



**International  
Competition  
Network**

**ANTI-CARTEL  
ENFORCEMENT  
TEMPLATE**

**CARTELS WORKING GROUP  
Subgroup 2: Enforcement Techniques**

**GERMANY**

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# ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

## IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

## 1. Information on the law relating to cartels

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| <b>A. Law(s) covering cartels:</b>             | Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB), as of March 17, 2009.<br>Languages: German, English (French currently only in an older version of the law)<br>Homepage address: <a href="http://www.bundeskartellamt.de">www.bundeskartellamt.de</a><br>Languages: German, English, French (some contents)<br>Procedural Rules:<br>Rules of the Administrative Courts (Verwaltungsgerichtsordnung - VwGO), as of August 21, 2009;<br>Law of Administrative Proceedings (Verwaltungsverfahrensgesetz - VwVfG) as of August 14, 2009;<br>Administrative Offences Act (Gesetz über Ordnungswidrigkeiten - OWiG) as of July 29, 2009.<br>Criminal Code (Strafgesetzbuch - StGB) as of Oktober 2, 2009.<br>Code of Criminal Procedure (Strafprozessordnung - StPO) as of July 30, 2009.<br>Homepage address: <a href="http://bundesrecht.juris.de/bundesrecht/GESAMT_index.html">http://bundesrecht.juris.de/bundesrecht/GESAMT_index.html</a><br>Languages: German |
| <b>B. Implementing regulation(s) (if any):</b> | None.  |

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| <b>C. Interpretative guideline(s) (if any):</b> | <p>Leniency Programme (Bonusregelung) of the Bundeskartellamt Notice No. 9/2006 which entered into force on 15 March 2006 replacing the old Notice No. 68/2000</p> <p>Fining guidelines (Bußgeldleitlinien) of the Bundeskartellamt Notice No. 38/2006 which entered into force on September 15,2006.</p> <p>De-minimis guidelines of the Bundeskartellamt (Bagatellbekanntmachung) of the Bundeskartellamt Notice No. 18/2006 which entered into force on March 13, 2007.</p> <p>Languages: German, English, French (in part)</p>  |
| <b>D. Other relevant materials (if any):</b>    | <p>Decisions of the Bundeskartellamt:<br/> <a href="http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/EntschKartell.shtml">http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/EntschKartell.shtml</a><br/> Language: German, English (in part)</p> <p>Case summaries of Decisions of the Bundeskartellamt:<br/> <a href="http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/kurzberichtkart/KurzberichtkartellW3DnavidW2634.php">http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/kurzberichtkart/KurzberichtkartellW3DnavidW2634.php</a><br/> <a href="http://www.bundeskartellamt.de/wEnglisch/Decisions/KurzberichteKartell/KurzberichteKartell_eW3DnavidW2628.php">http://www.bundeskartellamt.de/wEnglisch/Decisions/KurzberichteKartell/KurzberichteKartell_eW3DnavidW2628.php</a><br/> Language: German, English</p> <p>Decisions of the Higher Regional Court (Oberlandesgericht) Düsseldorf:<br/> <a href="http://www.justiz.nrw.de/RB/nrwe/index.html">http://www.justiz.nrw.de/RB/nrwe/index.html</a><br/> Language: German</p> <p>Decisions of the Federal High Court of Justice (Bundesgerichtshof):<br/> <a href="http://www.bundesgerichtshof.de">http://www.bundesgerichtshof.de</a><br/> Language: German</p> |

## 2. Scope and nature of prohibition on cartels

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| <b>A. Does your law or case law define the term “cartel”?</b><br><br><b>If not, please indicate the term you use instead.</b>  | <p>Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (§ 1 ARC).</p>  |
| <b>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or</b> | <p>Due to the 2005 amendment of the ARC replacing the traditional approach to horizontal agreements and aligning the German antitrust law with the European competition regime, case-law with regard to "hardcore" restrictions is still developing under the new legal system. In accordance with the enumeration in the Commission's Notice on agreements of minor importance which do not appreciably restrict competition</p> |

