



The Legal 500 Country Comparative Guides

Germany: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Germany.

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1. What is the relevant legislative framework?

Section 1 of the German Act against Restraints of Competition (GWB) essentially corresponds to Art 101(1) of the Treaty on the Functioning of the European Union (TFEU) and prohibits 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. Section 2 GWB is modelled on Art 101(3) TFEU and therefore contains an exemption from the general prohibition in case the conduct in question fulfils all subsequent conditions:

- It contributes to improving the production or distribution of goods or to promoting technical or economic progress.
- It allows consumers a fair share of the resulting benefit.
- It does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.
- It does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Section 28 to 31b GWB contain industry-specific regulation with regard to agriculture, the energy sector as well as press and water management contracts. Section 28 GWB for example exempts agricultural producers and their associations from the prohibition of restrictive agreements under certain conditions. It allows, however, not for resale price fixing or exclusion of competition. Section 30 GWB exempts resale price fixing for press products from the prohibition on restrictive agreements. Additionally, price fixing for books is mandatory in Germany according to the Law on the Fixing of Book Prices.

2. To establish an infringement, does there need to have been an effect on the market?

An effect on the market is not required to establish an infringement. An infringement can for example be caused by an anticompetitive agreement which undertakings conclude without actually implementing it (violation by object).

3. Does the law apply to conduct that occurs outside the jurisdiction?

The German law on restraints of competition applies to every conduct having an appreciable effect within Germany irrespective of where an undertaking involved in an infringement is based and whether the act of the infringement was conducted within or outside of Germany. There are no hard quantitative rules to determine whether a conduct is appreciable in Germany. Qualitative criteria may also play a role. As a general rule, the more severe the nature of a competitive restraint is, the more likely is it appreciable.

4. Which authorities can investigate cartels?

First and foremost, cartels are investigated by the German Federal Cartel Office

(Bundeskartellamt) in Bonn. Additionally, every state (Bundesland) has its own competition authority. The state competition authorities are competent to investigate cartels if their effect does not extend beyond the territory of a single state.

5. What are the key steps in a cartel investigation?

About half of all cartel investigations are initiated by leniency applications. Another way by which cartel investigations are regularly triggered are (anonymous) tip-offs. The Federal Cartel Office has set up a special online tool through which anonymous tip-offs can be submitted to the Federal Cartel Office.

In case of a leniency application the applicant usually places a marker first by declaring his willingness to cooperate. Thereafter, the Federal Cartel Office sets a time limit of up to eight weeks for the applicant to draft a leniency application containing information which is necessary in order to obtain a search warrant or which is necessary to prove the offence or - in case the applicant is not the first position leniency applicant in the case - is a significant contribution in proving the offence.

Often the competition authority will obtain a search warrant and search the premises of undertakings and/or persons involved in the alleged conduct. If the competition authority decides to pursue a case, it will formally initiate proceedings and inform the accused parties thereof.

However, the competition authority can also investigate the facts in other ways, for example by sending out information requests or by interviewing persons involved in the alleged conduct. Such interviews are also often conducted after a dawn-raid to further investigate the facts of the case and to gather additional information with regard to evidence obtained during the dawn-raid.

After completing its preliminary investigations, the competition authority informs the accused parties of its findings in a statement of objections, on which the parties can then comment.

The proceedings are concluded by the competition authority issuing a written fining decision or by sending a termination letter or. It may also simply de facto discontinue the investigation.

There is no specific timeline for an investigation.

