

Notice no. 14/2021  
on General Administrative Principles relating to the  
Exercise of Discretionary Powers in the Conduct of the Proce-  
dure for and Application of the Leniency Regime  
in accordance with Sections 81h to 81n of the  
Act against Restraints of Competition  
  
(Guidelines on the Leniency Programme)  
  
of 23 August 2021

## A. Objective and area of application

- (1) Under the provisions of Sections 81h to 81n of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) concerning the leniency programme, the Bundeskartellamt may grant immunity from or a reduction of an administrative fine imposed on natural persons, undertakings and associations of undertakings (cartel participants) if, by cooperating with the Bundeskartellamt, they contribute to uncovering a cartel (leniency). These Guidelines on the Leniency Programme set out the general administrative principles which the Bundeskartellamt has determined in relation to the exercise of its discretionary powers in the application of the leniency regime and conduct of the procedure; they complement the provisions of the Act against Restraints of Competition (Section 81h (3) GWB).
- (2) Like the statutory provisions relating to the leniency programme, these guidelines only apply to cartels (Section 81h (1) GWB). They are thus applicable to horizontal restraints of competition pursuant to Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 GWB between (actual or potential) competitors.
- (3) Leniency can only be granted upon application (Section 81i (1) sentence 1 GWB). Leniency applications (markers in accordance with Section 81m GWB; finalised leniency applications in accordance with Section 81i GWB; summary applications in accordance with Section 81n GWB) may be submitted to the Bundeskartellamt by each and any cartel participant. Unless expressly stated otherwise, leniency applications submitted for an undertaking apply to all legal persons or associations of persons that constitute the undertaking at the time the application is filed (Section 81i (2) sentence 1 GWB), as well as to their current and former directors, managers and members of staff (Section 81i (2) sentence 2 GWB). Those cartel participants in whose favour the leniency application has been filed must fulfil the general conditions for leniency set out in Section 81j (1) GWB in order to benefit from the leniency regime (Section 81j (2) GWB); the individual conditions of Section 81j (1) GWB are set out in section E below.
- (4) Those wishing to apply for leniency may contact either the Bundeskartellamt's Special Unit for Combating Cartels (SKK) (tel.: +49 (0)228 9499-386) or one of the Decision Divisions responsible for prosecuting infringements of competition law. During a search, leniency applications may also be submitted to the on-site Bundeskartellamt staff.

## **B. Immunity from administrative fines**

(5) Under Section 81k (1) GWB, the Bundeskartellamt refrains from imposing an administrative fine on a cartel participant if the following conditions are fulfilled:

1. The cartel participant is the first to submit evidence that, at the time the Bundeskartellamt receives the leniency application, allows it to obtain a search warrant for the first time.
2. The cartel participant has taken no steps to coerce other cartel participants to join or remain a member of the cartel (Section 81k (3) GWB).
3. The cartel participant fulfils the general conditions as required under the leniency regime (Section 81j GWB) by fully cooperating and exhausting all available means of clarifying the facts; the individual conditions are set out in section E below.

(6) If the Bundeskartellamt is already able to obtain a search warrant, it will, in accordance with Section 81k (2) GWB, generally refrain from imposing an administrative fine on a cartel participant if the following conditions are fulfilled:

1. The cartel participant is the first to submit evidence that makes it possible to prove the offence for the first time.
2. No other cartel participant has already fulfilled the conditions for immunity pursuant to para. 5 above.
3. The cartel participant has taken no steps to coerce other cartel participants to join or remain a member of the cartel (Section 81k (3) GWB).
4. The cartel participant fulfils the general conditions as required under the leniency regime (Section 81j GWB) by fully cooperating and exhausting all available means of clarifying the facts; the individual conditions are set out in section E below.

(7) In the event of immunity being granted, the procedure relating to the cartel participants concerned is terminated; the participants are notified of this (Section 81k GWB read in conjunction with Section 47 (1) Administrative Offences Act (*Ordnungswidrigkeitengesetz, OWiG*)).

## **C. Reduction of administrative fines**

(8) Under Section 81l (1) GWB the Bundeskartellamt may reduce the administrative fine imposed on a cartel participant if the following conditions are fulfilled:

1. The cartel participant submits evidence of the cartel which, relative to the information and evidence already available to the Bundeskartellamt, represents significant added value for the purpose of proving the offence.
2. The cartel participant fulfils the general conditions as required under the leniency regime (Section 81j GWB) by fully cooperating and exhausting all available means of clarifying the facts; the individual conditions are set out in section E below.

(9) The amount of the reduction is in particular determined on the basis of the usefulness of the information and evidence and the point in time at which the leniency applications are filed (Section 81l (2) GWB). Within the scope of its discretionary powers, the Bundeskartellamt can reduce the administrative fine by up to 50 per cent. The decision on a reduction is communicated in the order imposing the fine.

#### **D. Additional advantage of cooperating by submitting additional facts**

(10) If an applicant is the first to submit compelling evidence that the Bundeskartellamt uses to prove additional facts and to impose larger fines on other cartel participants, or if a cartel participant in whose favour the application has been filed (Section 81j (2) GWB) is extensively involved in the initial provision of such evidence, then these facts are not taken into account when setting the fine to be imposed on the applicant or, as the case may be, on the cartel participant favoured by the application (Section 81l (3) GWB).

