



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

A. Law(s) covering cartels:	German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB). http://www.gesetze-im-internet.de/englisch_gwb/index.html Languages: German, English Procedural Rules: Rules of the Administrative Courts (Verwaltungsgerichtsordnung - VwGO); Law of Administrative Proceedings (Verwaltungsverfahrensgesetz - VwVfG) ; Administrative Offences Act (Gesetz über Ordnungswidrigkeiten - OWiG); Criminal Code (Strafgesetzbuch - StGB); Code of Criminal Procedure (Strafprozessordnung - StPO); http://www.gesetze-im-internet.de/Teilliste_translations.html (Languages: German, English)
B. Implementing regulation(s) (if any):	None.
C. Interpretative guideline(s) (if any):	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>“Guidelines for the Setting of Fines in cartel administrative offence proceedings” (Leitlinien für die Bußgeldzumessung) of the Bundeskartellamt of 25 June 2013</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</p>
<p>D. Other relevant materials (if any):</p>	<p>Decisions of the Bundeskartellamt Language: German, English (in part)</p> <p>Case summaries of Decisions of the Bundeskartellamt Language: German, English</p> <p>Decisions of the Higher Regional Court (Oberlandesgericht) Düsseldorf: http://www.justiz.nrw.de/RB/nrwe/index.html Language: German</p> <p>Decisions of the Federal High Court of Justice (Bundesgerichtshof): Language: German</p>

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”?</p> <p>If not, please indicate the term you use instead.</p>	<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 (Sec. 1 GWB).</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?</p>	<p>In accordance with the enumeration in the Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (deminimis) in 11 (OJ (2001) No. C 368, p. 13, 14 et seq.) at least the following behaviour is likely to be identified as "hardcore cartels": price fixing, market sharing, production or sales quotas, allocation of customers and bid-rigging.</p> <p>Also, the Bundeskartellamt's Leniency Programme quotes agreements on the fixing of prices or sales quotas, market sharing and bid-rigging as typical cartels.</p> <p>Under German Law, there are two procedures which can be followed in the case of an infringement against Sec. 1 GWB, Art. 101(1) TFEU: 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</p>

¹ 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.

	<p>against cartel members. The fines procedure is regulated in the Administrative Offences Act (OWiG) and the Code of Criminal Procedure (StPO) (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>C. Scope of the prohibition of hardcore cartels:</p>	<p>See question 2/A.</p> <p>There are the following general exemptions in the GWB:</p> <p>Exempted are agreements in terms of Sec. 1 GWB 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) GWB).</p> <p>In this respect, the block exemption regulations under Art. 101 (3) TFEU are applicable irrespective of whether or not these agreements may affect trade between Member States (Sec. 2 (2)GWB).</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"> 1. competition on the market is not substantially impaired thereby, and 2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises (Sec.3 (1) GWB). <p>However, hardcore cartels do not meet these criteria and are generally not exempted.</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>²?</p>	<p>Yes.</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>Hardcore Cartels are not criminalized under German Law. The 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. German law provides for parallel enforcement in bid rigging cases (Sec. 82 para. 2 GWB): The competition authorities are responsible for the prosecution of undertakings (Sec. 30 OWiG), while the public prosecutors prosecute the respective individuals.</p>

² For the purposes of this template the notion of 'per se' covers both 'per se' and 'by object', as these terms are synonyms used in different jurisdictions.