6. What are the key investigative powers that are available to the relevant authorities?

Information requests

The competition authority is entitled to issue information requests to accused individuals and

undertakings. Although the accused have a comprehensive right to deny answers they are upon demand required to disclose information on

1. the total turnover of the undertaking or association of undertakings for the financial year that presumably was or is likely to be relevant for the authority's fining decision and for the five preceding financial years,
2. the turnover of the undertaking or association of undertakings generated within a defined or definable period with all customers or products, with specific customers or products, or with customers or products that can be determined by abstract criteria,
3. any corporate links, in particular via shareholdings, partnership and inter-company agreements, shareholder rights and agreements as well as the exercise of these, the rules of procedure and the meetings of advisory, supervisory and decision-making bodies and
4. the transfer and receipt of assets as well as changes in the legal structure in case of a possible (partial) universal succession, economic succession or in case the legal person or association of persons that were liable ceases to exist after the notification of initiation of administrative fine proceedings or if assets are transferred resulting in a situation where a fine that would be adequate for the undertaking cannot be imposed on it or its legal successor or is not likely to be enforceable.

A planned amendment of the German Act against Restraints of Competition in implementation of the ECN+ Directive, which is expected to come into force by beginning of 2021, will probably extend the competition authority's powers to demand information from the accused. According to the current state of the draft bill it will require accused individuals, undertakings and associations of undertakings to provide all documents and information available in the company to the competition authority upon its request. Representatives of the undertaking or association of undertakings may be interviewed by the competition authority in this context. They shall only be entitled to refuse to answer questions if the answer would expose themselves or a member of their family to the risk of prosecution.

Dawn raids

In order to investigate a factual situation, the competition authority may also search business and private premises of suspects as well as suspects themselves. The search of premises will usually also include the search of computer systems and electronic storage media such as laptops, mobile phones, USB flash drives etc.

According to a planned amendment of the German Act against Restraints of Competition individuals may in future be required to cooperate during a search for example by providing information necessary to access evidence or by providing explanations of facts or documents that could be related to the object and purpose of the search.

Interviews

The competition authority is also entitled to interview witnesses and suspects. Other than suspects, witnesses are generally obliged to testify. A witness has a right to refuse to give information only with regard to questions, the answer to which would expose himself or a member of his family to the risk of prosecution. Other than that, a witness may be ordered to bear the costs incurred and an administrative fine or detention order of up to six weeks can be imposed on him in case he or she refuses to testify altogether or with regard to certain questions. A false statement of a witness may constitute a criminal offence.

Expert witnesses

The competition authority may call in an expert witness during the investigation.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

Currently companies and individuals accused of a competition law infringement are not obliged to produce or provide any documents during proceedings regarding a criminal or administrative offence. However, according to the planned amendment of the German Act against Restraints of Competition in implementation of the ECN+ Directive the German competition authorities may in the future demand the provision of information and documents from accused individuals, companies and associations of companies.

Records of the defence lawyer as well as written communication between him and the accused are legally privileged and may not be confiscated by the competition authorities as long as they are in the possession of the defence lawyer. This does, however, not apply to in-house counsel. Also, it must be noted that the German legal privilege generally only applies to lawyers admitted in Germany and in a situation where the lawyer was (already) appointed to defend his/her client in proceedings regarding a criminal or administrative offence. It does therefore not apply in case the legal counsel is only mandated to conduct internal investigations or to advice rendered prior to the initiation of proceedings.

Additionally, all documents in the possession of the accused that were produced for the purpose of defence in the course of proceedings regarding a criminal or administrative offence are legally privileged regardless of who their author was (i.e. the defence lawyer, inhouse counsel or other employees of the accused undertaking).

The European legal privilege goes beyond the protection by German law described above. It includes all written communication between lawyers practicing in a member state of the European Union and clients connected to 'the client's rights of defence' if the exchange emanates from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment' (European Court of Justice in Case C-550/07 P *Akzo Nobel* [2010] I-8301, para 40, 41). European legal privilege does, therefore, also apply to documents produced in the run-up to cartel proceedings. Although the European legal privilege does, so

far, not apply in German cartel proceedings, this might change after the planned amendment of the German Act against Restraints of Competition will have come into force probably by the beginning of 2021.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The details of the Federal Cartel Office's leniency programme are currently laid down in the agency's Notice no. 9/2006. According to the planned amendment of the German Act against Restraints of Competition in implementation of the ECN+ Directive the leniency programme and its conditions will be included into the bill and will therefore be regulated by law.