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| <p><b>production or sales quotas<sup>1</sup>) and other types of “cartels”?</b></p>  | <p>under Article 81(1) of the Treaty establishing the European Community (de minimis) in 11 (OJ (2001) No. C 368, p. 13, 14 et seq.) the following behaviours are likely to be identified as "hardcore cartels": price fixing, market sharing, production or sales quotas, allocation of customers and bid-rigging.</p> <p>Under German Law, there are two procedures which can be followed in the case of an infringement against § 1 ARC: an administrative procedure which may inter alia result in a declaration that a certain behaviour is illegal (see question 10 A for details) or a fines procedure with the aim of imposing fines against cartel members. The fines procedure is regulated in the Administrative Offences Act and the Code of Criminal Procedure (see question 1 A). If there is a hardcore violation, the Bundeskartellamt will almost always follow the fines procedure. The answers to this questionnaire will therefore concentrate on the fines procedure. References to the administrative procedure will be made at some points where this is clearly stated.</p>  |
| <p><b>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the ban on hardcore cartels.]</b></p> | <p>There are the following general exemptions in the ARC:</p> <p>Exempted are agreements in terms of Sec. 1 ARC which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question (Sec. 2 (1) ARC).</p> <p>In this respect, the block exemption regulations under Art. 81(3) of the Treaty establishing the European Community are applicable irrespective of whether or not these agreements may affect trade between Member States (Sec. 2 (2) ARC).</p> <p>Exempted are in particular agreements and decisions whose subject matter is the rationalisation of economic activities through a form of cooperation among enterprises, provided</p> <ol style="list-style-type: none"> <li>1. competition on the market is not substantially impaired thereby, and</li> <li>2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises (Sec. 3 (1) ARC).</li> </ol> <p>However, hardcore-cartels do not meet these criteria and are generally not exempted.</p> |
| <p><b>D. Is participation in a hardcore cartel illegal per se? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</b></p>   | <p>Yes.</p>  |
| <p><b>E. Is participation in a</b></p>   | <p>Hardcore Cartels are not criminalized under German Law. The</p>   |

<sup>1</sup> In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

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| <p><b>hardcore cartel a civil or administrative or criminal offence, or a combination of these?</b></p> | <p>Bundeskartellamt may impose fines against a hardcore cartel following the fines procedure (see question 2 B). Most of the provisions of the Code of Criminal Procedure apply, although no criminal sanctions but only administrative fines can be imposed.</p> |
|   | <p>However, there is one important exception: According to Sec. 298 of the Criminal Code, bid rigging is considered a criminal offence with a maximum sentence of five years of imprisonment or criminal fines.</p>   |

### 3. Investigating institution(s)

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| <p><b>A. Name of the agency, which investigates cartels:</b></p>   | <p>Bundeskartellamt (BKartA)</p>  |
| <p><b>B. Contact details of the agency:</b></p>  | <p>Bundeskartellamt (BKartA)</p> <p>Address: Kaiser-Friedrich-Strasse 16, 53113 Bonn</p> <p>Tel.: +49 (0) 228-9499-0</p> <p>Fax: +49 (0) 228-9499-400</p> <p>E-Mail: <a href="mailto:info@bundeskartellamt.bund.de">info@bundeskartellamt.bund.de</a></p> <p>Website: <a href="http://www.bundeskartellamt.de">http://www.bundeskartellamt.de</a> (in German, English and French)</p> |
| <p><b>C. Information point for potential complainants:</b></p>   | <p>General Questions/Public relations</p> <p>Address: Kaiser-Friedrich-Strasse 16, 53113 Bonn</p> <p>Tel.: +49 (0) 228-9499-230</p> <p>Fax: +49 (0) 228-9499-400</p> <p>E-Mail: <a href="mailto:info@bundeskartellamt.bund.de">info@bundeskartellamt.bund.de</a></p>  |
| <p><b>D. Contact point where complaints can be lodged:</b></p>   | <p>General Questions/Public relations</p> <p>Address: Kaiser-Friedrich-Strasse 16, 53113 Bonn</p> <p>Tel.: +49 (0) 228-9499-230</p> <p>Fax: +49 (0) 228-9499-400</p> <p>E-Mail: <a href="mailto:info@bundeskartellamt.bund.de">info@bundeskartellamt.bund.de</a></p>  |
| <p><b>E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.</b></p> | <p>The local or regional police departments of the federal states may render assistance when conducting dawn raids.</p>   |