3. Investigating institution(s)

A. Name of the agency, which investigates cartels:	Bundeskartellamt (BKartA) or Competition Authority of the Länder (Landeskartellbehörde, cf. Sec. 48 GWB) and in the case of bid-rigging a public prosecutor (cf. Sec. 82 GWB)
B. Contact details of the agency:	Bundeskartellamt (BKartA) Address: Kaiser-Friedrich-Strasse 16, 53113 Bonn Tel.: +49 (0) 228-9499-0 Fax: +49 (0) 228-9499-400 E-Mail: info@bundeskartellamt.bund.de Website: www.bundeskartellamt.de (Languages: German,English)
C. Information point for potential complainants:	General Questions/Public relations Address: Kaiser-Friedrich-Strasse 16, 53113 Bonn Tel.: +49 (0) 228-9499-230 Fax: +49 (0) 228-9499-400 E-Mail: info@bundeskartellamt.bund.de
D. Contact point where complaints can be lodged:	General Questions/Public relations Address: Kaiser-Friedrich-Strasse 16, 53113 Bonn Tel.: +49 (0) 228-9499-230 Fax: +49 (0) 228-9499-400 E-Mail: info@bundeskartellamt.bund.de
E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	The local or regional police departments of the federal states may render assistance when conducting dawn raids.

4. Decision-making institution(s)³ [to be filled in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases:	See question 3 Bundeskartellamt is investigating institution as well as decision-making institution.
B. Contact details of the agency:	
C. Contact point for questions	

³ Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

and consultations:	
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	n.a.
E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?	<p>This only applies to bid-rigging cartels: The public prosecutor is solely responsible for the investigation and prosecution of natural persons in cases of possible bid-rigging (cf. Sec. 298 StGB; Sec. 35 (1) and Sec.40 (1) OWiG, Sec. 82 GWB). The criminal law takes priority over the administrative proceeding while Bundeskartellamt and public prosecutors lead parallel proceedings (cf. Sec. 21 (1) OWiG and Sec. 82 GWB). Meanwhile, the Bundeskartellamt remains competent for the prosecution of legal persons and association of persons (Sec.82 GWB). This investigation is closely coordinated with the public prosecutor. For example, dawn raids are often conducted conjointly. 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

A. Basis for initiating investigations in cartel cases:	<p>Investigations are instituted either ex officio, upon a leniency application, information provided by an informant or on the basis of a complaint.</p>
B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?	<p>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 includes details and exact determinations of the alleged infringement. Therefore, a written complaint with copies of documents with potential relevance to the proceeding attached is most suitable.</p> <p>In 2012 the Bundeskartellamt launched an electronic platform for whistleblowers and informants ("Business Keeper Monitoring System", BKMS) which forms a new way of communication with the Bundeskartellamt that allows a whistleblower to stay anonymous while at the same time providing a constant, two-sided contact channel with the Bundeskartellamt. This system already generated first substantial leads that resulted in the initiation of fines proceedings.</p> <p>In June 2015 the Bundeskartellamt concluded the first</p>

	proceeding which was triggered by a BKMS indication (acoustically effective components for automotive industry).
C. Legal requirements for lodging a complaint against a cartel:	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.
D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?	No. As mentioned above (see Point 5/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) OWiG).
E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?	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.
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?	No.

6. Leniency policy⁴

A. What is the official name of your leniency policy (if any)?	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). (Languages: German, English)
B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?	The Bundeskartellamt can grant cartel participants, who by their cooperation contribute to uncovering a cartel, full immunity from or a reduction of fines.

⁴ 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 synonyms.

<p>C. Who is eligible for full leniency?</p>	<p>Full immunity from fines is only granted to the first cartel participant to come forward and who fulfills the conditions laid down in the Leniency Programme (see Point 6/F).</p>
<p>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?</p> <p>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?</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>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p>	<p>Individuals, undertakings and association of undertakings</p>
<p>F. What are the conditions of availability of full leniency:</p>	<p>The Bundeskartellamt will grant a cartel participant full immunity from a fine if he</p> <ul style="list-style-type: none"> - is the first participant in a cartel to contact the Bundeskartellamt before the latter has sufficient evidence to obtain a search warrant and - by providing the Bundeskartellamt with verbal and written information and, where available, evidence which enables it to obtain a search warrant and - was not the only ringleader of the cartel nor coerced others to participate in the cartel and - cooperates fully and on a continuous basis with the Bundeskartellamt. <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 full immunity from a fine if he</p> <ul style="list-style-type: none"> -is the first participant in the cartel to contact the Bundeskartellamt before it has sufficient evidence to prove the offence and -by providing the Bundeskartellamt with verbal and written information and, where available, evidence which enables it to prove the offence and -was not the only ringleader of the cartel nor coerced others to participate in the cartel and -cooperates fully and on a continuous basis with the Bundeskartellamt and if <p>no cartel participant is to be granted immunity pursuant to the conditions described above.</p>
<p>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):</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"> - provides the Bundeskartellamt with verbal or written information and, where available, evidence which makes a significant contribution to proving the offence and - cooperates fully and on a continuous basis with the Bundeskartellamt.