Full immunity is granted to a cartel participant according to the leniency programme if it

1. is the first participant in a cartel to contact the Federal Cartel Office before the latter has sufficient evidence to obtain a search warrant and
2. provides the Federal Cartel Office with verbal and written information and, where available, evidence which enables it to obtain a search warrant and
3. was not the only ringleader of the cartel nor coerced others to participate in the cartel and
4. cooperates fully and on a continuous basis with the Federal Cartel Office.

In case the Federal Cartel Office is already in the position to obtain a search warrant but no other company is granted full immunity by fulfilling the above conditions, the first company to cooperate with the Federal Cartel Office can still be granted full immunity if it provides the Federal Cartel Office with verbal and written information and, where available, evidence which enables it to prove the offence (while also fulfilling the conditions (iii) and (iv) set out above).

The applicant's obligation to cooperate fully and continuously includes that it

- ends its involvement in the cartel immediately on request by the Federal Cartel Office,
- hands over to the Federal Cartel Office all the information and evidence available after the application for leniency has been filed; this includes in particular all information which is of significance for calculation the fine which is available to the applicant or which it can procure,
- keeps his cooperation with the Federal Cartel Office confidential,
- an undertaking names all employees involved in the cartel agreement (including former employees) and ensures that all employees, from whom information and evidence can be requested, cooperate fully and on a continuous basis with the Federal Cartel Office during the proceedings.

An applicant for leniency must submit information in its leniency statement which is necessary to either obtain a search warrant or to prove the offence (see above) or, in case it

is not the first applicant in this case, which is significant in proving the offence (see next question). A leniency application may also be filed verbally and/or in English.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

With regard to a leniency applicant who does not meet the criteria to be granted full immunity (see above) the Federal Cartel Office may reduce the fine by up to 50% if the applicant

- provides verbal or written information and, where available, evidence which makes a significant contribution to proving the offence and
- cooperates fully and continuously with the Federal Cartel Office.

The actual amount of the reduction of the fine depends on the sequence of the applications and on the value of the contributions to the investigation.

10. Are markers available and, if so, in what circumstances?

By declaring willingness to cooperate with the Federal Cartel Office ('marker'), a cartel participant can temporarily secure its position in the order of incoming leniency applications. The marker must contain details on the type and duration of the infringement, the products and territories affected, the identity of those involved and to which other competition authorities' applications have been or are intended to be filed. A marker may be set verbally or in writing, in German or English.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

The ongoing cooperation of a leniency applicant with the Federal Cartel office requires the applicant to provide further information on the alleged infringement in case this information comes to his attention during the Federal Cartel Offices investigation. Also, the applicant is supposed to provide further documents or explanations upon the Federal Cartel Office's request. The agency might for example come up with additional questions after having reviewed the leniency application or evidence obtained during a dawn raid or provided by other leniency applicants.

As part of the cooperation the applicant must keep its cooperation with the Federal Cartel Office confidential until the agency relieves him of this obligation which is usually the case after a search has been concluded.

Also, the applicant must end his involvement in the cartel immediately on request by the Federal Cartel Office.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Immunity granted to an undertaking under the Federal Cartel Office's leniency programme does not lead to immunity from prosecution for a criminal or administrative offence for the undertaking's employees and directors.

The Federal Cartel Office is not authorised to give commitments with regard to possible criminal prosecution. However, criminal prosecution in cartel cases in Germany primarily relates to cases of bid rigging. Other forms of cartel agreements usually do not constitute a criminal offence under German law.

13. Is there an 'amnesty plus' programme?

There is no 'amnesty plus' programme available in Germany. The only alleviation for a person or company that has been offered full immunity from fines is that in follow-on damages proceedings there is a limited joint and several liability with other cartel participants. This means that in principle this person is only liable to its own customers or suppliers for the damages they suffered from the cartel (yet not limited to own supplies).

