel.

However, such a decision must be made before the final decision in the case.

If an applicant does not qualify for leniency, its status of priority lapses and the subsequent applicants move up in rank. For example, an applicant ranked number two (qualified only for reduction of fine) may get full immunity from fine, if the number one-ranked applicant is disqualified.

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted?

Leniency protection only applies to the violation of competition law disclosed to the FCO by the applicant. If additional violations are discovered by the FCO during its investigation, those infringements are not covered by the leniency application.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

Under the 2006 Leniency Notice, immunity or a reduction of fine is granted with respect to the infringement disclosed in the leniency application. Therefore, there is no leniency plus under German law.

14. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

The grant of leniency may well affect a third party's ability to bring a follow-on damages action against a leniency applicant. If full immunity is granted to the leniency applicant, the FCO does not issue a final decision with respect to this applicant. Consequently, any follow-on action brought against this leniency applicant would not benefit from the binding effect of final infringement decisions by the competition authorities and/or courts (*section 33b, Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) (ARC)*). Moreover, the FCO will usually limit the right of third parties to inspect the authority's files in leniency cases and will particularly not disclose any information submitted by the leniency applicant, neither based on a third party's application nor based on a court order (*section 89c (4), ARC*). However, a recipient of full immunity is not granted full protection against follow-on damages actions, but, according to the 9th amendment of the ARC, is privileged in relation to the other cartelists, in this respect. While the cartelists, in general, are liable as joint and several debtors for the damages caused in total, the leniency applicant granted full immunity is only liable for damages of its own direct and indirect customers or suppliers (*section 33e, ARC*).

CONFIDENTIALITY AND DISCLOSURE

15. What are the rules relating to confidentiality during a leniency application?

Identity disclosure

The identity of a leniency applicant remains confidential during the proceedings until the statement of objections is issued to a cartel participant. However, the FCO may exchange information (including the identity of the leniency applicant) on a confidential basis with other foreign competition authorities, in particular within the ECN (*see Question 17*).

In addition, the FCO must disclose the identity of a leniency applicant to the Public Prosecutor if the anti-competitive practice(s) may constitute a criminal offence (see *Question 7*).

Information disclosure

Other companies and/or individuals under investigation have the right to get access to the FCO's file once they have received a statement of objections. At this stage, those persons will be granted access to the submissions of the leniency applicant(s) as well. The FCO may agree to remove certain trade and/or business secrets from the file which are not relevant for the proceedings, but there is no guarantee that such information will not be revealed to the other parties under investigation.

Confidentiality requests

The FCO usually rejects applications for access to the file by third parties, insofar as the leniency application and the evidence provided by the leniency applicant are concerned.

To date, this practice has been accepted by the anti-trust courts (see *Question 14*).

16. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic submissions and domestic discovery

In Germany, the available discovery mechanisms are much narrower in scope than those available in many common law jurisdictions. In specific cases, national courts may:

- Ask the FCO to share its file with the court in the context of private anti-trust litigation.
- Order a party to present specific documents that the other party has identified in its pleadings.

However, in practice, national courts are generally reluctant to ask for the submission of leniency documents, corporate statements and so on.

Domestic submissions and foreign discovery

To protect domestic leniency submissions from pre-trial discovery abroad, the FCO allows leniency applications, corporate statements and so on to be made orally under the 2006 Leniency Notice.

Foreign submissions and domestic discovery

There is no real discovery mechanism in German civil proceedings (see above, *Domestic submissions and domestic discovery*).

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

The FCO is a member of the ECN. The FCO is entitled to exchange (confidential) information with the Commission and with other national competition authorities within the ECN (*section 50a, ARC*). The ECN authorities closely co-operate on the basis of:

- Articles 11, 12 and 13 of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation).
- The ECN Notice.
- The ECN Model Leniency Programme.

The FCO also co-operates with other foreign competition authorities.