	<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>H. Obligations for the beneficiary after the leniency application has been accepted:</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 dawn raid 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>I. Are there formal requirements to make a leniency application?</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>J. Are there distinct procedural steps within the leniency program?</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, 1st 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 from (question 6/F, 2nd case) or a reduction of fines, 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 from or a reduction of fines.</p>
<p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this</p>	<p>See above Point 6/J.</p>

done?	
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?	<p>According to Sec. 81 GWB in combination with Sec. 47 (1) OWiG 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) GWB 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, 1st 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>
M. Do you have a marker system? If yes, please describe it.	<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>
N. Does the system provide for any extra credit⁵ for disclosing additional violations?	No.
O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.	<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 participant.</p>
P. Is there a possibility of appealing an agency's decision rejecting a leniency application?	<p>There is no possibility to appeal individually a decision that grants or rejects leniency. However, the cartel participant can always appeal their final fines decision.(cf. Sec. 67 pp. OWiG).</p>
Q. Contact point where a leniency application can be	<p>A leniency application can either be lodged with the head of the Special Unit for Combating Cartels or the chairman of the</p>

⁵ 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.

<p>lodged:</p>	<p>competent Decision Division. There is also the possibility to lodge anonymous tips: Electronic Platform for Whistleblowers and Informants ("Business Keeper Monitoring System", BKMS). Tel.:+49 (0) 228-9499-386 Fax:+49 (0)228-9499-560 E-Mail: info@bundeskartellamt.bund.de</p>
<p>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?</p>	<p>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.</p>
<p>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</p>	<p>There is no provision regarding "affirmative leniency" in the German Leniency Programme.</p>
<p>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate.</p>	<p>There are several provisions regarding the disclosure of information from the authority's file (see Sec. 89c GWB; Sec. 147, 406 e and Sec. 475 StPO).</p> <p>According to Sec. 89c (4) GWB the competition authority may refuse to submit documents and items which are included in its files on a proceeding or kept in official custody during a proceeding, e.g. if these contain leniency statements or settlement submissions.</p> <p>Party to the proceeding</p> <p>Pursuant to Sec. 147 StPO a company or individual has the right to access the entire file, i.e. including any leniency material or settlement submissions also from other parties.</p> <p>Cartel damage claimant</p> <p>Where the inspection of the competition authority's file or the disclosure of information is to serve the purpose of filing a claim for damages, Sec. 406e and 475 StPO are displaced by Sec. 89c GWB.</p> <p>Those who potentially suffered damages from cartel infringements can be granted access to the order imposing the fine, in which business secrets have been deleted.</p> <p>The scope of disclosure is limited by the extent of the legitimate interest (i.e., usually the interest to check whether a claim for damages exists). Based on that, the BKartA has developed a regular decisional practice in this area which consists of usually only granting access to the fining decision which contains all the relevant information about the acting individuals and the infringement as such, including the infringement period as well as the products affected by the infringement. Access to other parts of the file – e.g. leniency materials, pieces of evidence or settlement submissions – is usually denied as these parts of the file are outside the scope of the legitimate interest of the applicant.</p>

