

GCR | Know-how

Immunity, Sanctions & Settlements – Germany

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Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

Under the German Federal Cartel Office's (FCO) Leniency Programme, the first applicant to qualify for leniency will be granted full immunity from fines provided they comply with the obligation to fully and continuously cooperate with the authority.

The Leniency Programme applies to participants in cartels. The FCO particularly refers to 'agreements on the fixing of prices or sales quotas, market sharing and bid rigging'. Given that the FCO followed the recommendations of the ICN and the OECD when implementing the Leniency Programme, also other forms of horizontal hard-core restrictions by which two or more competitors coordinate their competitive behaviour on the market or influence relevant parameters of competition should be covered, such as the fixing of trading conditions, the allocation of production or the restriction of imports or exports and/or anti-competitive actions against other competitors. The Leniency Programme does not apply to vertical agreements and the abuse of a dominant market position.

2 Do the protections extend to current and former officers, directors and employees?

The FCO can fine companies and individuals who have represented or supervised a company, as well as associations of companies for their respective participation in a cartel. The FCO's Leniency Programme applies to all of these legal subjects and all of them are eligible to apply for immunity.

If a person authorised to represent a company files an application for leniency or places a marker on behalf of a company, the FCO rates this also made on behalf of the individuals participating in the cartel as current or former employees of the company, unless it is otherwise indicated in the application or by the conduct of the undertaking.

3 Is immunity available after an investigation begins?

Yes, immunity is available after the FCO started an investigation. The FCO's Leniency Programme sets out different eligibility requirements for leniency depending on whether the application is made before or after the FCO has gathered sufficient evidence to obtain a search warrant. In practice, the relevant point in time for the distinction is often the beginning of the dawn raid.

The first applicant who submits information that enables the FCO to obtain a search warrant will automatically be granted immunity provided that he complies with the obligation to cooperate going forward (see below question 4).

If the first application is made after the FCO has gathered sufficient evidence to obtain a search warrant, the authority will only as a rule grant immunity if the applicant provides sufficient evidence to prove to offence and complies with the obligation to cooperate (see below question 5).

4 What are the eligibility requirements before an investigation begins?

Before the FCO is in a position to obtain a search warrant, that is, before the authority has a concrete suspicion of a cartel, the FCO will automatically grant immunity from fines if:

- the applicant was the first participant to contact the FCO;
- the applicant provides the FCO with verbal and written information and, where available, evidence which enables the authority to obtain a search warrant;
- the applicant was not the only ringleader of the cartel nor coerced others to participate in the cartel; and
- the applicant cooperates fully and continuously with the FCO.

The FCO may grant a marker and allow the applicant to submit additional information at a later stage. Although the applicant initially only needs to submit information required for the authority to obtain a search warrant, under the obligation to cooperate, the applicant must subsequently also submit all available evidence to prove the offence.

5 What are the eligibility requirements after an investigation begins?

When the FCO already is in a position to obtain a search warrant or even has already started conducting the dawn raid, the authority will 'as a rule' grant immunity from fines, if:

- the applicant was the first participant in the cartel to contact the FCO,
- the applicant provides the FCO with verbal and written information and, where available, evidence that enables the FCO to prove the offence;
- the applicant was not the only ringleader of the cartel nor coerced others to participate in the cartel;
- the applicant cooperates fully and continuously with the FCO; and
- no other participant contacted the FCO before the authority obtained the search warrant.

In this scenario, the FCO will grant immunity not automatically but only 'as a rule'. The FCO may grant the applicant a marker and allow submitting the required information at a later stage.

6 Will the applicant have to admit to a violation of law?

A formal admission of a violation of law is not required to qualify for leniency.

7 Are ringleaders or initiators of the conduct eligible?

Immunity is excluded for ringleaders or applicants who coerced others to participate in the cartel. However, then a reduction of up to 50 per cent of the fine

is still available (see below question 43 et seq). An applicant is considered to be a ringleader if he, compared to the other participants, assumed a leading role in initiating and organising the cartel.