PROPOSALS FOR REFORM

18. Are there any proposals for reform?

There are currently no visible proposals to reform cartel leniency. Apart from the changes to disclosure and liability of full immunity leniency applicants and so on (see *Question 14*), the 9th amendment of the Act against Restraints of Competition (ARC), which came into force on 9 June 2017, will not alter any rules for leniency applications. However, the 9th amendment of ARC has strengthened anti-trust enforcement at national level, in particular by the introduction of group liability for cartel infringements (*section 81 (3a), ARC*).

19. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable laws and guidance

The applicable laws and guidance are:

- The German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (ARC).
- Leniency Notice (*Bekanntmachung Nr. 9/2006 - Bonusregelung*) (2006 Leniency Notice).

According to section 81(7) of the ARC, the German Federal Cartel Office (*Bundeskartellamt*) (FCO) is entitled to lay down general administrative principles on the exercise of its discretionary powers in determining fines in competition cases. On that basis, the FCO has published the 2006 Leniency Notice, which has replaced the 2000 Leniency Notice.

An English version of the 2006 Leniency Notice is available on the FCO's website (www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5).

Some of the regional competition authorities (*Landeskartellbehörden*) operate their own leniency programmes, which are structured in the same way as the 2006 Leniency Notice.

Regulatory authorities

A leniency programme is operated by the FCO and by several regional competition authorities, as follows:

- The FCO is responsible for the enforcement of German and EU competition laws, if the effect of a restricting practice (for example, cartel agreement) goes beyond the territory of a single German federated state (*Land*) (these states, of which there are 16, are partly sovereign constituent states of the Federal Republic of Germany).
- On a state level, the enforcement of competition law rests with the respective regional competition authorities.

The FCO and the regional competition authorities can impose fines on companies and individuals for wilful or negligent violations of German or EU competition law.

SCOPE OF APPLICATION

20. What infringements of competition law does the leniency programme cover?

The 2006 Leniency Notice applies to cartels only, that is, to severe horizontal restrictions of competition such as agreements and/or concerted practices between competitors relating to, in particular:

- Price fixing.
- Fixing of sales quotas.
- Market sharing.
- Bid-rigging.

Vertical restrictions of competition (for example, in the context of distribution agreements) are not covered by the 2006 Leniency Notice. However, the FCO has previously granted immunity also with respect to certain vertical restrictions, in particular in cases comprising both horizontal and vertical restrictions.

The 2006 Leniency Notice and the leniency programmes of the regional competition authorities apply to investigations by the respective competition authority only. Thus, the leniency programmes operated by the FCO and by the regional competition authorities do not apply to criminal investigations by the Public Prosecutor. If an infringement of German and/or EU competition law involves a criminal offence under applicable German criminal law (for example, in cases of bid-rigging or fraud), the competition authorities will refer proceedings against the individuals involved (as opposed the companies) to the Public Prosecutor (*see Question 7*).

RECENT CASES

21. What notable recent cases have applied the leniency programme?

The 2006 Leniency Notice and its predecessor have been applied by the FCO in a great number of cases. Leniency applications have been submitted in almost every cartel case handled by the FCO in recent years.

In 2015, the FCO received a total of 76 leniency applications from corporate entities and individuals, in 29 cases. Actual figures for 2016 are not yet available. Since December 2015, the FCO adopted notable fining decisions only in the following leniency cases, while other cases are still pending:

- **The Melitta coffee case (B10-50/14).** Fines of approximately EUR50 million were imposed on five food retailers for illegal retail price maintenance on Melitta filter coffee. The proceeding was triggered by Melitta's leniency application, followed by dawn raids at the sites of the food retailers. Melitta received full immunity for its cooperation under the 2006 leniency notice.
- **The automotive part case.** Fines of approximately EUR90 million were imposed on six manufacturers of acoustically effective components and on staff responsible for illegal price fixing agreements regarding the supply to the automobile industry. The proceeding was triggered by an anonymous tip. However, one manufacturer, which took part in the illegal agreement received full immunity for its cooperation under the 2006 leniency notice.
- **The TV studio case (B12-23/15).** Fines of approximately EUR3.1 million were imposed on three TV studio operators for participation in anti-competitive information exchange. The proceeding was triggered by a leniency application filed by a fourth participant in the cartel. No fine was imposed on this company in accordance with the 2006 leniency notice.

