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**Working Party No. 3 on Co-operation and Enforcement**

**The Future of Effective Leniency Programmes – Note by Germany**

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This document reproduces a written contribution from Germany submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/the-future-of-effective-lenieny-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. This contribution starts with an introduction (1), provides a brief outline of the development of the Bundeskartellamt's leniency programme (2), examines its recent leniency programme as well as the respective guidelines (3), touches upon recent trends (4), describes other detection tools of the Bundeskartellamt (5), and sums up the key aspects in a conclusion (6).

### 1. Introduction

2. Cartels cause significant damage to the economy. Where businesses agree on prices, divide orders, customers and markets between themselves or coordinate key terms and conditions, competition is eliminated to the detriment of customers. In such cases price and quality will no longer be determined by supply and demand, but by conspiratorial cartel activity.

3. The Bundeskartellamt has always given high priority to the prosecution and punishment of illegal agreements, especially price and quota agreements and customer or territorial allocation agreements ("hardcore cartels"). In order to further increase the number of uncovered cartel agreements and to speed up proceedings the Bundeskartellamt has *inter alia* established specialised anti-cartel divisions and has set up a Special Unit for Combating Cartels (SKK) in the early 2000s. The SKK assists the Bundeskartellamt's decision divisions in the planning and implementation of investigatory measures (e.g. dawn raids) and in the increasingly complex evaluation of evidence.

4. A general prohibition of cartels is provided in Section 1 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* - "GWB")<sup>1</sup>. A corresponding provision under European law can be found in Article 101 TFEU. Cartels are prosecuted as administrative offences and can be punished with heavy fines. In this regard the Bundeskartellamt has powers similar to those of a public prosecutor.

5. The Bundeskartellamt's leniency programme has become a key tool for detecting cartels. The programme fulfils several functions:

6. On the one hand, the leniency programme helps to uncover cartels. In cases of anti-competitive agreements, it is usually a big challenge for competition authorities to discover an infringement in the first place, let alone secure sufficient evidence to prove the illegal cartel agreement and impose a fine. In order to effectively combat cartels, it is often necessary to uncover cartel agreements with the help of an insider. It is therefore essential to induce cartel members to cooperate with the Bundeskartellamt. The incentive for cartel members to cooperate with the authority and uncover a cartel is the prospect of gaining immunity from a fine or at least a substantial reduction of the fine imposed. Furthermore, an undertaking that gains immunity from fines has also benefits when it comes to civil damage claims: its primary liability for compensation is limited to its own customers. Customers of other cartel members can approach such an undertaking only if they have failed to claim their damages from all of the other cartel members (secondary liability).

7. On the other hand, the Bundeskartellamt's leniency programme serves as a deterrent. The prospect of immunity from a fine creates uncertainty among cartel members

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<sup>1</sup> An English version is available at: [https://www.gesetze-im-internet.de/englisch\\_gwb/](https://www.gesetze-im-internet.de/englisch_gwb/).

as to whether one of them might blow the whistle at some stage to secure immunity. This element of uncertainty has an effect even before an illegal agreement is reached, because the companies have to reckon with the cartel agreement being uncovered and proved through a leniency application and them having to face painful sanctions and damages actions from injured parties. As a consequence, companies shy away from entering into such illegal agreements which, in turn, prevents considerable damage to the national economy.

8. However, it should be noted that in recent years, the Bundeskartellamt was also able to conduct some successful proceedings based on non-lenieny tools.<sup>2</sup>

## 2. Development and revision of the Bundeskartellamt's Leniency Programme and of the corresponding legal bases

9. As one of the first competition authorities after the US Department of Justice and the European Commission the Bundeskartellamt issued general administrative principles on leniency in 2000. Since then it has been possible to uncover a large number of cartels in a wide variety of sectors with the assistance of key witnesses.

10. Based on its experience with its first programme, and with regard to the international development of cartel prosecution, the Bundeskartellamt initially revised its principles on leniency in 2006 (so-called "Leniency Programme"). Its aim was to define more clearly the provisions of the programme and to provide companies with more transparency and legal certainty.

11. 2017 followed the transposition of the EU Directive on Antitrust Damages Actions<sup>3</sup> into German law, i.a. with the introduction of limits to the liability of immunity recipients. Section 33e GWB states that immunity recipients are only liable to their direct or indirect purchasers; the liability to other injured parties is subject to the condition that the other injured parties cannot obtain full compensation from the other infringers.