8 When must the applicant terminate its involvement in the conduct?

The applicant must terminate the involvement in the cartel immediately upon request by the FCO. In certain circumstances, the FCO may allow the applicant to continue to passively take part in an upcoming cartel meeting in order to not alert co-conspirators.

9 What constitutes termination of the conduct?

Termination of the conduct usually requires that the applicant stops communicating with its co-conspirators and no longer attends cartel meetings.

10 Will the applicant be required to make restitution to victims?

No, restitution to victims is not a pre-condition for leniency.

11 Can more than one applicant qualify for immunity?

No, only the first applicant who enables the FCO to obtain a search warrant or to prove the offence may qualify for immunity. An applicant who informs the FCO before the authority issued a search warrant has priority. Joint applications by cartel participants are not admissible.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

The FCO can fine companies and individuals, who have represented or supervised a company, for their respective participation in a cartel. The FCO's Leniency Programme applies to all of these legal subjects. If a person authorised to represent a company files an application for leniency or places a marker on behalf of the company, the FCO rates this also made on behalf of the individuals participating in the cartel as current or former employees of the company, unless it is otherwise indicated in the application or by the conduct of the undertaking. However, an application made by an individual explicitly only in his own name or without authorisation to represent a company will not cover the company. In this scenario leniency will not be available for the company any more.

13 Does the afforded protection extend to any non-antitrust infringements?

No, the FCO's Leniency Programme only covers infringements of antitrust law and may only lead to immunity or reduction of fines imposed by the FCO against companies or individuals or associations of companies. It should be noted that bid-rigging constitutes a crime under the German criminal code for the commission of which individuals (not companies) may be prosecuted and fined or sentenced to jail by a German court. Although a leniency application does not protect an individual from prosecution, in practice, it may be possible to reach a deal with the public prosecutor.

14 What confidentiality assurances are given to the first applicant to report?

Until the FCO issues a statement of objections, the authority will not reveal to any other competition authority or other private third party the identity of the applicant or any trade and business secrets submitted by the applicant.

The applicant is furthermore protected by the European Commission Notice on cooperation within the network of competition authorities, which has been signed by the cartel authorities of the EU. As a member of the European Competition Network (ECN), the FCO may without consent of the applicant only exchange information with ECN-authorities where the applicant also applied for leniency or if the receiving authority guarantees in writing that it will not initiate proceedings against the applicant.

The FCO will not exchange information without prior consent of the applicant with other foreign competition authorities, ie, with those that are not members of the ECN.

In addition, in its Leniency Programme, the FCO undertook to generally

and without time limit refuse to grant private third parties, especially those seeking to claim for damages, access to the file insofar as the leniency application is concerned.

15 Does the authority publish guidance regarding the application of the programme?

The FCO's Leniency Programme is available on the authority's website: www.bundeskartellamt.de

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

The national competition authorities (NCAs) of the EU member states and the European Commission have parallel competence to open an investigation into a cartel. However, the European Commission (Commission) has prevailing powers and can block the authorities of the Member States. Consequently, a case can be dealt with by a single NCA, by several NCAs in parallel, or by the Commission. The Commission Notice on cooperation with the network of competition authorities gives guidelines as to when an authority is well placed to handle a case.

A marker or an application with the FCO does not protect the applicant from fines in other EU member states or from the Commission. Consequently, the leniency notice of the Commission suggests applying for leniency in all member states that could have jurisdiction plus with the Commission.

According to the FCO's Leniency Programme, the FCO may, for the time being, exempt marker applicant from perfection if the Commission is the best placed authority to handle the case within the meaning of the above-mentioned notice and if the applicant applied for leniency with the Commission or intends to do so. If the Commission does not take the case, the FCO will ask the applicant to perfect the marker within the regular time frame.

Immunity application and marker process

17 What is the initial process for making an application?

An applicant must either contact the head of the Special Unit for Combating Cartels at the FCO or the chairman of the competent decision-making body and declare his willingness to cooperate (marker) or make a leniency application. A marker can be placed verbally or in writing in German or in English.