	<p>Public Prosecutor</p> <p>With regard to requests of public prosecutors in accordance with Sec. 474 StPO investigating a case that is linked to the cartel proceedings of the Bundeskartellamt, the Bundeskartellamt usually transfers the entire file. If the file contains any leniency material, the Bundeskartellamt joins a special piece of information regarding our leniency program which also contains a request to the public prosecutor to contact the Bundeskartellamt prior to granting any third party access to the leniency material as this might endanger cartel proceedings (also in future cases).</p> <p>Civil Court</p> <p>In the case of a civil court requesting to inspect cartel files pursuant to Sec. 474 StPO in the context of a pending action for cartel damages, the Bundeskartellamt would restrict the transfer of the file and exclude leniency material. The reasoning would be that the disclosure of leniency material to a civil court followed by a possible disclosure to the parties of the civil procedure would endanger future investigations in other cartels cases as such disclosure might deter future leniency applicants from applying for leniency. In practice, up to now, civil courts have been restricting their request for inspection of the file to the fining decisions issued by the BKartA. Therefore, the restriction with regard to leniency material has not been applied.</p>
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7. Settlement

<p>A. Does your competition regime allow settlement? If yes, please indicate its public availability.</p>	<p>Yes.</p> <p>Information Leaflet on the Settlement procedure used by the Bundeskartellamt in fine proceedings. (Languages: German, English)</p>
<p>B. Which types of restrictive agreements are eligible for settlement?</p>	<p>All types of cartel administrative offence proceedings are eligible for settlement.</p>
<p>C. What is the reward of the settlement for the parties?</p>	<p>Reduction of the fine imposed by the Bundeskartellamt; settlement declaration is considered a mitigating circumstance in the setting of fines; in horizontal restraint cases the fine may be reduced by up to 10%.</p>
<p>D. May a reduction for settling</p>	<p>Yes; if an application for leniency has been filed, the settlement</p>

be cumulated with a leniency reward?	reduction is deducted from the amount of fine which has already been reduced following the application for leniency.
E. List the criteria (if there is any) determining the cases which are suitable for settlement.	n.a.
F. Describe briefly the system.	<p>If the Bundeskartellamt has already inspected the evidence in order to gain an adequate amount of information, settlement negotiations can be initiated by both sides at any time; dispatch of a hearing form is not required.</p> <p>The Bundeskartellamt informs the parties orally or in writing about the facts of which it accuses them. Based on the latest investigation status, the Bundeskartellamt proposes an amount of fine which is not to be exceeded if a settlement is reached, and hears the person or company concerned.</p> <p>The Bundeskartellamt sets a term during which the settlement proposition can be accepted. If the person or company decides to submit a settlement declaration, this can be done either in writing or orally during a hearing. However, the declaration must be signed by the party. The settlement negotiations are recorded in the file.</p>
F. Describe the procedural efficiencies of your settlement system.	Expedition and shortening of complexity of the cartel fine proceedings.
G. Does a settlement necessitate that the parties acknowledge their liability for the violation?	A settlement agreement requires a statement of confession by the person or company concerned. The confession must contain not only a description of the offence but also information on the circumstances that are relevant for setting the fine. The formal requirement for a confession is that it includes a so-called settlement declaration in which the person or company declares that they acknowledge the facts of the infringement of which they are charged and accept the fine up to the amount announced. Though the settlement does and may not exempt the fine decision from judicial review.
H. Is there a possibility for settled parties to appeal a settlement decision at court?	Yes; in case the addressee of the fine files an appeal, the Bundeskartellamt withdraws the short decision and issues a detailed fine decision.

8. Commitment

A. Does your competition regime allow the possibility of commitment? If yes, please indicate its public availability.	Yes. Section 32b GWB.
B. Which types of restrictive agreements are eligible for	Eligible for commitment are all types of anticompetitive practices that may be subjected to administrative procedures.