#### 4. Decision-making institution(s)<sup>2</sup> [to be filled in only if this is different from the investigating agency]

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| <b>A. Name of the agency making decisions in cartel cases:</b>   | see question three   |
| <b>B. Contact details of the agency:</b>   | see question three   |
| <b>C. Contact point for questions and consultations:</b>   | see question three   |
| <b>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</b> | n.a.   |
| <b>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</b>                | <p>This only applies to bid-rigging cartels:</p> <p>The Public Prosecutor is solely responsible for the investigation and prosecution of natural persons in cases of possible bid-rigging (cf. Sec. 298 Criminal Code; Sec. 35 (1) and Sec. 40 (1) Administrative Offences Act - OWiG). The criminal proceeding takes priority over the administrative proceeding (cf. Sec. 21 (1) Administrative Offences Act - OWiG).</p> <p>Meanwhile, the Bundeskartellamt remains competent for the prosecution of legal persons and association of persons (Sec. 82 ARC). This investigation is closely coordinated with the Public Prosecutor. For example, dawn raids are often conducted conjointly: generally, the Bundeskartellamt will seek a search warrant for the premises of the undertaking, while the Public Prosecutor will seek a warrant to search the individuals who allegedly formed the bid-rigging agreement. The auspices of the investigation is amicably arranged between the two authorities and can even be divided between different objects (e.g. premises) of a dawn raid.</p> |

#### 5. Handling complaints and initiation of proceedings

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| <b>A. Basis for initiating investigations in cartel cases:</b>                     | Investigations are instituted either ex officio, upon a leniency application, information provided by an informant or on the basis of a complaint.                         |
| <b>B. Are complaints required to be made in a specific form (e.g. by phone, in</b> | Complaints can be lodged in any form: orally, by phone or in writing. Even anonymous complaints are acceptable. However, it facilitates the investigation if the complaint |

<sup>2</sup> Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

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| <b>writing, on a form, etc.)?</b>   | includes details and exact determinations of the alleged infringement. Therefore, a written complaint with copies of all documents with potential relevance to the proceeding attached is most suitable.  |
| <b>C. Legal requirements for lodging a complaint against a cartel:</b>  | There are no legal requirements for lodging a complaint, as it is only regarded as an incitement for the Bundeskartellamt to scrutinise the case for initiating an official proceeding.   |
| <b>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?</b>                               | No.<br>As mentioned above (see Point 4/C), the initiation of an investigation upon a complaint is generally left to the discretion of the Bundeskartellamt. It is only required to exercise said power in a dutiful manner (Opportunitätsprinzip, cf. Sec. 47 (1) Administrative Offence Act - OWiG).                           |
| <b>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</b>                        | No, the decision not to take action on behalf of a complainant does not have to be addressed to the complainant explaining the reasons. In addition, as the official proceeding is governed by the "Opportunitätsprinzip" (see point 5/D. above) the decision not to initiate a proceeding cannot be challenged before a court. |
| <b>F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?</b> | No.   |

## 6. Leniency policy<sup>3</sup>

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| <b>A. What is the official name of your leniency policy (if any)?</b>  | Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen - Bonusregelung. (Notice No. 9/2006 of the Bundeskartellamt on the immunity from and the reduction of fines in cartel cases - Leniency Programme).<br><br>Website: <a href="http://www.bundeskartellamt.de">http://www.bundeskartellamt.de</a> (available in German, English and French). |
| <b>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</b> | The Bundeskartellamt can grant cartel participants, who by their cooperation contribute to uncovering a cartel, full immunity from or a reduction of fines.  |
| <b>C. Who is eligible for full</b>   | Full immunity from fines is only granted to the first cartel   |

<sup>3</sup> For the purposes of this template the notion of 'leniency' covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like 'leniency' 'amnesty' and 'immunity' are considered as synonyms.