18 What information is required to secure a marker?

The marker must contain the type and duration of the infringement, the product and geographic markets affected, the identity of those involved, and an explanation at which other competition authority an application has been or is intended to be filed.

19 How much time will an applicant have to perfect its marker?

The FCO sets a deadline of up to eight weeks after the marker has been placed for the perfection of the marker.

20 Can the deadline for perfecting the marker be extended?

The FCO Leniency Programme does not provide for the possibility of an extension and, therefore, if the time limit is not met, the applicant runs the risk of losing the status of priority and subsequent applicants may move up in rank.

21 What is required to perfect the marker?

This depends on when the marker has been placed. If the marker has been placed before the FCO has sufficient evidence to obtain a search warrant, the applicant must provide sufficient information so that the FCO can obtain a search warrant from the competent judge. However, under the obligation to fully and continuously cooperate, the applicant must subsequently also submit all available evidence to prove the offence.

If the marker has been placed after the FCO has obtained a search warrant, the applicant must submit all information that enables the FCO to prove the offence.

Where available, the FCO shall also be informed on whether the cartel had any effects in other countries.

If the application is made in English, upon request of the FCO, the appli-

cant is obliged to provide a written German translation without undue delay. If the applicant does not fulfil the obligations to perfect the marker, the status of priority lapses and subsequent applicants may move up in rank.

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?

Generally, a marker only protects from fines with regard to the reported act in a legal sense. The marker will not apply to another violation that has been committed by a separate act.

The FCO recommends setting the scope of the marker as wide as possible in the beginning.

If the applicant discovers additional violations (eg, concerning additional products or services or an additional time frame), it needs to be assessed whether this has occurred through the same act or a separate act, so that the scope of the marker can either be expanded or another separate marker has to be placed. This may also be discussed with the authority.

23 Can an applicant lose its marker if a second applicant comes forward with better information?

An applicant does not lose priority merely due to the fact that other applicants provide better information. An applicant, however, can lose priority if they fail to perfect the marker within the deadline set by the FCO or if the applicant does not observe its duty to fully and continuously cooperate with the FCO during the course of the investigation by handing over all information and evidence available to him.

24 What if the applicant's investigation reveals that no violation exists?

In that situation, the applicant should inform the FCO accordingly. However, the FCO is not bound by this finding and may pursue investigations independent from the applicant's finding.

25 What if the authority decides not to investigate?

In this case, the FCO will inform the applicant that it will not open an investigation.

Immunity cooperation obligations

26 What is the applicant required to produce?

The immunity applicant has the obligation to fully and continuously cooperate with the FCO. The applicant must hand over to the FCO all available information and evidence. This obligation is permanent and the applicant has to comply during the entire proceeding.

The applicant must also name all employees (including former employees) involved in the cartel and has to ensure that all employees, from whom information and evidence can be requested, cooperate fully and continuously with the FCO during the proceedings.

In addition, the applicant must submit all available information that is relevant for calculating the fine. This includes the turnover of the most recent financial year of the entire group of companies to which the applicant's company belongs as well as the turnover the applicant generated with the cartelized products or services over the period at issue.

The applicant is furthermore obliged to keep the cooperation with the FCO confidential until the authority relieves him from his obligation which happens usually after the dawn raid has been concluded.

It can sometimes be complicated to strike the right balance between exercising the right to defend against the investigation (eg, by submitting exculpatory facts) and complying with the obligation to cooperate.

27 Will the applicant be required to make a written confession?

No, the applicant will not have to make a written confession.

28 Can third parties obtain access to the materials provided by the applicant?

It is the policy of the FCO to use its discretionary powers within their statutory limits to refuse to grant private third parties access to the file, insofar as the leniency application and the evidence provided by the applicant are concerned.

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

Full cooperation of all (former) employees involved in the cartel is a key element of the applicant's duty to cooperate with the FCO. Hence, the refusal of one or more of the employees to cooperate may jeopardise the applicant's benefits. The applicant must use all available means to ensure that employees cooperate.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

Such behaviour can result in an infringement of the applicant's duty to cooperate with the FCO. The applicant must use all available means to ensure that employees comply with the obligation to cooperate.