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The Federal Cartel Office may and regularly does enter into settlements to terminate cartel proceedings. The authority decides at its own discretion which cases are suitable for a settlement.

As part of the settlement the accused is required to issue a statement of confession ('settlement declaration') containing a description of the offence, information on the circumstances that are relevant for setting the fine and the declaration that he acknowledges the facts of the infringement of which he is charged and accepts a fine up to the amount announced. The accused does, however, not waive his right to appeal as part of a settlement.

There is no formal procedure for the settlement process. Settlement discussions can be initiated both by the authority and the accused and usually start after the Federal Cartel Office has sifted through the evidence and gained a clear view on the case.

It is not necessary for the authority to issue an extensive notice of hearing before entering into settlement talks. In case both sides are generally willing to terminate the proceedings by entering into a settlement, the Federal Cartel Office informs the accused orally or in writing of the facts of the alleged infringement. The authority generally grants at least partial access to the file and hears the accused. The agency then proposes a maximum fine which will not be exceeded in case of a settlement. The accused is offered the proposition of a settlement

declaration including a summary of the results of the investigation. It is usually only possible to influence the content of the settlement declaration to a very limited extent. The settlement declaration can be submitted either in writing or orally during a hearing but it must, however, be signed by the accused or in case of a company by a representative. The settlement negotiations are recorded in the Federal Cartel Office's file.

There are no formal requirements for the settlement agreement itself. No court approval is needed for it to come into force.

After the settlement has been reached the Federal Cartel Office issues a short-form fining decision by which the proceedings are terminated. The short form decision usually only contains limited information on the offence.

Hybrid settlement are generally possible in Germany. The experience shows, however, that the Federal Cartel Office often endeavours to coordinate the timing of settlement procedures and to issue fining decisions simultaneously if possible.

15. What are the key pros and cons for a party that is considering entering into settlement?

First and foremost, a settlement will lead to a reduction of the fine by up to 10%. In case the fine is also reduced due to a leniency application, the settlement reduction is deducted from the amount of the reduced fine.

Besides reducing the fine a settlement leads to additional cost savings by ending the proceedings and providing legal certainty for the accused.

It might sometimes also be possible to take some influence on the scope of the fining decision during settlement talks. In some cases, the authority may be willing to limit the fining decision to a certain time period or to the main aspects of the alleged infringement. Such a limitation may also lead to a further reduction of the fine as both the duration and the scope of the infringement have an impact on the amount of the fine.

The issuance of a short form fining decision following a settlement may also be preferable with regard to possible claims for damages. Potential claimants generally get significantly less information from short form decisions than they would get from a detailed fining decision.

A settlement does not limit the accused's right to appeal the fining decision. In case of an appeal the Federal Cartel Office will, however, withdraw the short form decision and instead issue a detailed fining decision as a basis for the appeal proceedings.

On the other hand, there are some major downsides to be considered in entering into a settlement. The indispensable requirement to admit the alleged violation of law within the settlement declaration may for some accused be unacceptable with regard to possible reactions of business partners, customers or other authorities and courts.

By not being granted full access to the file and by often entering into a settlement before the investigations are fully concluded the accused waives essential procedural and defence rights.

Also, it must be noted that regarding possible follow-on damage claims the earlier termination of proceedings due to a settlement may be disadvantageous by making the settling party a priority target of damage claims.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

Currently, there is one formal bilateral cooperation agreement in force: The agreement between the government of the United States of America and the government of the Federal Republic of Germany relating to mutual cooperation regarding restrictive business practices (effective since 23 June 1976). This agreement determines specifically the exchange of information (e.g. reports, interviews, decisions of administrative or judicial bodies), cooperation during antitrust investigations and proceedings (e.g. attendance of public officials to give testimony or expert opinions), as well as regular exchange of competition policy and changes in antitrust laws.