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| <p><b>leniency [only for the first one to come forward or for more participants in the cartel]?</b></p>  | <p>participant to come forward and who fulfills the conditions laid down in the Leniency Programme (see Point 6/F).</p>  |
| <p><b>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</b></p> <p><b>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</b></p> | <p>A leniency applicant is guaranteed full immunity if he reports a cartel to the Bundeskartellamt of which the latter had no prior knowledge. But even after the Bundeskartellamt has become aware of a cartel, a cartel member can (in general) obtain full immunity from fines, provided that it is the first to cooperate and submit evidence proving the cartel, if the Bundeskartellamt was unable to do so up to this point.</p> <p>Therefore the date at which the participants come forward with the information is vitally important for the outcome of the leniency application.</p>  |
| <p><b>E. Who can be a beneficiary of the leniency program (individual / businesses)?</b></p>   | <p>Individuals, undertakings and association of undertakings</p>   |
| <p><b>F. What are the conditions of availability of full leniency:</b></p>   | <p>The Bundeskartellamt will grant a cartel participant immunity from a fine if he</p> <ul style="list-style-type: none"> <li>- is the first participant in a cartel to contact the Bundeskartellamt before the latter has sufficient evidence to obtain a search warrant and</li> <li>- by providing the Bundeskartellamt with verbal and written information and, where available, evidence which enables it to obtain a search warrant and</li> <li>- was not the only ringleader of the cartel nor coerced others to participate in the cartel and</li> <li>- cooperates fully and on a continuous basis with the Bundeskartellamt.</li> </ul> <p>At the point at which it is in a position to obtain a search warrant the Bundeskartellamt will as a rule grant a cartel participant immunity from a fine if he</p> <ul style="list-style-type: none"> <li>- is the first participant in the cartel to contact the Bundeskartellamt before it has sufficient evidence to prove the offence and</li> <li>- by providing the Bundeskartellamt with verbal and written information and, where available, evidence which enables it to prove the offence and</li> <li>- was not the only ringleader of the cartel nor coerced others to participate in the cartel and</li> <li>- cooperates fully and on a continuous basis with the Bundeskartellamt and if</li> </ul> |

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|  | <p>- no cartel participant is to be granted immunity pursuant to the conditions described above.</p>   |
| <p><b>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):</b></p>  | <p>For the benefit of a cartel participant who does not meet the conditions for immunity, the Bundeskartellamt can reduce the fine by up to 50 per cent if he</p> <ul style="list-style-type: none"> <li>- provides the Bundeskartellamt with verbal or written information and, where available, evidence which makes a significant contribution to proving the offence and</li> <li>- cooperates fully and on a continuous basis with the Bundeskartellamt.</li> </ul> <p>The amount of the reduction shall be based on the value of the contributions to uncovering the illegal agreement and the sequence of the applications.</p>   |
| <p><b>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]</b></p>           | <p>The leniency applicant who either seeks full or partial leniency must cooperate fully and on a continuous basis with the Bundeskartellamt. He must end his involvement in the cartel immediately on request by the Bundeskartellamt. He must especially hand over to the Bundeskartellamt all the information and evidence available to him after his application for leniency has been filed. This includes in particular all information which is of significance for calculating the fine which is available to the applicant or which he can procure.</p> <p>He is also obliged to keep his cooperation with the Bundeskartellamt confidential until the Bundeskartellamt relieves him of this obligation (normally after the search has been concluded). Furthermore, an undertaking must name all the employees involved in the cartel agreement (including former employees) and ensure that all employees, from whom information and evidence can be requested, cooperate fully and on a continuous basis with the Bundeskartellamt during the proceedings.</p> |
| <p><b>I. Are there formal requirements to make a leniency application?</b></p>   | <p>A leniency application can be filed either orally or in writing. It can be either in German or in English. If the Bundeskartellamt accepts an application in English the applicant is obliged to provide a written German translation without undue delay. Joint applications by cartel participants are inadmissible.</p> <p>The application must include information which suffice the conditions laid down in the Leniency Programme (see Point 6/F and G above).</p>  |
| <p><b>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency – PGL – and further steps leading to a final leniency agreement / decision)?]</b></p> | <p>The procedural steps within the Leniency Programme include the possibility to place a marker (see Point 6/M). The placement of a marker is followed by a period of a maximum of 8 weeks during which a formal application can be completed.</p> <p>The Bundeskartellamt immediately confirms to the applicant in writing that a marker has been placed and/or that the application has been received, stating the date and time of receipt. If the requirements for full immunity (question 6 F 1<sup>st</sup> case) are satisfied, the Bundeskartellamt assures the applicant in writing that he will be granted immunity from the fine on the condition that he was neither the only ringleader of the cartel nor coerced others to participate in the cartel and fulfills his obligations to cooperate.</p> <p>In the case of an application for immunity (question 6F 2<sup>nd</sup></p>  |