31 Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?

Under German law, attorney-client communication is only protected to a limited extent. The German attorney-client privilege only protects documents that:

- have been created after the investigation has been initiated;
- if the attorney has been retained to defend the client; and
- if the document has been created for the purposes of defending the client.

Furthermore, documents that are in the custody of an attorney are generally protected (if the attorney is not subject to an investigation himself), regardless of when and for what purpose they have been created. All other documents will have to be submitted to the FCO if they respond to the applicant's duty to cooperate.

Granting immunity

32 How does the authority announce its promise not to charge or sanction?

The FCO confirms the receipt of the marker or leniency application in writing, stating the date and time of receipt.

If the marker has been placed or the application has been made before the FCO has sufficient evidence to obtain a search warrant, the FCO assures the applicant in writing that immunity will be granted on the condition that the applicant was neither the only ringleader of the cartel nor coerced others to participate in the cartel and that he fulfils his obligations to fully cooperate going forward.

If the application is made after the FCO obtained enough evidence to obtain a search warrant (or after the authority started conducting the dawn raid), the FCO initially only informs the applicant of the rank and that he is in principle eligible for immunity if he fulfils his duties to cooperate. A decision on immunity or reduction is made at the earliest point after perusal and examination of the information and evidence obtained during the search. The FCO wants to first examine whether the provided information is sufficient to prove the offence or significantly contributes to it.

The FCO also informs the applicant in writing if they do not qualify for immunity (or reduction of fines).

33 Does the authority put its commitment in writing?

Yes, see question 32 above.

34 Who is given access to the document?

Only the applicant will receive the written statement.

35 Does the authority publish a model letter for conferring immunity?

No such document is publicly available.

Individual immunity or leniency**36 Is there an individual immunity programme?**

Given that the FCO can also fine individuals for their participation in a cartel, the Leniency Programme of the FCO also applies to individuals (see questions 2 and 12).

37 What is the process for applying?

The process for applying for individuals is the same as for companies.

38 What are the criteria for qualifying?

The criteria for qualifying as an individual are the same as for companies.

Revocation of immunity**39 On what basis can corporate immunity be revoked?**

Immunity is granted on the condition that the applicant fully and continuously cooperates with the FCO and in particular submits all available information and evidence. If the applicant infringes his duty to cooperate, immunity may be revoked by the FCO. Immunity can also be revoked if the investigation shows that the applicant was a ringleader or coerced others into taking part in the cartel.

40 When can it be revoked?

Immunity can be revoked at any time during the proceedings.

41 What notice is required to revoke?

The FCO usually first addresses the respective applicant with its concerns about the cooperation and often issues can be solved. So far the authority has not revoked immunity during the proceedings, but the authority can do so at any time if it is of the opinion that the applicant does not comply with the duties to cooperate or was a ringleader or coerced others to take part in the cartel.

42 Can the applicant file a judicial challenge to a decision to revoke?

So far, immunity has never been revoked by the FCO and, hence, there is no precedent on this. Technically, the decision by the FCO to revoke immunity is appealable as it is a negative individual decision by an authority against a private legal subject for which judicial review generally is available.

Reduction in sanctions**43 Does the leniency programme allow for reductions in sanctions?**

Yes, if an applicant who is willing to cooperate does not qualify for immunity (eg, because the application has been made too late or the applicant was a ringleader), the FCO can reduce the fine by up to 50 per cent if the applicant provides the FCO with verbal or written information and, where available, evidence that makes a significant contribution to proving the offence and cooperates fully and continuously with the FCO.

Different to other jurisdictions, the mere rank of the application is not relevant for the amount of the reduction. Moreover, the amount of the reduction lies in the discretion of the FCO and will be based on the respective added value of the contribution to uncovering a cartel and the sequence of the applications.