12. The next revision of the Leniency Programme followed in early 2021. The Leniency Programme was first enshrined into law as part of the 10th Amendment to the GWB and the provisions of the European ECN+-Directive were implemented. These essentially correspond with the Bundeskartellamt's previous Leniency Programme. In revising the supplementary guidelines, as in the case of the Leniency Programme, the Bundeskartellamt has provided specific details on how the proceeding is conducted, the exercise of its discretionary powers in determining the fine and on the amount of the reduction of the fine.<sup>4</sup> With the help of the Bundeskartellamt's additional Guidelines on the Leniency Programme companies which are involved in a cartel can more easily judge what they can expect and under what conditions they can be considered for exemption from paying a fine or having their fine considerably reduced. By improving transparency and

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<sup>2</sup> See Section 5. of this note.

<sup>3</sup> Directive 2014/104/EU; available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104>.

<sup>4</sup> Notice no. 14/2021 on General Administrative Principles relating to the Exercise of Discretionary Powers in the Conduct of the Procedure for and Application of the Leniency Regime in accordance with Sections 81H to 81N GWB of 23 August 2021 (Guidelines on the Leniency Programme), available at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Leniency\\_Guidelines\\_08\\_2021.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Leniency_Guidelines_08_2021.pdf?__blob=publicationFile&v=6).

predictability the guidelines thus make a significant contribution to motivating cartel members to come forward and seek leniency.

### 3. The Bundeskartellamt's leniency programme in brief

13. The Leniency Programme is regulated by law as set out under Sections 81h to 81n GWB. Where cartel participants contribute to uncovering a cartel of competitors under the leniency regime, the Bundeskartellamt may grant full immunity from or a reduction of an administrative fine.

14. The provisions are complemented by the Bundeskartellamt's Guidelines on the Leniency Programme. These guidelines set out the general administrative principles which the authority has determined in relation to the exercise of its discretionary powers in the application of the leniency regime and conduct of the procedure.

15. The first participant in a cartel agreement to uncover a cartel in such a way that the Bundeskartellamt is enabled to obtain a judicial search warrant that would not have been obtainable without the application receives immunity from a fine ("first come, first serve" principle). Even if the Bundeskartellamt already was in a position to get a judicial search warrant, immunity is under exceptional circumstances still available if the undertaking is (1) the first to enable the Bundeskartellamt to prove the infringement and (2) no other eligible immunity applicant already exists. The leniency recipient that was granted full immunity from the fine is also privileged with regard to civil-law claims for damages as outlined under Section 33e GWB (only secondary liability when it comes to customers of other cartel members).

16. Members of a cartel who have coerced others to participate in the cartel are excluded from immunity, but can still get a reduction of the fine.

17. All other and later leniency applicants can still be granted a significant reduction of an administrative fine. Key criteria for determining the amount of the reduction are the usefulness of the information and evidence and the point in time at which the leniency application is filed. Cartel participants can thus be granted a reduction of up to 50 per cent of the fine imposed.

18. The requirement for immunity from or a reduction of a fine is the leniency applicant's continuous and full cooperation with the Bundeskartellamt throughout the entire proceeding.

19. Leniency can only be granted upon application. An application submitted for an undertaking applies to all the legal persons that constitute the undertaking at the time the application is filed, as well as to all its former and current directors, managers and members of staff.

20. Since the date and time at which leniency applications are submitted are also important in relation to immunity and the amount of any reduction, cartel participants can temporarily secure a place in the queue for leniency by placing a so-called marker. To do so, applicants must declare their willingness to cooperate and provide certain details in brief, especially when it comes to their own involvement in the cartel. The condition for keeping one's place in the queue is that the applicant then submits the finalised leniency application together with the corresponding evidence within the prescribed period.

#### 4. Recent trends in leniency applications

21. Although the number of leniency applications is to be interpreted with caution, because it says little about the success of a leniency programme, it can be noted that in Germany, the number of leniency applications has declined.

22. Back in 2015 the Bundeskartellamt registered 76 leniency applications following a steady increase, and while that number was still 59 in 2016, it has decreased to a mere maximum of 13 leniency applications per year over the last three years (2020: 13, 2021: ten, 2022:13).

23. This development is likely to be linked to the EU Directive on Antitrust Damages Actions. Whereas, since the implementation of this directive civil courts have handled a growing number of private enforcement cases, the Bundeskartellamt has seen a parallel and continuing decrease in leniency applications. Potential leniency recipients now probably give greater consideration than before to the higher risk that a damages action against them could be successful when deciding on whether or not to file a leniency application.