AVAILABILITY OF LENIENCY

Administrative liability

22. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

Under the 2006 Leniency Notice, full immunity from administrative fines may be available to the first applicant in the following circumstances:

- The FCO grants full immunity from administrative fines if the applicant satisfies all of the following conditions (*paragraph 3, 2006 Leniency Notice*):
 - it is the first cartel member to contact the FCO before the latter has sufficient evidence to obtain a search warrant;
 - it provides the FCO with verbal and written information and, where available, evidence, which enable the FCO to obtain a search warrant;
 - it was not the only ringleader of the cartel, and did not coerce others to participate in the cartel;
 - it co-operates fully (*see below*) and continuously with the FCO.
- At the point at which the FCO is in a position to obtain a search warrant, it will grant full immunity from fines if the applicant satisfies all of the following conditions, provided that no other cartel member is to be granted full immunity under paragraph 3 (*see above*) (*paragraph 4, 2006 Leniency Notice*):
 - it is the first participant in the cartel to contact the FCO before it has sufficient evidence to prove the offence;
 - it provides the FCO with verbal and written information and, where available, evidence, which enable the FCO to prove the offence;
 - it was not the only ringleader of the cartel, nor coerced others to participate in the cartel;
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Full co-operation under the 2006 Leniency Notice means, in particular, that the leniency applicant must:

- Terminate its participation in the cartel immediately on the FCO's request.
- Submit any and all information and evidence available to him, including such information and evidence which became available to him following the submission of the leniency application.
- Keep its co-operation with the FCO confidential until the FCO exempts the applicant from that confidentiality obligation (which usually occurs once the FCO's dawn raids have been concluded).
- Name all current or former employees involved in the cartel.

23. Is there a sliding scale of available leniency from administrative penalties?

An applicant who does not qualify for full immunity (*see Question 4*) may still qualify for a fine reduction of up to 50%, if it both (*paragraph 5, 2006 Leniency Notice*):

- Provides the FCO with verbal or written information and, where available, evidence, which significantly contribute to proving the offence.

- Co-operates fully (see *Question 4*) and continuously with the FCO.

Contrary to full immunity, more than one applicant can receive a reduction of fine under paragraph 5 of the 2006 Leniency Notice. However, there is no fixed sliding scale of available leniency from fines. The actual percentage of reduction granted by the FCO depends on:

- The value of the applicant's contribution towards the uncovering of the cartel.
- The chronological order of the leniency applications received by the FCO.

24. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

Immunity from administrative fines and reduction of such fines (see *Question 4* and *Question 5*) are available to individuals and corporate entities.

The FCO usually considers a company's leniency application as being made on behalf of the applicant's current and former employees as well, unless otherwise indicated either in the application or through the conduct of the leniency applicant (*paragraph 17, 2006 Leniency Notice*). As a consequence, those employees also benefit from any decision on immunity or reduction granted to the corporate entity.

If a current or former employee does not co-operate with a corporate leniency applicant, this could, in theory, result in the corporate leniency applicant's disqualification under the 2006 Leniency Notice, because any such corporate leniency applicant must ensure that all employees from whom information and evidence can be requested co-operate fully and continuously (*paragraph 10, 2006 Leniency Notice*). In practice, however, the FCO may still grant the corporate leniency applicant (full or partial) immunity if the applicant satisfactorily shows that it made sufficient efforts to ensure such co-operation.

Criminal liability

25. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

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However, co-operation of an individual with the FCO during the administrative proceedings may be considered by the criminal court to be a mitigating circumstance.

Employees' interests

There is no universal answer as to how employees' and/or managers' interests can best be protected when a company decides to apply for leniency. Generally, the interests of the company and its senior management are treated equally in the context of a leniency application (see *Question 6*).

A company applying for leniency under the 2006 Leniency Notice must ensure that all employees from whom information and evidence can be requested co-operate fully and on a continuous basis with the FCO during the proceedings (*paragraph 10, 2006 Leniency Notice*).