44 What is the process for seeking a reduction in sanctions?

The application for a fine reduction is similar to an application for immunity. The application can be made orally or in writing, in German or in English with the head of the Special Unit for Combating Cartels at the FCO or the chairman of the competent decision making body (see question 17).

45 Is there a marker process similar to immunity applications?

Yes, the marker process also covers applications for fine reductions. However,

the mere rank of the application is not relevant for the amount of the reduction. Moreover, the amount of the reduction is based on the respective added value of the contribution to uncovering a cartel and the sequence of the applications.

46 Are the reductions in sanctions fixed or discretionary?

The maximum reduction available is 50 per cent of the fine. The amount of the reduction lies in the discretion of the FCO and will be based on the respective value of the contribution to uncovering a cartel and the sequence of the applications. The FCO will also acknowledge cooperation as a mitigating factor when setting the fine before it applies the reduction.

47 How are the reductions in sanctions calculated?

The reduction lies in the FCO's discretion. The authority will determine the fine according to its sentencing guidelines and will finally apply the reduction.

48 Are there sentencing guidelines?

Yes, the Sentencing Guidelines are available on the website of the FCO: www.bundeskartellamt.de. The fine is generally calculated by taking into account usually 10 per cent of the turnover generated with the cartelised products over the time period at issue. This amount will be multiplied by a certain factor according to the size of the undertaking and then mitigating or aggravating factors will be applied. The maximum fine is 10 per cent of the worldwide turnover of the entire group of companies to which the company concerned belongs.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

Yes, the FCO may factor into the fine calculation self-incriminating information that expands the scope of the conduct. However, voluntary disclosure may be considered as mitigating factor.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

No, fine reduction is available for all applicants who do not qualify for immunity because they are second or later through the door. The mere rank of the application is not relevant for the amount of the reduction. Moreover, the amount of the reduction lies in the discretion of the FCO and will be based on the respective added value of the contribution to uncovering a cartel and the sequence of the applications.

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

No, there are no particular incentives offered to an applicant that is the first non-immunity applicant.

52 Does the competition authority publish guidance regarding sentencing reductions?

The FCO published Fining Guidelines, a Leniency Programme, and Guidance on the settlement procedure.

53 Does the authority provide for "Amnesty Plus" benefits?

No, there is no Amnesty Plus benefit under German law.

54 How is the Amnesty Plus discount calculated?

There is no Amnesty Plus benefit under German law.

Cooperation obligations for sentencing reductions**55 Are the cooperation obligations similar to those for immunity applicants?**

Yes, see question 26 in that regard.

56 Will the applicant be required to make a written confession?

No, see question 27.

57 Can third parties obtain access to the materials provided by the applicant?

No, see question 28 above.

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

If an immunity applicant fails to comply with the duty to fully and continuously cooperate with the FCO because an employee of the applicant refuses to duly cooperate with the FCO, the applicant will not be eligible for immunity. However, if the applicant used all efforts to ensure that the employees cooperate, reduction should still be available. The refusal of employees to cooperate may affect the added value of the contribution to uncovering a cartel and, thus the amount of the reduction.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

See question 58 above.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

See question 31 above.

61 Can an applicant challenge the amount of the reduction of sanctions?

There is no precedent concerning an isolated appeal against the amount of the reduction. However, the applicant can appeal the decision as such and can limit the appeal only to the amount of the fine. It should be noted, however, that neither the Leniency Programme nor the FCO's Fining Guidelines will be applied by the court. Moreover, the competent Court of Appeals in Düsseldorf uses its own methodology of setting the fine (up to EUR 1 million for individuals and up to 10 per cent of the worldwide group turnover for companies). Nonetheless, the court can factor cooperation as mitigating into the decision.

Settlements**62 How is the settlement process initiated?**

There are no fixed procedural deadlines for settlement negotiations. After the FCO had the opportunity to assess available evidence and gain sufficient information, settlement talks may be initiated at any time by either the FCO or the companies/individuals concerned. If both sides are principally willing to settle, the FCO will orally or in writing set out the factual basis of the alleged infringement and propose a maximum fine that shall not be exceeded in case of a settlement.