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|   | <p>case) or a reduction, the Bundeskartellamt initially only informs the applicant that he is the first, second etc. applicant and in principle, especially if he fulfils his duties to cooperate, is eligible for immunity or a reduction.</p>   |
| <p><b>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</b></p>  | <p>See above Point 6/J.</p>   |
| <p><b>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</b></p> | <p>According to Sec. 81 ARC in combination with Sec. 47 (1) Administrative Offences Act it is left to the discretion of the Bundeskartellamt whether to impose a fine upon a cartel participant or not. Therefore it is left to the discretion of the Bundeskartellamt to grant immunity from fines in return for a substantial cooperation. Furthermore Sec. 81 (7) ARC states that the Bundeskartellamt may lay down general principles on the exercise of its discretionary powers in fixing the amount of the fine.</p> <p>The decision to grant immunity or a reduction is taken by the respective decision division of the Bundeskartellamt. In case of immunity (see question 6 F 1<sup>st</sup> part), conditional immunity will be granted in writing. If final immunity is granted at the end of the proceeding, this will not be laid down in a formal decision but the proceedings against the applicant will simply be closed. In case of a reduction, the leniency decision is part of the final fines decision which states the percentage and reason for the reduction.</p> |
| <p><b>M. Does your legislation have a marker system? If yes, please describe it.</b></p>  | <p>A cartel participant can contact the head of the Special Unit for Combating Cartels or the chairman of the competent Decision Division to declare his willingness to cooperate (Marker). The marker can be placed verbally or in writing, in German or English. It must contain details about the type and duration of the infringement, the product and geographic markets affected, the identity of those involved and at which other competition authorities applications have been or are intended to be filed. After the marker has been placed, the Bundeskartellamt sets a time limit of a maximum of 8 weeks for the drafting of an application for leniency.</p>  |
| <p><b>N. Does the system provide for any extra credit<sup>4</sup> for disclosing additional violations?</b></p>   | <p>No.</p>  |
| <p><b>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</b></p>   | <p>There is no requirement as such. However, the Leniency Programme states: Within the scope of the statutory limits and regulations on the exchange of information with foreign competition authorities the Bundeskartellamt shall treat in confidence the identity of the applicant and protect all trade and business secrets during the course of the proceedings up to the point at which a statement of objections is issued to a cartel</p>  |

<sup>4</sup> Also known as: “leniency plus”, “amnesty plus” or “immunity plus”. This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