<p>commitment?</p> <p>Are there commitments which are excluded from the commitment possibility?</p>	<p>According to Sec. 32b GWB, administrative procedures are concluded by requiring an undertaking to terminate an infringement, or the declaration that an infringement has occurred in the past. However, cartel offence proceedings which are, in contrast, concluded with the setting of a fine, are not eligible for commitment (supra, “7. Settlement”). Theoretically, administrative procedures can be initiated in all cases of anticompetitive conduct. Nevertheless, it’s unlikely that hardcore cartels (such as horizontal price fixing, market sharing etc.) are treated within the framework of an administrative procedure.</p>
<p>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</p>	<p>Suitable for commitment are:</p> <p>(1) Proceedings under Sec. 30 (3) GWB – cases in which the Bundeskartellamt declares the resale price maintenance for newspapers and magazines to be of no effect.</p> <p>(2) Proceedings under Sec. 31a (3) GWB – abuse of market power in the public water supply sector.</p> <p>(3) Proceedings under Sec. 32 GWB – termination and subsequent finding of infringements of a provision of the GWB or of Art. 101, 102 TFEU.</p>
<p>D. Describe, which types of commitments are available under your competition law.</p>	<p>Behavioural commitments only.</p>
<p>E. Describe briefly the system</p>	<p>The Bundeskartellamt initiates the proceedings under Sec. 32b GWB.</p>
<p>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</p>	<p>No.</p>
<p>J. Describe how your authority monitors the parties’ compliance to the commitments.</p>	<p>n.a.</p>
<p>K. Is there a possibility for parties to appeal a commitment decision at court?</p>	<p>No.</p>

9. Investigative powers of the enforcing institution(s)⁶

<p>A. Briefly describe the investigative measures available to the enforcing</p>	<p>The Bundeskartellamt may use all the evidence necessary for the clarification of an infringement which is generally available in criminal proceedings (cf. Sec. 46 (1) OWiG).</p>
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⁶ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

<p>agency such as requests for information, searches/raids⁷, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>This may include witnesses, experts, questioning and the inspection of objects and documents. In order to collect evidence and conduct the investigation, the Bundeskartellamt may use the investigatory powers laid down in the Code of Criminal Procedure (StPO). It may in particular:</p> <ul style="list-style-type: none"> - take testimonies from witnesses and suspects (cf. Sec. 46 (1) OWiG in combination with Sec. 161a and 133 pp. StPO). - conduct dawn raids at search premises (cf. 46 (1) OWiG in combination with Sec. 102 pp. 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 StPO). In exigent circumstances, the Bundeskartellamt may conduct these searches without a judicial warrant (cf. Sec. 46 (2) OWiG in combination with Sec. 105 (1) StPO). - seize objects (including data) which may be of importance as evidence in the investigation (Sec. 94 StPO). 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>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Yes, under the same conditions laid down under question 9/A.</p>
<p>C. Can servers located outside the territory (abroad or in a cloud) be inspected? Are there special rules for this investigative power? Please explain!</p>	<p>According to Sec. 110 (3) StPO the examination of an electronic storage medium on the premises of the person affected by the search may be extended to also cover physically separate storage media insofar as they are accessible from the storage medium if there is a concern that the data sought would otherwise be lost. Data which may be of significance for the investigation may be secured; Sec. 98 (2) shall apply accordingly. Article 101 (3) StPO does not contain explicit rules for cases in which servers are located outside Germany. The Directive (EU) 2019/1 (ECN+ Directive) provides in Article 6 (1) b that the EU Member States shall ensure that their national competition authorities have the right to access any information - irrespective of the medium on which they are stored - which is accessible to the entity subject to an inspection.</p>

<p>D. 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)?</p>	<p>Such evidence can be seized on a provisional basis if it is not handed over voluntarily (cf. Sec. 108 StPO). 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) StPO).</p>
<p>E. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</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>

⁷ “Searches/raids” means all types of search, raid or inspection measures.