(11) The additional facts must refer to clearly identifiable parts of the infringement – for example new infringement periods or new regions of significant size.

#### **E. Conditions for leniency – obligations to cooperate**

(12) In order for leniency to be granted, a cartel participant must fulfil the general conditions set out in Section 81j GWB by fully cooperating and exhausting all available means of clarifying the facts. Applicants – and, accordingly, under Section 81j (2) GWB cartel participants in whose favour the leniency application has been filed – are under the following obligations:

1. To disclose their knowledge of, and role in, the cartel to the Bundeskartellamt in the leniency application (Section 81j (1) no. 1 GWB).
2. To end any involvement in the cartel immediately after filing the leniency application, except in relation to specific activities which, in the Bundeskartellamt's view, may be necessary to preserve the integrity of its investigations (Section 81j (1) no. 2 GWB).

3. To meet the obligation to cooperate genuinely, continuously and expeditiously with the Bundeskartellamt from the time of the leniency application up until the conclusion of the enforcement proceedings against all the cartel participants (Section 81j (1) no. 3 GWB). This, in particular, includes the following:
  - a. Promptly providing all the information and evidence relating to the cartel which is accessible to the applicant (Section 81j (1) no. 3 a) GWB).
  - b. Answering any request which may contribute to establishing the facts (Section 81j (1) no. 3 b) GWB). This not only covers requests relating to the infringement under competition law but also to facts which are relevant to, for instance, its legal consequences (e.g. the setting of fines).
  - c. Making directors, managers and other members of staff available for questioning; in the case of former directors, managers and other former members of staff, efforts to that effect are considered sufficient (Section 81j (1) no. 3 c) GWB).
  - d. Not destroying, falsifying or concealing information or evidence relating to the cartel (see Section 81j (1) no. 3 d) GWB).
  - e. Not disclosing either the fact that a leniency application has been submitted or any of its content until the Bundeskartellamt grants release from this obligation (Section 81j (1) no. 3 e) GWB).
4. Moreover, while contemplating filing a leniency application, applicants are already under the following obligations:
  - a. Not to destroy, falsify or conceal information or evidence relating to the cartel (see Section 81j (1) no. 4 a) GWB).
  - b. Not to disclose either the contemplated leniency application or its contemplated content; this does not preclude disclosure to other competition authorities (Section 81j (1) no. 4 b) GWB).

## **F. Leniency applications**

### **I. General rules relating to applications**

- (13) The condition for effective submission of a leniency application in accordance with para. 3 is that details as to the identity of the applicant are already provided at the point in time at which the application is submitted. Applications may not be submitted anonymously.

- (14) An application may be submitted in writing or, pursuant to Section 32a of the Code of Criminal Procedure (*Strafprozeßordnung, StPO*), in electronic form (Section 81i (3) sentence 1, Section 81m (2), Section 81n (2) GWB). If expressly permitted by the Bundeskartellamt, an application may also be submitted in another form (see Section 81i (3) sentence 3 GWB). A marker or summary application may also be submitted orally (e.g. by telephone) or in text form (e.g. by fax or email) (see Section 81m (2) sentence 1, Section 81n (2) GWB).
- (15) An application may be filed in German, English or – after prior agreement between the Bundeskartellamt and the applicant – in another language of the European Union (Section 81i (3) sentence 1, Section 81m (2), Section 81n (2) GWB). If the Bundeskartellamt accepts an application in a language other than German, the applicant must furnish a German translation without delay after being requested to do so by the Bundeskartellamt (Section 81i (3) sentence 2, Section 81m (2), Section 81n (2) GWB).

## **II. Declaration of willingness to cooperate (marker)**

- (16) Under Section 81m GWB, a cartel participant may initially declare its willingness to cooperate (marker) in order to be assigned a place in the queue for leniency in the order in which applications are received. A marker must at least include the following details in brief:
1. The name and address of the applicant,
  2. The names of the other cartel participants (involved natural persons, undertakings and associations of undertakings; Section 81h (1) GWB),
  3. The products and territories affected,
  4. The duration and nature of the offence, in particular also with regard to the applicant's own involvement, and
  5. Information on any past or possible future leniency applications relating to the cartel that have been made or will be made to other competition authorities, other European competition authorities or other foreign competition authorities.
- (17) The Bundeskartellamt confirms receipt of the marker, stating the date and time, upon the applicant's request (see Section 81m (2) sentence 2 GWB read in conjunction with Section 81i (4) GWB) and specifies a reasonable period within which the applicant is to submit a finalised leniency application, including details as to all the required information, together with the corresponding evidence (see Section 81m (3) sentence 1 GWB). As a rule, the period is set at no more than eight weeks.

