

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON LENIENCY FOR SUBSEQUENT APPLICANTS

-- Germany --

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1. Introduction

Leniency programmes have turned out to be a success story for many competition authorities all around the world. However, just as there are different competition regimes, there are also significant differences in their leniency programmes.

This paper will describe the Bundeskartellamt's experience with its Leniency Programme (2.) and focus especially on the possibility of granting a reduction of fines for subsequent leniency applicants (3.). It will then continue with a word of caution on the relationship between leniency programmes and settlements (3.) and conclude with the interplay of leniency programmes and private damages claims (4.).

2. The Bundeskartellamt's Leniency Programme

1. As one of the first competition authorities after the US Department of Justice and the European Commission, the Bundeskartellamt adopted a leniency programme over ten years ago in 2000 and revised it in 2006.¹ Under this programme the co-operation of a cartel member with the Bundeskartellamt can lead to the reduction of or even immunity from a fine. The purpose of the leniency programme is not formally stated in the programme itself, but becomes apparent from the context.

2. The leniency programme serves to improve the gathering of evidence. In order to effectively combat cartels it is often helpful or even necessary to uncover cartel agreements with the help of an insider and cartel member. The prospect of immunity from a fine creates uncertainty among cartel members as to whether one of them might blow the whistle at some stage to obtain immunity. Therefore an effective leniency programme also has a second objective which is to increase the deterrent effect before a cartel agreement is reached. As a consequence, companies shy away from entering into such illegal agreements, which prevents considerable damage to the national economy.

3. According to the leniency programme, those helping to uncover a previously unknown cartel will be granted immunity from a fine. Those cooperating after the Bundeskartellamt has become aware of the agreement will be granted a reduction of their fine. The amount of this reduction will depend on how valuable their contribution is for clarifying the facts of the case, their position in the leniency queue and the time at which the leniency application was submitted.

4. The programme clearly states that the "first come first served principle" applies.² Only the first applicant will be granted full immunity from a fine. Later applicants can, however, be granted a reduction of up to 50 % of the fine.

5. Allowing subsequent leniency applications may negatively affect the race for immunity. However, this also has several benefits for the Bundeskartellamt. In some cases the information given by the immunity applicant may not be sufficient to prove the case. Especially in cases where information is not allocated equitably, the first applicant may not have had access to all information. In these cases the information given by subsequent applicants may be vital to concluding the case. Every further piece of information helps the Bundeskartellamt to understand the case better. It will also become more difficult for other parties involved to deny their involvement.

¹ See Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases, available at www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf

² See Notice 9/2006, Section "B. Immunity from fines".

6. The Bundeskartellamt will grant immunity from a fine if the applicant is the first participant in a cartel to contact the Bundeskartellamt before it has sufficient evidence to obtain a search warrant. Furthermore, the applicant has to provide verbal and written information and, where available, evidence which enables the Bundeskartellamt to obtain a search warrant. The applicant may not be the only ringleader of the cartel nor have coerced others to participate in the cartel, and he has to cooperate fully and on a continuous basis with the Bundeskartellamt.³ The applicant must end his involvement in the cartel immediately on request by the Bundeskartellamt.⁴

7. If the Bundeskartellamt is already in a position to obtain a search warrant, it will, as a rule, grant immunity from a fine, provided that immunity has not been granted to another cartel participant according to the above provisions. Furthermore, the applicant has to fulfil the same conditions as set out above for cases in which the Bundeskartellamt is not yet in a position to obtain a search warrant.⁵

8. Also, subsequent applicants must cooperate fully and on a continuous basis with the Bundeskartellamt during the entire duration of the proceedings. The Leniency Notice does not contain a formal application period within which applicants have to seek immunity or reduction of the fine. The cut-off point for applications is rather based on practical considerations and is defined by the point at which the proceedings have developed so far that the information supplied by the applicant no longer provides the necessary added value.