10. Procedural rights of businesses / individuals

<p>A. Key rights of defence in cartel cases. Please indicate the relevant legal provisions.</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 OWiG), the right to be heard will be performed by its authorised representatives.</p> <p>In general, an individual 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 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 to self-incriminate himself (cf. Sec. 46 (1) OWiG in combination with Sec. 136 (1) StPO).</p> <p>The parties have a right to legal representation throughout the entire proceedings (Sec. 137 (1) StPO). 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 not only granted to the lawyer of the suspect, but also to the suspect himself (cf. Sec. 46 (1) OWiG in combination with Sec. 147 (4) StPO). 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) StPO).</p>
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B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on

There is no legal provision providing for limited access to file for suspects on the grounds that the files contain business secrets. If third parties demand access to file, the Bundeskartellamt shall use the statutory limits of its discretionary powers to

<p>whether the information is provided under a compulsory legal order or provided under informal co-operation? Please indicate the relevant legal provisions.</p>	<p>refuse access to documents which include competitively sensitive information (cf. Sec. 46 (1) OWiG in combination with Sec. 475, 406e StPO).</p>
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11. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision on the merits of the case must be made? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</p>	<p>The limitation period for infringements of Art. 101 TFEU and Sec. 1 GWB, both containing the prohibition of cartels, is five years commencing with the termination of the infringement (Sec. 81 (8) GWB, Sec. 31 (3) OWiG). The period of limitation can be interrupted (cf. Sec. 33 (1) OWiG) i.a.</p> <ul style="list-style-type: none"> - by the notification that investigation proceedings have been initiated against the respective individual / undertaking or, - by any official order for inspection or seizure or, - by any request by the prosecuting authority or the judge to undertake an investigatory act in a foreign country or - by a decision imposing a fine. <p>After each interruption the limitation period of five years runs anew. However, prosecution shall be barred by the statute of limitations at the latest after ten years (Sec. 33 (3) OWiG).</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</p>	<p>There is no statutory deadline for completion of an investigation apart from running of limitation period. Its interruption opportunities are set out under A. However, there is a general rule to accelerate sanction proceedings.</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions? (see also 15A)</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 OWiG).</p>

12. Types of decisions

<p>A. 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.]</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"> a) conclude that there is no infringement and decide that there is no reason to investigate further (Sec. 32cGWB); b) withdraw the exemption under Sec. 2 (2) GWB, if an agreement in the particular case has effects that are incompatible with Sec. 2 (1) GWB or Art. 81 (3) EC (Sec. 32d GWB) c) order interim measures in cases of urgency in order to prevent an irreparable damage to competition (Sec. 32a GWB); d) require the parties to end an infringement (Sec. 32 (1)GWB); 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) GWB).
<p>B. List any other types of decisions on the merits of the case relevant particularly in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A).</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) GWB).</p>
<p>C. Can interim measures¹ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both².) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</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 GWB). The measure must be limited in time and may not exceed one year.</p>

¹ 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].

² Only for agencies which answered “yes” to question 2.B. above

13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

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

⁸ 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].

⁹ Only for agencies which answered “yes” to question 2.B.above

14. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined): On whom can sanctions be imposed?	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 (OWiG), in case of the violation of supervisory duties also Sec. 130 OWiG). Bid-rigging-cartels constitute a criminal offence for individuals (for details, see question 2/D and 4/E).
B. Criteria for determining the sanction / fine:	The scope for setting a fine in a specific case is determined with due consideration to the gain and harm potential on the one hand and the total turnover of the company on the other. Within the scope of setting a fine the offence is assessed according to the legal criteria for setting a fine (Sec. 81 (4) sentence 6 GWB and Sec. 17 (3) OWiG) based on an overall appraisal of all aggravating and mitigating factors. • Offence-related criteria are, for example: the type and duration of the infringement, its qualitative effects (e.g. size of the geographic markets affected by the infringement, significance of the companies involved in the infringement on the markets