- (18) The place in the queue for leniency for a finalised leniency application filed within the period specified is allocated on the basis of the time of the marker, provided that the applicant fulfils its obligations at all times (Section 81m (3) sentence 2 GWB). In such cases, all the information and evidence properly produced prior to the expiry of the period specified are deemed to have been submitted at the time of the marker (Section 81m (3) sentence 3 GWB). A marker only has effect for cartel activities in respect of which sufficient information has been provided and for which further specific details are submitted in the leniency application within the period specified. The Bundeskartellamt takes account of any evidence and information submitted after expiry of the period specified; however, in relation to the assessment conducted in accordance with para. 9, it is not deemed to have been submitted at the time of the marker (see Section 81m (3) sentence 3 GWB).

### **III. Leniency application**

- (19) The leniency application must contain details as to all the information specified in para. 16 and must be submitted together with the corresponding evidence (Section 81i (1) GWB). The applicant must in particular detail its own involvement in the infringement in question and, where possible, provide personal statements made by the cartel participants.
- (20) In addition, details must be supplied as to whether the cartel has had any impact in other countries – insofar as this is known.
- (21) Upon the applicant's request, the Bundeskartellamt confirms receipt of the leniency application, stating the date and time (Section 81i (4) GWB).
- (22) If, after conducting the relevant examination, the Bundeskartellamt concludes that the conditions for immunity from an administrative fine under Section 81k (1) no. 2 GWB or under Section 81k (2) no. 2 GWB are fulfilled, then, upon request, it notifies the applicant in writing that immunity will be granted – on condition that the applicant has not coerced others to participate in the cartel and that the conditions under Section 81j GWB are fulfilled (conditional assurance of immunity from fines).
- (23) If, after receiving a leniency application, the Bundeskartellamt decides not to launch an investigation or decides to terminate a previously launched investigation, it merely notifies the applicant that the procedure was not initiated or that the previously initiated procedure was terminated.

### **IV. Summary application**

- (24) Where a cartel participant files a leniency application with the European Commission, the Bundeskartellamt accepts a summary application relating to the same cartel if the application refers to more than three Member States as the geographical areas affected by the cartel (Section 81n GWB).

A summary application has the same effect as a marker in terms of securing a place in the queue for leniency (see Section 81n (2) and (4), Section 81m (3) sentences 2 and 3 GWB). It must contain, at a minimum, the details listed in para. 16 in brief. In addition, details must be provided as to the Member States in which the evidence of the cartel is likely to be located (Section 81n (2) GWB). Upon the applicant's request, the Bundeskartellamt confirms receipt of the summary application, stating the date and time (Section 81n (2), Section 81m (2), Section 81i (4) GWB). If the Bundeskartellamt has received no other leniency application relating to the same cartel, then, upon the applicant's request, it notifies the applicant of this, that is if the summary application contains the details listed in para. 16.

- (25) The Bundeskartellamt requests submission of a full leniency application and specifies a reasonable period (generally no more than eight weeks) as soon as it has been informed by the European Commission that it is no longer pursuing the case, either in whole or in part, or if further information is required to delineate or allocate the case (see Section 81n (3) GWB).

#### **G. Disgorgement of economic benefits and confiscation of value**

- (26) Where a cartel participant is granted immunity from or a reduction of an administrative fine, the Bundeskartellamt generally neither disgorges the economic benefits (Section 34 GWB) nor orders the confiscation of the value (Section 29a OWiG).

#### **H. Consequences under civil and criminal law**

- (27) This notice is without prejudice to any civil-law consequences of participating in a cartel. As regards civil-law claims for damages, the law privileges the immunity recipient (see Section 33e GWB).
- (28) Under Section 41 OWiG, the Bundeskartellamt must pass the procedure conducted in relation to a natural person to the public prosecution office if the act in question is a criminal offence (in particular pursuant to Section 298 of the German Criminal Code (*Strafgesetzbuch, StGB*)). In such cases, the leniency regime only has a direct effect in favour of the undertaking in the competition proceedings and not for the responsible natural persons in the separate procedure (see Section 82 GWB as regards these separate procedures). The cooperation of a natural person is acknowledged separately by the competent bodies in the criminal proceedings, whereby any sanction imposed may likewise be reduced in those proceedings on the basis of that person's cooperation, or the proceedings may be terminated (see Article 23(2), (3) Directive (EU) 2019/1).
- (29) Private third-parties that are not involved in the administrative fines proceedings are, by law, not permitted access to leniency applications within the meaning of para. 3. This protection applies to documents or recordings, including those relating to the content of a hearing conducted as part of the procedure before the competition authority, if and insofar as they contain a leniency declaration by or



on behalf of an undertaking or a natural person (see Section 89c (5), Section 33g (4) no. 1, Section 89b (8) sentence 2 no. 1 GWB).

#### **I. Validity**

- (30) The provisions concerning the statutory leniency programme entered into force on 19 January 2021. The Bundeskartellamt will deal with applications submitted after that date as detailed in these guidelines. Applications that were submitted before the aforementioned date on the basis of the authority's previous Notice no. 9/2006 and that concern procedures which have not yet been concluded will be dealt with by the Bundeskartellamt on the basis of its examination of which rules are the most favourable.

Bonn, 23 August 2021

Andreas Mundt

President of the Bundeskartellamt