The employees' rights (for example, under applicable data protection laws and employment laws) must be observed during the preparation of any leniency application.

If an individual refuses to co-operate with a corporate leniency applicant, the company may enforce such co-operation by means of employment law, but only to the extent that the requested co-operation does not result in the employee incriminating himself.

APPLICATION PROCEEDINGS

26. When should an application for leniency be made?

A leniency application can be submitted at any time, even following a dawn raid by the German competition authorities. Naturally, the timing is of essence, since full immunity is granted to the first leniency applicant only (see *Question 4*). Subsequent applicants may benefit from a reduction of fines (see *Question 5*).

27. What are the procedural rules for leniency applications?

Relevant authority

The leniency application must always be submitted to the FCO. In cases that potentially affect the territory of one federated state only, a parallel leniency application should be submitted to the competent regional competition authority (see *Question 1, Regulatory authorities*).

If the cartel may have affected trade between EU member states (that is, if it may have violated EU competition law), parallel leniency applications should be submitted to the European Commission (Commission) and to any relevant national competition authority within the EU, including the FCO. This is because, in principle, both the Commission and the national competition authorities within the European Competition Network (ECN) are competent to prosecute violations of EU competition laws and a leniency application to one competition authority within the ECN does not have any legal binding effect on prosecutions of other ECN competition authorities (see ECJ Case C-428/14 – *DHL Express Italy vs. Autorità Garante della Concorrenza e del Mercato*).

Applicant

A leniency application can be submitted by any authorised representative of the company (including its authorised external legal counsel). The FCO normally considers a company's application to be made on behalf of its employees as well (see *Question 6*). Moreover, the FCO accepts leniency applications submitted on behalf of all companies belonging to the same group of companies.

Joint applications by two or more cartel participants are not accepted.

Informal guidance

Leniency applicants can contact the Special Unit for Combating Cartels (*Sonderkommission Kartellbekämpfung*) or the Chairman of one of the competent Decision Divisions (*Beschlussabteilungen*) at the FCO for informal guidance before submitting a leniency

application. Such guidance can be obtained on a confidential and anonymous basis.

Form of application

There is no specific application form.

The application can either be made in writing or orally. An application in English will also be accepted, on the condition that the applicant subsequently provides a German translation without undue delay.

Markers

Markers are available under the 2006 Leniency Notice. The timing of the placement of the marker will determine the applicant's status (ranking).

Under the 2006 Leniency Notice, a marker is a declaration of the applicant's willingness to co-operate with the FCO. The marker can be placed orally (for example, over the phone) or in writing. It must be addressed to the Special Unit for Combating Cartels or to the Chairman of one of the competent Decision Divisions at the FCO. The marker can be filed in German or in English.

In its declaration, the applicant must provide the following basic information:

- Type and duration of the infringement.
- Product and geographic market(s) affected.
- Identity of those involved.
- Any other competition authorities where leniency applications have been submitted or are intended to be submitted.

Following the placement of a marker, the FCO confirms to the applicant the date and time of the placement of the marker and sets a time limit of up to eight weeks for the submission of a complete leniency application.

The FCO may provisionally exempt the applicant from the obligation to submit a complete application in Germany in addition to the marker if both:

- The FCO comes to the conclusion that the Commission is the best placed competition authority within the meaning of the Notice on co-operation within the network of competition authorities (*OJ 2004 C101/43*) (ECN Notice).
- The applicant has submitted a parallel leniency application to the Commission or intends to do so.

Information/evidence

The information/evidence that must be submitted by an applicant varies depending on which paragraph of the 2006 Leniency Notice the application is made under:

- Paragraph 3: information necessary to obtain a search warrant.
- Paragraph 4: information necessary to prove the offence.
- Paragraph 5: information that makes a significant contribution to proving the offence.

Leniency applicants are expected to provide the FCO with all relevant information/evidence available to them, including:

- E-mail correspondence.
- Meeting notes.
- Exchanged documents (for example, price lists, market share tables, sales figures).
- Diaries.
- Travel records and/or accounts of travel expenses.