Also, there are formalised international cooperations (e.g. the International Competition Network). In Europe, the most important cooperation between competition authorities is the European Competition Network ("ECN"). This includes, in particular, the exchange of information about cases and decisions taken by the member competition authorities and mutual assistance with investigations. Details of the cooperation system of ECN are provided in the Commission Notice on cooperation within the ECN of 27 April 2004 (2004/C 101/03).

Although the ECN Model Leniency Programme (November 2012) has set out a framework for ECN members to align their respective programmes, the leniency programmes are not yet fully harmonised at a European level. For example, an application for leniency to one authority is not to be considered as an application for leniency to Federal Cartel Office. It is therefore in the interest of the company involved to apply for leniency to all competition authorities simultaneously in each of the territories which might be affected by the infringement.

17. What are the potential civil and criminal sanctions if cartel activity is established?

- Civil sanctions

Any agreement which infringes the prohibition to restrict competition is void. Also, whoever violates an anti-trust provision or a decision taken by a German competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements.

- Administrative sanctions

A German competition authority may impose administrative fines on companies, associations of companies and their representatives. The fine for a natural person is limited to EUR 1 million. A company and an industry association can be fined up to 10% of the total turnover in the business year preceding the decision of the competition authority. The turnover will be calculated based on the turnover achieved by the “economic unit”, i. e. the entire company group behind the infringing company.

- Criminal sanctions:

Apart from specific criminal rules concerning collusive tendering and fraud (Sections 298 and 263 of the German Criminal Code, both only apply to natural persons), there are no criminal sanctions for cartel activities in Germany.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The scope for setting a fine 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. Both offence-related and offender-related criteria shall be taken into consideration. In particular, the type and duration of the infringement, its qualitative effects, the economic situation of the company, the role of the company in the infringement and its extent of intention/negligence will play a role. The Federal Cartel Office has set out further details in its Guidelines for the setting of fines in cartel administrative offence proceedings of 25 June 2013.

With regard to possibilities to reduce the fine, cartel participants can be granted full immunity from or a reduction of fines up to 50% in line with the Leniency Programme of Federal cartel Office. A settlement with the Federal Cartel Office may also lead to a reduction of the fine (in horizontal cartel cases 10%). Since a settlement can be concluded independently of a leniency application, the fine can be reduced twice in such cases.

Federal Cartel Office recently imposed fines totalling around EUR 646 million on stainless steel manufactures in 2019.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Not only the infringing company, but also its parent company exercising direct or indirect “decisive influence” at the date when the infringement was committed can be subject to a fine. This provides a strict liability of the parent company for cartel infringements of its subsidiaries. If fines are imposed on both, the infringing subsidiary and the parent company are jointly and severally liable.

20. Are private actions and/or class actions available for infringement of the cartel rules?

The German legal system has an effective private damages regime for the compensation of the loss suffered as a result of cartel conduct. Damages claims are primarily based on Sections 33a to 33h GWB. A further legal basis can be found in the general tort law, Section 823 et seq German Civil Code. In addition, private parties can claim for injunction and rectification pursuant to Section 33 GWB. Claims for injunctive relief or damages may under certain circumstances also be based on Sections 8 and 9 Act against Unfair Competition. For the purpose of enforcing the claims, claimants may have the right to have evidence surrendered and information disclosed by the infringer, which is required for the claimant to substantiate and prove the prerequisites of a damage claim (Section 33g GWB).

Class actions are not available. There is a possibility of submitting bundled damages claims through third parties. However, if the third party brings the claims through a special purpose vehicle, which has been established only to claim damages on its own behalf, the foundation of this vehicle must be examined carefully. In particular, in a case regarding the bundling of damages claims against the members of the truck cartel, the Munich district court indicated in its judgment of 7 February 2020 that such business model was not permitted under the Act on Out-of-Court Legal Services.