9. In Germany, leniency applications can be filed verbally, and in German or English. Cartel participants can contact the head of the Bundeskartellamt's Special Unit for Combating Cartels or the Chairman of the competent Decision Division to declare their willingness to cooperate, thereby setting a "marker". A marker allows leniency applicants to secure a certain position in the leniency queue without having to submit a complete leniency application. In order to obtain a marker, applicants have to provide details about the type and duration of the infringement, the product and geographic markets affected, the identity of those involved, and state at which other competition authorities applications have been or are intended to be filed. The marker can also be placed verbally or in writing.⁶

10. The Bundeskartellamt has had good experience with a lean and automatic marker system. This means that if the conditions set out in the leniency programme are fulfilled, the marker will be granted without any discretion on the part of the Bundeskartellamt. Fears that the authority could receive a great number of markers with no real basis for the suspicion, which had been raised in discussions prior to the leniency programme, have proved to be unfounded. The Bundeskartellamt's burden of managing markers is not very high and it is clearly outbalanced by the system's positive effects. Furthermore, a lean marker system offers the advantage that the immunity applicant is "hooked" by the Bundeskartellamt at a very early stage and that the Bundeskartellamt – now being in the driver's seat – has an increased opportunity to steer the investigations in order to avoid destruction of evidence and leaks.

11. If an applicant does not fulfil his obligations (especially his obligation to cooperate), his status of priority lapses and subsequent applicants move up in rank.⁷

³ See Notice 9/2006, Section "B. Immunity from fines".

⁴ See Notice 9/2006, Section "D. Obligations to cooperate".

⁵ See Notice 9/2006, Section "B. Immunity from fines".

⁶ See Notice 9/2006, Section "E. Marker, Application, Statement of Assurance".

⁷ See Notice 9/2006, Section "E. Marker, Application, Statement of Assurance".

12. The amount of the reduction granted depends on the value of the co-operation and the order of precedence of the application. An applicant's position in the leniency queue is decisive for his immunity or the amount of reduction of his fine. Leniency programmes try to initiate a race among the cartel members. This race is more easily triggered if the thresholds for the first move are low.

13. In parallel cases with implications for several jurisdictions the burden on the potential applicants is high anyway because of the necessity of multiple filing. In such a scenario a lean marker system is of particular importance. In addition, the ECN established its "ECN Model Leniency Programme" in 2006, which introduced a new procedure for a uniform summary application system for cases concerning more than three EU Member States.⁸ Such summary applications alleviate the burden of multiple filings for leniency applicants. If a full application has been made with the Commission, national competition authorities can accept temporarily to protect the applicant's position on the basis of very limited information that can be given orally. Should any of the national competition authorities want to act on the case it will grant the applicant additional time to complete its application. The summary application system is supposed to save resources for both applicants and authorities without jeopardising the flexible work-sharing within the ECN.⁹ Such an application is available in Germany, also for subsequent leniency applicants. However, summary applications are not available in all jurisdictions in Europe.

14. In its "ECN Leniency Convergence Project" the ECN is currently reviewing the practical application of the "ECN Model Leniency Programme", trying to identify further possibilities for improvement.

15. In a further effort to strengthen its cartel prosecution and leniency programmes, the Bundeskartellamt installed an anonymous whistle blowing system in June 2012. This electronic system allows the authority to receive anonymous tip-offs on cartel law infringements.

16. Such a system has proved effective over many years of practice by a number of German criminal police offices. It guarantees the anonymity of informers while still allowing for continual reciprocal communication with investigative staff at the Bundeskartellamt via a secure electronic mailbox. The new system gives those informers who have not contacted the Bundeskartellamt up to now for fear of reprisal a chance to support the authority in its cartel prosecution work.

3. Subsequent leniency applicants

17. It is also important to keep in mind that not only the first applicant seeking immunity but also subsequent applicants may be capable of providing valuable information to the competition authority. Therefore, it is advisable to encourage cartelists to come in with subsequent leniency applications.

18. Furthermore, the correlation between an applicant's place in the leniency queue and the value of the information provided has to be clear to applicants. A better place in the leniency queue does not mean that the reduction of the fine will automatically be higher than the reduction that is granted to an undertaking with a lower place in the leniency queue. The position in the queue of candidates entitled to a reduction in fines is especially important if evidence or information presented at a later date proves obsolete in the light of evidence already presented at an earlier stage. On the other hand, evidence presented at a later stage may be particularly essential to solving the case, with the result that subsequent leniency applicants may be granted a higher reduction despite being further down in the queue.

⁸ See MEMO/06/356 "Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions" of 29th September 2006.

⁹ See MEMO/06/356 "Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions" of 29th September 2006.