In addition, the FCO expects leniency applicants to provide, where applicable, any information necessary to calculate a potential

(reduced) fine to be imposed on the applicant (such as the applicant's group turnover and the turnover achieved from the infringement).

The applicant must admit the infringement, in a general matter, at the earliest stage of the leniency procedure (for example, when placing the marker).

Oral statements

Oral statements are accepted by the FCO under the 2006 Leniency Notice in initial contact (markers are usually placed via phone) as well as main submission (via a face-to-face interview with the applicant itself or its defence lawyer).

Short-form applications

Short-form or summary applications within the meaning of the ECN Model Leniency Programme are accepted by the FCO and are handled in the same way as markers in cases where the Commission may be the best placed competition authority (*see above, Markers*).

28. What are the applicable procedures and timetable?

The FCO promptly (usually within three to seven days) confirms in writing that a marker has been placed and/or that the application has been received, stating the date and the time of the receipt (*paragraph 18, 2006 Leniency Notice*).

If the applicant qualifies for immunity under paragraph 3 of the 2006 Leniency Notice (*see Question 4*), the FCO confirms in writing that the applicant will be granted immunity from fines (subject to the fulfilment of its obligation to co-operate fully and continuously, and on the condition that he was not the only ringleader of the cartel and did not coerce others to participate in the cartel) (*paragraph 19, 2006 Leniency Notice*).

In the case of an application for immunity under paragraph 4 of the 2006 Leniency Notice or for a reduction of fine under paragraph 5 of the 2006 Leniency Notice (*see Question 4 and Question 5*), the FCO initially only informs the applicant about its current ranking and that it is, in principle, eligible for immunity or a reduction of fine, subject to the fulfilment of its obligation to co-operate. A decision on immunity or reduction of fine is made at the earliest opportunity following the review and examination of all information and evidence obtained by the FCO during the dawn raids (*paragraph 20, 2006 Leniency Notice*). However, the FCO informs the applicant about its final decision at a late stage of the proceedings, often close to the commencement of the settlement conversation.

After the placement of a marker, the applicant generally has a time limit of up to eight weeks before a complete leniency application must be submitted (*see above, Markers*). There is no fixed timetable for the next stages of proceedings. The duration depends on the complexity of the case and the personal resources of the FCO.

WITHDRAWAL OF LENIENCY

29. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

The FCO may decide at any stage of the investigation that a leniency applicant does not qualify for leniency, in particular if the applicant:

- Does not sufficiently co-operate with the FCO (*see Question 4*).
- Turns out to be the only ringleader of the cartel.
- Is found to have coerced others to participate in the cartel.

However, such a decision must be made before the final decision in the case.

If an applicant does not qualify for leniency, its status of priority lapses and the subsequent applicants move up in rank. For example, an applicant ranked number two (qualified only for reduction of fine) may get full immunity from fine, if the number one-ranked applicant is disqualified.

SCOPE OF PROTECTION

30. What is the scope of leniency protection after it has been granted?

Leniency protection only applies to the violation of competition law disclosed to the FCO by the applicant. If additional violations are discovered by the FCO during its investigation, those infringements are not covered by the leniency application.

31. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

Under the 2006 Leniency Notice, immunity or a reduction of fine is granted with respect to the infringement disclosed in the leniency application. Therefore, there is no leniency plus under German law.

32. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

The grant of leniency may well affect a third party's ability to bring a follow-on damages action against a leniency applicant. If full immunity is granted to the leniency applicant, the FCO does not issue a final decision with respect to this applicant. Consequently, any follow-on action brought against this leniency applicant would not benefit from the binding effect of final infringement decisions by the competition authorities and/or courts (*section 33b, Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) (ARC), 9th amendment*). Moreover, the FCO will usually limit the right of third parties to inspect the authority's files in leniency cases and will particularly not disclose any information submitted by the leniency applicant, neither based on a third party's application nor based on a court order (*section 89c (4), ARC, 9th amendment*). However, a recipient of full immunity is not granted full protection against follow-on damages actions, but, according to the 9th amendment of the ARC, is privileged in relation to the other cartelists, in this respect. While the cartelists, in general, are liable as joint and several debtors for the damages caused in total, the leniency applicant granted full immunity is only liable for damages of its own direct and indirect customers or suppliers (*section 33e, ARC, 9th amendment*).