Then, the party will be granted the right to be heard. Sometimes there are several meetings with the FCO in which the findings and the amount of the fine will be discussed. The FCO usually grants a limited access to the file (ie, disclosing the main evidence). If the parties are still willing to settle the case, the FCO will submit a proposal of a settlement including a summary of the preliminary results of the investigation, the maximum fine and a deadline for acceptance of the settlement proposal.

If the company or individual concerned accepts the final proposal the FCO submits a draft of the decision in order to grant the party the right to be heard. Finally, the company or individual concerned has to make the settlement declaration either in writing or orally in a hearing before the FCO. The declaration needs to be signed either way. Settlements are generally available not only for cartels but also for vertical agreements or other fine proceedings.

63 Is the amount of the sanction always fixed in the settlement agreement?

The settlement proposal made by the FCO contains a suggested fine that shall not be exceeded if the case is settled. The FCO generally calculates the fine

according to its usual fining guidelines. In horizontal cartel cases, the FCO generally grants a settlement reduction of 10 per cent of the fine.

64 What role, if any, do the courts play in the settlement process?

Courts are not involved in the settlement process. Settlement discussions only take place between the FCO and the undertaking and/or individuals concerned.

65 Are the settlement documents, including any factual admissions, made public?

The FCO does not publish the settlement statement or any other documents that have been created in the course of the settlement proceedings. In addition, one of the main procedural benefits of a settlement is that the FCO does not publish a reasoned decision but only a short form decision with much lesser details. In addition, the FCO regularly publishes a short case summary on its website summarising the decision. The case summary generally mentions in how far the case has been closed by way of a settlement procedure.

66 Is an admission of wrongdoing required?

The undertaking and/or individual has to sign a settlement declaration by which he or she acknowledges the factual findings and admits that the findings are true. The settlement declaration also contains an acknowledgment of the circumstances that are relevant to determine the fine as well as an acceptance of the fine up to the maximum amount proposed by the FCO. Further elements of the settlement declaration are a waiver of full access to the file and acknowledgment of the closure of the procedure by way of a simplified short-form decision.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?

The maximum fine reduction is 10 per cent for horizontal cartel infringements. The FCO usually applies this amount.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

No, the FCO can settle only with those subjects of the investigation that are willing to do so. Settlement negotiations are always bilateral.

69 Will the authority settle with subjects who refuse to cooperate?

Generally, settlements are voluntary. Insofar the FCO needs the cooperation of the undertakings and/or individuals concerned. However, it is not required to take part in the FCO's Leniency Program to qualify for a settlement.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

Any information provided or statements made during the settlement negotiations can be used by the FCO against the parties if the parties do not explicitly revoke the settlement declaration.

71 May a party to the settlement agreement void the agreement after it is entered?

The FCO must not ask for a waiver of the right to challenge the decision. The parties can appeal the settlement. In that case, however, the FCO will withdraw the short-form settlement decision and issue a normal reasoned decision including the full fine. It is not clear whether courts are bound by the settlement declaration. Therefore, it is advisable to explicitly revoke the settlement declaration.

72 Does the competition authority publish guidance regarding settlements?

A guidance paper can be found on the FCO website: www.bundeskartellamt.de

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He has worked on many complex transactions in his career and regularly represents companies in cartel and abuse of dominance investigations before the German Federal Cartel Office and the European Commission.

Mr Murach is a frequent author and speaker on antitrust issues. He has authored a handbook on German Merger Control (*Deutsche Fusionskontrolle, Erich Schmidt*, 2011) and co-authored a leading German commentary on EU antitrust law (*Frankfurter Kommentar zum Kartellrecht, Otto Schmidt*, 1982/2011). He lectures on German and European antitrust law at the University of Osnabrück in Germany.

Mr Murach is recognized by the *JUVE* Handbook among the leading Antitrust practitioners in Germany and is also recommended in Belgium: Competition by *Legal 500 EMEA* 2014.

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