19. Additionally, an increased reduction (within the limit of up to 50 % of the fine) can be granted on the basis of the rank position itself (because earlier co-operation of lower evidential value can be strategically more important than later co-operation with better evidential value. For example, this can be useful for further dawn raids or trying to convince remaining cartel members to admit the infringement, as with each new leniency applicant it will become harder to deny the facts). Nonetheless, an increased reduction in fine for early co-operation still requires that at least some added value has been provided.

4. Leniency programmes and settlements

20. So far, the German Leniency Programme has been very successful. It has brought many cartel cases to the Bundeskartellamt's attention, which have been concluded effectively. The growing number of cases has made it even more important to also develop useful tools for the termination of proceedings. Over the last years the Bundeskartellamt has made increasing use of settlements to close proceedings.

21. For a competition authority like the Bundeskartellamt it is very important to coordinate and differentiate between these two tools. It is especially vital to ensure that the two systems do not hinder each other and that one system does not undermine the incentive to cooperate under the other. For example, it should be ensured that the reduction of the fine granted for co-operation in the settlement proceedings does not reach a level which discourages cartelists to be the first to come in for leniency. The reduction in fines for applicants which cooperate in the settlement proceedings plus the reduction for subsequent applicants under the leniency programme should still leave enough room for incentives to come in for immunity. If this gap is not clearly discernible, there will be no race to apply for immunity and it will be more difficult to destabilise cartels.

5. Leniency programmes and private damage claims

22. The tools at the disposal of the Bundeskartellamt have to be used cautiously, and it must be prevented that one tool interferes with the efficiency of other tools. Therefore, the leniency programme also has to be implemented and used with care. In this context the interaction of the Bundeskartellamt's leniency programme and potential private damages claims is important. One of the major issues in this regard is access to files by third parties which intend to bring private damages claims.

23. The success of any immunity programme depends on the after effects on the immunity applicants: They may be discouraged from seeking immunity or reduction of fines if such an application increases their risk of facing private damages law suits.

24. In the "Pfleiderer" case, which was eventually taken to the ECJ, a third party had requested access to the Bundeskartellamt's files in an administrative fine proceeding in order to prepare its private damages claim.¹⁰ Pfleiderer, a customer of a décor paper cartel, which sued the cartelists for damages, requested information from the Bundeskartellamt's proceedings against the cartel, including leniency documents. On 14 June 2011, the European Court of Justice (ECJ) issued a preliminary ruling in the case Pfleiderer vs. Bundeskartellamt.¹¹

¹⁰ See Germany's contributions to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. [DAF/COMP/WP3/WD\(2010\)35](#) and Germany's contribution to the October 2011 Roundtable on "Institutional and procedural aspects of the relationship between competition authorities and courts, and update on developments in procedural fairness and transparency", OECD Doc. [DAF/COMP/WP3\(2011\)77](#).

¹¹ The decision is available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79889385C19090360&doc=T&ouvert=T&seance=ARRET>

25. The ECJ ruled that national courts must decide on the level of disclosure by balancing the need to protect the effectiveness of leniency programmes with the right of cartel victims to receive compensation.¹² Applying the judgment, the Local Court of Bonn refused disclosure.¹³ Pfleiderer was not granted access to the leniency applications of the cartel participants. This decision has far reaching consequences for the future practice of the Bundeskartellamt in the prosecution of hard-core cartels.

26. With its decision the court affirmed the Bundeskartellamt's view that leniency applications are subject to particularly strict confidentiality. In order to maintain effective anti-cartel enforcement, the effectiveness of leniency programmes should be maintained. Private claims for damages suffered from cartel law violations are an important supplement to public antitrust enforcement. But to be able to claim damages, the victims of cartel agreements are dependent on the competition authorities to uncover the cartel. If the leniency programme does not function properly, significantly fewer cartels will be uncovered. This would hamper not only the punishment of the perpetrators, but also the compensation of the victims.

27. In the very recent decision of the Düsseldorf Higher Regional Court of August 2012, the court even ruled that the denial of third-party access to leniency applications of cartel participants was also valid in court proceedings. Therefore, leniency applicants can now rely on their applications being kept confidential not only by the Bundeskartellamt, but also in court proceedings.¹⁴

¹² See ECJ, decision of 14 June 2011.

¹³ See the Local Court of Bonn's decision of 18 January 2012, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf

¹⁴ See the Bundeskartellamt's Press release of August 27, 2012 on the Higher Regional Court's decision available at http://www.bundeskartellamt.de/wEnglisch/News/press/2012_08_27.php