	<p>affected), the importance of the markets (e.g. type of product affected by the infringement) and the degree of organisation among the parties involved. In the case of price-fixing and quota cartels, territorial and customer agreements and other similarly serious horizontal competition restraints, the fine will usually be set in the upper range.</p> <ul style="list-style-type: none"> • Offender-related criteria are, for example, the role of the company within the cartel, its position on the market affected, specifics concerning the degree of value creation, the extent of intention/negligence and previous infringements. The Bundeskartellamt also takes the company's financial capacity into account.
C. Are there maximum and / or minimum sanctions / fines?	<p>A fine can be imposed of up to 1 million Euros (cf. Sec. 81 (4) GWB). 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. In case of negligent action the maximum the amount can be raised to up to 5% of the company's total turnover in the preceding business year (Sec. 17 (2) OWiG).</p>
D. Guideline(s) on calculation of fines:	<p>“Guidelines for the Setting of Fines in cartel administrative offence proceedings” of the Bundeskartellamt of 25 June 2013</p> <p>Guidelines for the setting of fines in cartel administrative offence proceedings (Languages: German, English)</p>
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?	<p>An appeal against a decision imposing a fine has a suspensory effect.</p>

15. Possibilities of appeal

A. Does your law provide for an appeal against a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of	<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> <p>Against this decision, an appeal on points of law to the Federal</p>
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procedural requirements?	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) GWB). An appeal is always admissible when fundamental procedural rights of the parties have been violated (see Art.74 (4) No. 1-6 GWB).
B. Before which court or agency should such a challenge be made?	See question 15/A. above.

16. Private enforcement

A. Are private enforcement of competition law and private damage claims possible in your jurisdiction? If there is no legal provision for private enforcement and damage claims, what are the reasons for it?	Yes.
B. Laws regulating private enforcement of competition law in your jurisdiction [indication of the provisions and languages in which these materials are available; availability (homepage address)]	Sec. 33 et. seq. GWB.
C. Implementing regulation(s) on private enforcement (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]	n.a.
D. On what grounds can a private antitrust cause of action arise? / In what types of antitrust matters are private actions available?	Whoever intentionally or negligently violates in particular Sec. 1 GWB (Prohibition of Agreements Restricting Competition), Sec. 19 GWB (Prohibited Conduct of Dominant Undertakings), Sec. 20 GWB (Prohibited Conduct of Undertakings with Relative or Superior Market Power), Sec. 21 GWB (Prohibition of Boycott and Other Restrictive Practices) or Art. 101 or 102 TFEU or whoever violates a decision taken by the competition authority shall be liable for any damages arising from the infringement (Sec. 33 GWB).
E. What pleading standards must the plaintiff meet to file a stand-alone or follow-on claim? <ul style="list-style-type: none"> is a finding of infringement by a competition agency 	A finding infringement or a decision adopted by the Bundeskartellamt is not required to enforce a civil damage claim. A decision by the competition authorities or the courts with regard to an infringement facilitates the burden of proof, since it has a binding effect on courts in civil proceedings (Sec. 33b GWB). The binding effect refers to the factual findings and to