21. What type of damages can be recovered by claimants and how are they quantified?

Pursuant to Sections 249 et seq German Civil Code, damage claims are restricted to the compensation of actual loss including lost profits. Punitive or exemplary damages are not available.

Generally, cartel damages are calculated by comparing the financial situation of the claimant during the cartel period, and the hypothetical situation in which it would have been under competitive conditions, but for the infringement. Regarding the quantum of the damage Section 287 Code of Civil Procedure provides that the court can estimate the amount of damages based on an overall assessment, while all circumstances of the case must be taken into account. As a basis for such an estimation, the courts can order independent experts to render an economic analysis quantifying the amount of damages.

22. On what grounds can a decision of the relevant authority be appealed?

Cartel participants can appeal final fining decisions. The appeal court (the Higher Regional

Court) will independently investigate the alleged violation, take evidence and hand down an own fining decision, consider options for a settlement, or discontinue proceedings. It is not possible to appeal individually a decision that grants or rejects leniency.

23. What is the process for filing an appeal?

The appeal has to be filed in writing within two weeks from service of the decision. The appeal has to be filed with the competition authority.

A further appeal on points of law against the judgment of the appeal court (the Higher Regional Court) is permitted to the Federal Court of Justice.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

According to a press release of 12 December 2019, the Federal Cartel Office has imposed fines totalling around EUR 646 million on 3 steel manufacturers and 3 individuals responsible for exchanging information on and agreeing certain price supplements and surcharges for quarto plates from mid-2002 until June 2016 in Germany. The illegal agreement was based on the mutual understanding and aim of the participating companies to negotiate with their customers on the base prices only. All companies admitted the accusations made by FCO and agreed to a settlement. One other company was the first company to cooperate with FCO and was granted full immunity from fines.

One other notable cartel case involved the sale of plant protection products. In December 2019 and January 2020, the Federal Cartel Office imposed fines totalling EUR 154.6 million on 7 wholesalers of plant protection products and their responsible employees for agreeing on price lists, discounts and some individual sales prices to retailers and end customers in Germany between 1998 and March 2015. All 7 wholesalers concerned cooperated with the Federal Cartel Office by applying for leniency. One other company was exempt from a fine since it was the first company to cooperate. Investigations against two further companies are ongoing.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?

In 2019, Federal Cartel Office imposed fines of approximately EUR 848 million on 23 companies or trade associations and 12 individuals for cartel infringements, which is more than twice as high as in the previous year. The sectors concerned included bicycle wholesale, building service providers, magazines, industrial batteries, purchase of steel for the automotive industry and steel production. In total 16 cartel participants have provided Federal Cartel Office with information on cartel infringements in their industry by making use of the leniency programme. This marks a further decline in leniency applications for the third year in a row, which could primarily be affected by the increased risk of follow-on

damage claims due to the implementation of the EU directive governing actions for damages for infringements of competition law of November 2014.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

In 2020, the focus of developments of German competition law will be the adoption of the new competition bill. The draft bill for the 10th amendment to Act against Restraints of Competition (“ARC-Digital Competition Act”) aims to develop the anti-trust rules regarding the digital economy and to transpose the provisions of the ECN+Directive (EU) No. 2019/1. In addition, the legal framework for cartel damages will be further developed and the turnover thresholds in merger control will be increased.

With regard to case-law, the German Federal Supreme Court indicated in a decision of 28 January 2020 that the practice of many regional courts separating cartel damage proceedings in two phases (first phase: judgment on the merits of the claim i.e. the ground and prerequisites of the claim as well as the possibility that a plaintiff has suffered any harm; second phase: judgment on the amount of the damage) could lead to an unjustified delay and increase in procedural costs and should therefore be applied more carefully. Taking this judgment and the fact that there is still a large number of cartel damage claims pending before the German courts (e.g. in the European trucks cartel) into consideration, it is most likely that there will be a number court decisions on the issues of causality and quantum of cartel damages in the near future.