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|  | participant.  |
| <b>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</b>   | There is no possibility to appeal individually a decision that grants or rejects leniency. However, the cartel participant can always appeal the final fines decision.(cf. Sec. 67 pp. Administrative Offences Act - OWiG).   |
| <b>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</b>  | A leniency application can either be lodged with the head of the Special Unit for Combating Cartels or the chairman of the competent Decision Division.<br><br>There is also the possibility to lodge anonymous tips.<br><br>Tel.:+49 (0) 228-9499-386<br><br>Fax:+49 (0) 228-9499-560<br><br>E-Mail: info@bundeskartellamt.bund.de                                     |
| <b>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</b> | If the applicant does not fulfill all the requirements laid down in the Leniency Program, Leniency will not be granted. This will usually result in a final fines decision addressed to the Leniency applicant. This decision may be appealed like any fines decision (see question 6 P). There is no possibility to challenge individually the revocation of leniency. |
| <b>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</b>  | There is no provision regarding "affirmative leniency" in the German Leniency Programme.  |

## 7. Investigative powers of the enforcing institution(s)<sup>5</sup>

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| <b>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids<sup>6</sup>, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</b> | The Bundeskartellamt may use all the evidence necessary for the clarification of an infringement which is generally available in criminal proceedings (cf. Sec. 46 (2) Administrative Offences Act - OWiG). This may include witnesses, experts, interrogation and the inspection of objects and documents. In order to collect evidence and conduct the investigation, the Bundeskartellamt may use the coercive powers laid down in the Code of Criminal Procedure. It may in particular:<br><br>- take testimonies from witnesses and suspects (cf. Sec. 46 (1) Administrative Offences Act in combination with Sec. 161a and 133 pp. Code of Criminal Procedure).<br><br>- conduct dawn raids at search premises (cf. 46 (1) Administrative Offences Act in combination with Sec. 102 pp. |
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<sup>5</sup> "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

<sup>6</sup> "Searches/raids" means all types of search, raid or inspection measures.

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|  | <p>Code of Criminal Procedure). Objects of a dawn raid may either be the premises of a suspect and the person of the suspect (Sec. 102 Code of Criminal Procedure) or the premises and person of a third party if facts are present which support the conclusion that evidence looked for is in the premises searched on (Sec. 103 Code of Criminal Procedure). Searches shall be ordered by a judge (Sec. 105 Code of Criminal Procedure). In exigent circumstances, the Bundeskartellamt may conduct these searches without a judicial warrant (cf. Sec. 46 (2) Administrative Offence Act - OWiG in combination with Sec. 105 (1) Code of Criminal Procedure).</p> <p>- seize objects which may be of importance as evidence in the investigation (Sec. 94 Code of Criminal Procedure). A seizure order is only required if the material is not handed over voluntarily. If a seizure is necessary, a court order is required. However, in cases of exigent circumstances, the Bundeskartellamt itself may order the seizure of objects. The powers of search and seizure also apply to material in electronic form.</p> |
| <p><b>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</b></p>  | <p>Yes, under the same conditions laid down under point 7/A.</p>  |
| <p><b>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</b></p> | <p>Such evidence can be seized on a provisional basis if it is not handed over voluntarily (cf. Sec. 108 Code of Criminal Procedure). The competent authority then has to decide within a reasonable time limit whether or not to initiate a proceeding. Only in the first case, is a formal seizure requiring judicial approval necessary (cf. Sec. 98 (1) (1) Code of Criminal Procedure).</p>  |
| <p><b>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</b></p>  | <p>The actions taken by the Bundeskartellamt during dawn raids, especially the seizure of objects can be challenged by filing a complaint (cf. Sec. 62 (1) Administrative Offences Act - OWiG). The court order issuing a warrant or sanctioning a seizure can be challenged by filing a complaint according to general criminal procedural law (cf. Sec. 304 (1) Code of Criminal Procedure).</p> <p>In the majority of cases search and seizure are not challenged by the persons affected. However, there are sometimes objections to the seizure of objects (e.g. where questions of legal privilege arise). In the vast majority of cases, the courts uphold the Bundeskartellamt's actions.</p>   |

