

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

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

- Germany -

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Introduction

1. The German Competition Authority, the Bundeskartellamt, has an extremely successful key witness programme, the Leniency Programme.¹ It was established in 2000 and substantially revised six years later following an amendment of the competition law and in line with the ECN leniency model program. Today, more than half of all cartel proceedings are triggered by information from leniency applicants and the programme is one of the most successful Leniency Programmes of the world with 65 leniency applications in 42 cases alone in 2013. One of the ‘pillars’ of its success is the use of markers.

2. In this contribution, first a quick overview over the main features of the Leniency Programme is provided (2.) before the marker as one of the most important mechanisms within the programme is described in detail (3.). The contribution ends with some concluding remarks on the Bundeskartellamt’s experience with its Leniency Programme (4.).

2. The Leniency Programme

3. The Leniency Programme can apply to all participants in a cartel, natural persons as well as companies. The fine to be imposed on a cartel participant is waived if he is the first to contact the Bundeskartellamt in order to uncover the cartel. Immunity from fines can also be granted at a later date, if the Bundeskartellamt is provided with decisive evidence without which the existence of a cartel could not have been proved. The fine can be reduced by up to 50% for all other leniency applicants depending on the value of their contributions to proving the offence.

4. In this respect it is important at which stage of the cartel investigations the application for leniency has been made and whether the applicant has contacted the Bundeskartellamt before any other cartel member.

5. The Bundeskartellamt will grant a cartel participant immunity from a fine if he is the first participant in a cartel to contact the Bundeskartellamt before the latter has sufficient evidence to obtain a search warrant, and provides the Bundeskartellamt with verbal and written information and, where available, evidence which enables it to obtain a search warrant.

6. If the Bundeskartellamt is already in a position to obtain a search warrant, it will as a rule grant a cartel participant immunity from a fine if he is the first participant in the cartel to contact the Bundeskartellamt before it has sufficient evidence to prove the offence, and provides it with verbal and written information and, where available, evidence which enables it to prove the offence. To obtain immunity, the applicant must not have been the only ringleader of the cartel nor coerced others to participate in the cartel.

7. 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 the applicant provides information and/or evidence which makes a significant contribution to proving the offence. The amount of the reduction is based on the value of the contributions and the sequence of receipt of the applications.

8. To obtain immunity or a reduction of his fine, the applicant must cooperate fully and continuously with the Bundeskartellamt. In particular, the applicant must end his involvement in the cartel immediately upon the request of the Bundeskartellamt and submit all the information and evidence

¹ See also http://www.bundeskartellamt.de/EN/Banoncartels/Leniency_programme/leniencyprogramme_node.html

available to him after his application for leniency has been filed. He is also obliged to keep his cooperation with the Bundeskartellamt confidential until the Bundeskartellamt relieves him of this obligation.

9. A decision on a reduction of the fine is generally made at the earliest possible date after perusal and examination of all the information and evidence obtained by an earlier dawn raid and/or by other leniency applicants. In most of the cases, the Bundeskartellamt informs the applicant on the exact amount of the reduction after having filed its statement of objections.

3. The Role of Markers

10. The application process under the Bundeskartellamt's Leniency Programme usually starts with a marker, irrespective of whether it is an application for immunity or an application for a reduction of a fine.

11. 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, thereby setting a marker. The setting of a marker happens automatically, meaning that there is no discretion whether or not to accept the marker when the requirements are fulfilled. The timing of the placement of the marker is decisive for the status of the application.

12. Upon receiving the wish to cooperate and setting a marker, the case handler immediately confirms to the applicant in writing that a marker has been placed, stating the date and time of receipt. The applicant then has a maximum of 8 weeks to draft a complete leniency application, after having applied for a marker in order to safeguard his position in the leniency queue with the marker. This deadline cannot be extended. If the complete application is not received within the deadline, other leniency applicants have a chance to overtake the position of the previous applicant, which provides further incentives to cooperate as fast and completely as possible. The deadline is set by the respective case handler who may take into account time and resource constraints as well as problems or needs of the applicant in trying to meet the deadline to a certain extent.

13. In his extensive application the applicant must submit information which makes a significant contribution to proving the offence. Documents proving the infringement should be presented if available. If there are no such documents available, it might be sufficient to name the employees involved in the cartel agreement and to ensure that all employees, from whom information can be requested, cooperate fully and on a continuous basis with the Bundeskartellamt during the proceedings.

14. The Bundeskartellamt provides the applicant with information on the status of his application. It assures the applicant in writing that he will be granted immunity from the fine if the requirements for full immunity are satisfied and the marker is set before the Bundeskartellamt has gathered enough information for a search warrant. If the marker is set at the stage where enough information for a search warrant is already available or the application is for a reduction of the fine, the Bundeskartellamt initially only informs the applicant that he is the first, second etc. applicant and in principle (especially if he fulfils his duties to cooperate) is eligible for immunity or a reduction. Due to the Bundeskartellamt's relatively flat hierarchy the applicant can receive a quick feedback from the decision division that will take the final decision on the immunity/reduction of his fine. This provides a high degree of certainty for applicants.

15. The Bundeskartellamt has a very lean marker system. The application can be made in German, English, in writing, orally, by telephone or by fax and during or after a dawn raid. A valid marker in writing may only have the size of two pages. And setting a marker by telephone often takes only 10-20 minutes. An oral marker can be set quite informally, without, for example, making an appointment beforehand.

16. A marker application must state the type and duration of the cartel law violation, the product and geographic markets affected, as well as the identity of the cartel members. In addition, it must indicate at what other competition authorities applications have been or will be filed. Each of the mentioned criteria can, however, be fulfilled in just a few sentences.

17. While the scope of the marker has to be as clear as possible, minor uncertainties about the scope can be accepted to a certain extent as long as the full application meets the deadline and clarifies all open questions. For example, it may suffice if, when setting the marker, the type of the cartel is described as “customer allocation”, “price fixing” and/or “information sharing” without any in depth-description of the alleged behaviour. Also, the duration of the cartel law violation can be described providing ranges and estimates, for example “from at least 2002 until today”. Concerning the cartelized product, the definition has to be as exact as possible, but in practice the marker can be interpreted with the help of the full application.

18. Because there is one central court which is competent for deciding on all the search warrants requested by the Bundeskartellamt, it is possible to quickly come to a reliable assessment whether a leniency application meets the requirement of “enabling a search warrant”. This assessment is equally easy for the lawyers of the applicants. As a consequence, the demands made on the marker by the Bundeskartellamt can be comparably low.

19. The timing is extremely important concerning the potential reduction of the fine, as the (potential) amount of the reduction of the fine is based on both the evidentiary value of the application and its ranking. While the ranking of an application for a reduction is of essence, it is not the only element the Bundeskartellamt takes into account. There can be cases where a lower-ranking application with better evidentiary value may receive a higher reduction than an application with a prior ranking but poor evidentiary value. The first applicant eligible for full immunity who provides the relevant information as basis for a search warrant, however, keeps his position.

4. Conclusions

20. The Bundeskartellamt’s experience with its Leniency Programme, including the lean automatic marker system, has been extremely positive. The occasionally voiced concerns that a lot of markers could be received which provided no real grounds for suspicion and merely overburdened the authority proved to be unfounded. The burden on the Bundeskartellamt of managing the markers is not very high and clearly outbalanced by the positive effects resulting from the subsequent enforcement actions. At a conservative estimate, by uncovering and breaking up cartels the Bundeskartellamt has over the last years brought benefits to the German consumer of EUR 500 to 750 million a year.