<p>required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition agency on national courts/tribunals?</p> <ul style="list-style-type: none"> • if a finding of infringement by competition authority is required, is it also required that decision to be judicially finalised? 	<p>the legal assessment.</p> <p>In regard to the binding effect of a decision it is required that it became definitive.</p>
<p>F. Are private actions available where there has been a criminal conviction in respect of the same matter?</p>	<p>Yes.</p>
<p>G. Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private damages cases?</p>	<p>Leniency applicants will receive certain beneficial treatments in follow-on private damages claims laid down in Sec. 33a GWB.</p> <p>See question 6/T with regard to rules to protect leniency material from disclosure.</p>
<p>H. Name and address of specialised court (if any) where private enforcement claims may be submitted to</p>	<p>Private damages claims fall within the competence of the civil courts. Within the civil courts, specialized chamber of commerce dealing with competition law are competent.</p>
<p>I. Information about class action opportunities</p>	<p>Class action is not applicable in Germany.</p>
<p>J. Role of your competition agency in private enforcement actions (if at all)</p>	<p>The Bundeskartellamt is not allowed to intervene or participate as party in private action proceedings before national courts.</p> <p>Where appropriate to protect the public interest, the Bundeskartellamt can submit written statements to a court, to point out facts and evidence, attend hearings, present arguments and address questions to parties, witnesses and experts in such hearings (“amicus curiae”, Sec. 90 GWB).</p>
<p>K. What is the evidentiary burden on plaintiff to quantify the damages? What evidence is admissible?</p> <ul style="list-style-type: none"> • Role of your competition agency in the damage calculation (if at all) 	<p>Sec. 33a (2) GWB only provides a rebuttable presumption that a cartel (horizontal agreement or concerted practices) results in harm. It does not apply to vertical agreements or unilateral behaviour.</p> <p>In order to be able to quantify the damages caused by the infringement, Sec. 33a (3) GWB refers to § 287 of the German Code of Civil Procedure (Zivilprozessordnung – ZPO). According to Sec. 33a (3) sentence 2 GWB, account may, in particular, be taken of the proportion of the profit which the infringer has derived from the infringement under paragraph 1 according to Sec. 33a (3) sentence 2 GWB in quantifying the harm. Sec. 287 ZPO provides that the court shall rule at its discretion and conviction on the amount of the damage or of the equivalent in money to be reimbursed, based on its evaluation of all circumstances. The court may also decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be involved to prepare a report.</p> <p>The plaintiff has to provide the facts for calculation of an estimation by the court. In order to be able to assess the damages the court may rely on expert evidence. In addition the</p>

	<p>court may ask the Bundeskartellamt to provide a comment on the amount of the damage resulting from the infringement according to sec. 90 para 5 (1) GWB. The requested comment is at the discretion of the Bundeskartellamt.</p>
<p>L. Discovery / disclosure issues:</p> <ul style="list-style-type: none"> • can plaintiff obtain access to competition authority or prosecutors' files or documents collected during investigations? • is your competition agency obliged to disclose to the court the file of the case (in follow-on cases)? • summary of the rules regulating the disclosure of confidential information by the competition agency to the court • summary of the rules regulating the disclosure of leniency-based information by the competition agency to the court 	<p>See question 6/T.</p>
<p>M. Passing-on issues:</p> <ul style="list-style-type: none"> • how is passing-on regulated / treated in your jurisdiction? • is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims? 	<p>Sec. 33c GWB deals with passing-on issues and provides in paragraph 1 sentence 1 where a good or service is purchased at an excessive price (overcharge), the fact that this good or service was resold shall not exclude the occurrence of harm. The harm incurred by the purchaser shall be deemed to be remedied to the extent that the purchaser has passed on the overcharge resulting from an infringement to its customers (indirect purchasers). The injured party's right to claim compensation for lost profits under Sec. 252 ZPO shall remain unaffected, to the extent that such loss of profit is the result of the passing-on of the overcharge.</p> <p>According to Sec. 33c (2) GWB, it shall be presumed in the indirect purchaser's favour that the overcharge has been passed on to it if</p> <ol style="list-style-type: none"> 1. the infringer has violated Sec. 1 or Sec. 19 GWB or Artt. 101 or 102 TFEU, 2. the infringement has resulted in an overcharge for the direct purchaser of the infringer, and 3. the indirect purchaser has purchased goods or services that <ol style="list-style-type: none"> a) were the object of the infringement, b) were derived from goods or services that were the object of the infringement, or c) contained goods or services that were the object of the infringement. <p>The presumption shall not apply where it is credibly demonstrated to the satisfaction of the court that the overcharge was not, or not entirely, passed on to the indirect purchaser.</p>

These provisions also shall apply mutatis mutandis to cases where the violation of Sec. 1 or Sec. 19 GWB or Artt. 101 or 102 TFEU concerns supplies to the infringer.

§ 33c (4) GWB provides that Sec. ZPO shall apply mutatis mutandis when quantifying the extent to which the overcharge has been passed on.