## 8. Procedural rights of businesses / individuals

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| <p><b>A. Key rights of defence in cartel cases:</b></p>   | <p>The parties to the proceedings have a right to be heard under Art. 103 of the German Constitution (Grundgesetz), in particular comprising the possibility to make statements presenting their case in the course of the procedure. If the party to the proceedings is a legal person (cf. Sec. 30 Administrative Offence Act - OWiG), the right to be heard will be performed by its authorised representatives.</p> <p>In general the cartel participant has a right not to self-incriminate himself which is a basic constitutional principle in German Criminal Law and also applies to administrative offences (cf. Sec. 3 Administrative Offences Act - OWiG). Legal persons or associations of persons are also entitled to the right not to self-incriminate themselves.</p> <p>When interrogated, a suspect must generally be instructed about his right not self-incriminate himself (cf. Sec. 46 (1) Administrative Offences Act - OWiG in combination with Sec. 136 (1) Code of Criminal Procedure).</p> <p>The parties have a right to legal representation throughout the entire proceedings (Sec. 137 (1) Code of Criminal Procedure). However, when conducting dawn raids, the investigators do not have to await the arrival of the defence counsel.</p> <p>A right of access to documents in the possession of the Bundeskartellamt is only granted to the lawyer of the suspect, not the suspect himself (cf. Sec. 46 (1) Administrative Offences Act - OWiG in combination with Sec. 147 (1) Code of Criminal Procedure). Access to the documents can be denied if the investigation has not been formally completed and if full access would endanger the objective of the investigation (Sec. 147 (2) Code of Criminal Procedure).</p> <p>The Bundeskartellamt has, at its discretion, the right to grant access to file to a suspect not represented by a lawyer (section 49 (1) of the Administrative Offences Act), but in practice, all suspects are represented by a lawyer.</p> |
| <p><b>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?</b></p> | <p>There is no legal provision providing for limited access to file for suspects on the grounds that the files contain business secrets.</p> <p>If third parties demand access to file, the Bundeskartellamt shall use the statutory limits of its discretionary powers to refuse access to documents which include competitively sensitive information (cf. Sec. 46 (1) Administrative Offences Act - OWiG in combination with Sec. 475, 406e Code of Criminal Procedure).</p>   |

## 9. Limitation periods and deadlines

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| <p><b>A. What is the limitation period (if any) from the</b></p> | <p>The limitation period for infringements of Art. 81 EC and Sec. 1 ARC, both containing the prohibition of hardcore cartels, is five</p> |
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| <p><b>date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?</b></p>         | <p>years commencing with the termination of the infringement (Sec. 81 (8) ARC, Sec. 31 (3) Administrative Offences Act (OWiG)). The Bundeskartellamt has to initiate its investigation in order to suspend the expiry of the limitation period (cf. Sec. 33 (1) Administrative Offences Act (OWiG)).</p> |
| <p><b>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</b></p>                          | <p>After each suspension, the statute of limitation commences anew, however, the prosecution is statute-barred if double the length of the limitation period has passed since the termination of the infringement (Sec. 33 (3) Administrative Offences Act (OWiG)).</p>                                  |
| <p><b>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?</b></p> | <p>There is no remedy to challenge either the commencement or the completion of an investigation.</p> <p>The final fines decision can be appealed against within two weeks (see Sec. 67 of the Administrative Offences Act).</p>   |

## 10. Types of decisions

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| <p><b>A. Please list which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]</b></p> | <p>The Bundeskartellamt may, when conducting an administrative procedure (see question 2 B), in the course of the proceedings</p> <ul style="list-style-type: none"> <li>a) conclude that there is no infringement and decide that there is no reason to investigate further (Sec. 32c ARC);</li> <li>b) withdraw the exemption under Sec. 2 (2) ARC, if an agreement in the particular case has effects that are incompatible with Sec. 2 (1) ARC or Art. 81 (3) EC (Sec. 32d ARC);</li> <li>c) order interim measures in cases of urgency in order to prevent an irreparable damage to competition (Sec. 32a ARC);</li> <li>d) require the parties to end an infringement (Sec. 32 (1) ARC);</li> <li>e) declare the behaviour illegal even after the infringement has been brought to an end if there are legitimate reasons for such a declaration (Sec. 32 (3) ARC).</li> </ul> |
| <p><b>B. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).</b></p>  | <p>In fine proceedings, which will almost always follow the detection of a hardcore-cartel (see question 2 B), the Bundeskartellamt may impose fines against individuals and corporations (Sec. 81 (4) ARC).</p>   |