CONFIDENTIALITY AND DISCLOSURE

33. What are the rules relating to confidentiality during a leniency application?

Identity disclosure

The identity of a leniency applicant remains confidential during the proceedings until the statement of objections is issued to a cartel participant. However, the FCO may exchange information (including the identity of the leniency applicant) on a confidential basis with other foreign competition authorities, in particular within the ECN (*see Question 17*).

In addition, the FCO must disclose the identity of a leniency applicant to the Public Prosecutor if the anti-competitive practice(s) may constitute a criminal offence (*see Question 7*).

Information disclosure

Other companies and/or individuals under investigation have the right to get access to the FCO's file once they have received a statement of objections. At this stage, those persons will be granted access to the submissions of the leniency applicant(s) as well. The FCO may agree to remove certain trade and/or business secrets from the file which are not relevant for the proceedings, but there is no guarantee that such information will not be revealed to the other parties under investigation.

Confidentiality requests

The FCO usually rejects applications for access to the file by third parties, insofar as the leniency application and the evidence provided by the leniency applicant are concerned.

To date, this practice has been accepted by the anti-trust courts (*see Question 14*).

34. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic submissions and domestic discovery

In Germany, the available discovery mechanisms are much narrower in scope than those available in many common law jurisdictions. In specific cases, national courts may:

- Ask the FCO to share its file with the court in the context of private anti-trust litigation.
- Order a party to present specific documents that the other party has identified in its pleadings.

However, in practice, national courts are generally reluctant to ask for the submission of leniency documents, corporate statements and so on.

Domestic submissions and foreign discovery

To protect domestic leniency submissions from pre-trial discovery abroad, the FCO allows leniency applications, corporate statements and so on to be made orally under the 2006 Leniency Notice.

Foreign submissions and domestic discovery

There is no real discovery mechanism in German civil proceedings (*see above, Domestic submissions and domestic discovery*).

INTER-AGENCY CO-OPERATION

35. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

The FCO is a member of the ECN. The FCO is entitled to exchange (confidential) information with the Commission and with other national competition authorities within the ECN (*section 50a, ARC*). The ECN authorities closely co-operate on the basis of:

- Articles 11, 12 and 13 of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation).
- The ECN Notice.
- The ECN Model Leniency Programme.

The FCO also co-operates with other foreign competition authorities.

PROPOSALS FOR REFORM

36. Are there any proposals for reform?

There are currently no visible proposals to reform cartel leniency. Apart from the changes to disclosure and liability of full immunity leniency applicants and so on (see *Question 14*), the ninth

amendment of the Act against Restraints of Competition (ARC), which came into force on 9 June 2017, will not alter any rules for leniency applications. However, the 9th amendment of ARC strengthens anti-trust enforcement at national level, in particular by the introduction of group liability for cartel infringements (*section 81 (3a), ARC*).

ONLINE RESOURCES

Federal Cartel Office (Bundeskartellamt) (FCO)

W www.bundeskartellamt.de

Description. Official website of the FCO, where original language materials as well as English translations can be obtained.

Practical Law Contributor profiles



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Areas of practice. German and EU competition law.

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Recent transactions. Recently advised and represented clients in cartel cases relating to the following goods and markets:

- Propane gas (German investigation; Supreme Court).
- Automatic doors (German investigation).
- Sausages and meat products (German investigation).
- Sewage duct construction, refractory construction et seq. (bid-riggings, German investigations).
- Metal packaging (EU investigation).
- Steel (German investigation).

Languages. German, English

Professional associations/memberships. Association of German Anti-trust Lawyers (*Studienvereinigung Kartellrecht e.V.*); Network Compliance (*Network Compliance eV*).