24. Therefore, private damages actions represent an instrument which in recent years has increasingly accentuated the deterrent effect of competition law. If cartel members have to expect actions for damages from customers harmed by the cartel in addition to a heavy fine, this appreciably weakens the attractiveness of illegal agreements.

25. The EU Directive on Antitrust Damages Actions took into account that private damages claims are typically follow-on claims brought after public enforcement and therefore depend on the effectiveness of public prosecution by providing certain privileges for the first leniency applicant.<sup>5</sup> However, it seems appropriate to provide even greater incentives for collaborating with the competition authorities.

26. The German Federal Government, which was newly elected in 2021, shared this opinion and in its competition agenda<sup>6</sup> declared to be in favour of strengthening cartel prosecution through an initiative for improving the protection of leniency recipients and reviewing the EU Directive on Antitrust Damages Actions.

27. Ways to do so would be e.g. to limit the immunity recipient's liability vis-à-vis the injured parties to the exceptional case that they cannot obtain compensation from the co-cartelists (e.g. due to insolvency). With regard to the internal relationship among the cartelists, the leniency recipient should not be liable and should be able to take full recourse if he has compensated damages to the injured parties. This, and especially the second proposal, would render leniency programmes more appealing for potential whistle-blowers and could therefore increase the number of leniency applications. By no means, such proposal would neglect the right of the injured parties to full compensation under the Damages Directive. Injured parties could still sue the leniency recipient if they are unable to obtain full compensation from the other infringers.

28. Other reasons why the number of leniency applications could have decreased must of course also be considered. Such reasons could include companies stepping up their

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<sup>5</sup> The first leniency recipient is also privileged with regard to civil-law claims for damages as outlined under Section 33e GWB.

<sup>6</sup> „Wettbewerbspolitische Agenda des BMWK bis 2025“; available at [https://www.bmwk.de/Redaktion/DE/Downloads/0-9/10-punkte-papier-wettbewerbsrecht.pdf?\\_\\_blob=publicationFile&v=8](https://www.bmwk.de/Redaktion/DE/Downloads/0-9/10-punkte-papier-wettbewerbsrecht.pdf?__blob=publicationFile&v=8) (in German only).

compliance efforts, more complex cartel structures or the increased complexity of leniency applications with regard to international cartels.

29. The success achieved in cartel prosecution in recent years and a consequent decrease in the number of cartels as a whole is also given as a reason for the reduced number of leniency applications.

## 5. The future of cartel prosecution

30. The Bundeskartellamt's Leniency Programme has been of particular significance for uncovering cartels. Over half of all cartel proceedings have been triggered by information provided by leniency applicants. In order to increase its attractiveness and to counteract the declining numbers of leniency applications, the German Leniency Programme as well as the respective Guidelines on the Leniency Programme have been revised as described above.

31. However, there are many different sources which can lead to the detection of cartels. For example, the Bundeskartellamt has received information indicating illegal agreements from market players, some of which have used its anonymous whistle-blowing system, or from other law enforcement agencies. In addition, the Bundeskartellamt conducts its own research (screenings) or follows up on new information gathered in ongoing proceedings (ex officio).

32. The Bundeskartellamt is also following the development of IT-based screening methods and comparable methods and has already used them in bid-rigging cases where appropriate. In the respective cases, in which there were already initial indications of an agreement, an economic analysis of the bidder's behaviour was carried out and it was examined whether conclusions about possible agreements could be drawn. The Bundeskartellamt requested the data from the contracting authorities, checked them for abnormalities using IT-based analysis methods and then used them to apply for judicial search warrants, which the court issued in accordance with the application. Fines have not yet been imposed in such proceedings.

## 6. Conclusion

33. The Bundeskartellamt's Leniency Programme is still a powerful detection tool. Key witnesses continue to play a crucial role in uncovering and prosecuting illegal cartels.

34. In view of its importance the decrease in leniency applications is alarming.

35. From the German perspective, this downward trend is mainly due to the remaining liability risk in private damage claims. Therefore, the incentives to collaborate with the competition authorities should be strengthened again and Germany participates with great interest in the discussion on possible ways to do so.

36. However, leniency programmes are not the only source which can lead to the detection of cartels. A mix of all instruments will ensure effective cartel detection and enforcement.