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| <p><b>C. Can interim measures<sup>7</sup> be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both<sup>8</sup>.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</b></p> | <p>In the administrative procedure (see question 2 B), the Bundeskartellamt can - ex officio - order interim measures in urgent cases if there is a danger of a serious, irreparable damage to competition (Sec. 32a ARC). The measure must be limited in time and may not exceed one year.</p> |
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## 11. Sanctions for procedural breaches (non-compliance with procedural obligations)<sup>9</sup>

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| <p><b>A. Grounds for the imposition of procedural sanctions / fines:</b></p>                  | <p>In certain cases which are laid down in Sec. 81 (2) Nr. 2-6 ARC non-compliance with procedural obligations is classified as an administrative offence.</p> |
| <p><b>B. Type and nature of the sanction (civil, administrative, criminal, combined):</b></p> | <p>Administrative sanctions in form of fines.</p>   |
| <p><b>C. On whom can procedural sanctions be imposed?</b></p>                                 | <p>Individuals, undertakings and associations of undertakings.</p>  |
| <p><b>D. Criteria for determining the sanction / fine:</b></p>                                | <p>The duration and the gravity of the infringement are taken into account.</p>   |
| <p><b>E. Are there maximum and / or minimum sanctions / fines?</b></p>                        | <p>The maximum fine for non-compliance with procedural obligations is 100,000 Euro (cf. Sec. 81 (4) 3 ARC).</p>   |

<sup>7</sup> In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

<sup>8</sup> Only for agencies which answered “yes” to question 2.C. above

<sup>9</sup> In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

## 12. Sanctions on the merits of the case

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| <p><b>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</b></p> <p><b>On whom can sanctions be imposed?</b></p>   | <p>In fine proceedings (see question 2 B), fines can be imposed against undertakings, associations of undertakings and their representatives (Sec. 9 and 30 of the Administrative Offences Act).</p> <p>Bid-rigging-cartels constitute a criminal offence for individuals (for details, see question 2 D and 4 E).</p> |
| <p><b>B. Criteria for determining the sanction / fine:</b></p>   | <p>The duration and the gravity of the infringement are taken into account (cf. Sec. 81 (4) 4 ARC).</p>  |
| <p><b>C. Are there maximum and / or minimum sanctions / fines?</b></p>   | <p>A fine can be imposed of up to 1 million Euros (cf. Art. 81 (4) ARC). In case of an undertaking or an association of undertakings, this amount can be raised to up to 10% of the company's total turnover in the preceding business year.</p>   |
| <p><b>D. Guideline(s) on calculation of fines:</b></p>   | <p>Fining guidelines (Bußgeldleitlinien) of the Bundeskartellamt Notice No. 38/2006.</p> <p><a href="http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E.pdf">http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E.pdf</a></p>  |
| <p><b>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</b></p> | <p>An appeal against a decision imposing a fine has a suspensory effect.</p>   |

## 13. Possibilities of appeal

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| <p><b>A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If</b></p> | <p>Yes.</p> <p>An appeal can be lodged before the Higher Regional Court/Appeal Court (Oberlandesgericht) in Düsseldorf, in which new facts and evidence can be introduced.</p> |
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| <b>yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</b>    | Against this decision, an appeal on points of law to the Federal Court of Justice (Bundesgerichtshof) is admissible, if the Higher Regional Court grants leave to appeal, e.g. for questions of general importance, for the development of the law and to ensure uniform court practice (cf. Art. 74 (1), (2) ARC). An appeal is always admissible when fundamental procedural rights of the parties have been violated (see Art. 74 (4) No. 1-6 ARC). |
| <b>B. Before which court or agency should such a challenge be made? [if the answer to question 13/A is affirmative]</b> | See point 13/A. above.   |