



## **Guidelines on leniency for cartel activities**

These guidelines show how the Danish Competition Authority deals with an application for leniency for participation in cartel activities. It is essential that persons or undertakings that apply for leniency are treated in a uniform, transparent and effective manner.

### **Withdraw from the cartel:**

- Ring the Danish Competition authority on tel. no. +45 2547 2222
- Send an e-mail to [leniency@ks.dk](mailto:leniency@ks.dk)
- Send a fax to +45 3318 1425

### **What is a cartel?**

A cartel is an illegal agreement between competitors that restricts competition. Cartel activities are characterised by the fact that they are difficult to expose, because the cartel participants have a common interest in keeping their agreement secret.

Typically, cartel agreements concern themselves with:

- *Prices*

A cartel may be an agreement to standardise purchase or sales prices, an agreement on uniform price increases, an agreement on uniform discounts or an agreement that prevents the participants from granting discounts.

- *Restrictions of production*

A cartel may be an agreement as to what or how much the individual participant in the cartel can produce or sell.

- *Market sharing*

A cartel may be an agreement to share the market in geographical areas between the cartel participants and prohibiting activity in each others' areas. A cartel may also be an agreement between the cartel participants to share customers or customer categories, or about import or export restrictions.

- *Bid-rigging*

A cartel may be an agreement on bid-rigging or a system that coordinates the bids between the participants by choosing in advance the undertaking that will win the order.

## **Why are cartels forbidden?**

Cartels result in higher prices and less choice for consumers. For this reason, anti-competitive agreements – and so-called concerted practice – between undertakings are forbidden under Section 6 of the Danish Competition Act and Article 81 of the EU Treaty. Cartel formation is a serious form of economic crime. An undertaking may therefore be ordered to pay a fine for having participated in a cartel.

It is not only undertakings that may be punished. The manager or chairman of the board may also be ordered to pay a fine.

Participation in a cartel is an extremely serious infringement of the Danish Competition Act, and may be punished by fines exceeding DKK 15 million. However, in some cases there may be circumstances of an extenuating nature, and here the fines may be lower.

Even if an undertaking has participated in a cartel, the new Danish Competition Act has made it possible to obtain leniency, so that the fine is either remitted in its entirety or reduced.

## **What does leniency mean?**

Leniency for participation in a cartel is a blanket term covering either immunity from fines (dismissal of all charges) or reduction of fines.

- Immunity from fines means that no charge is brought at all, i.e. the undertaking or person concerned is not punished at all for having participated in the cartel.
- Reduction of fines means that the fine levied against the undertaking or person concerned is reduced.

## **Why offer leniency?**

The aim of offering leniency is both to make it easier to expose cartels and to reduce the desire to participate in a cartel at all.

Experience from other countries has shown that the option of leniency has a major preventive effect. It increases the risk of exposure of cartel participants, since all undertakings now have the option of approaching the authorities and informing them about a cartel in which they have participated, and applying for leniency.

## Immunity from fines

The following conditions must be complied with to qualify for immunity from fines:

- The applicant is the first to approach the authorities about the cartel.
- The applicant shall provide information about the cartel not previously in the possession of the authorities.
- This information shall give the authorities occasion either:
  - a. to undertake an inspection, a search or inform the police,or
  - b. to confirm that there has been an infringement of the Danish Competition Act in the form of a cartel (an inspection or search has already taken place).
- The applicant shall cooperate with the authorities throughout the procedure.
- The applicant shall have brought his participation in the cartel to an end at the time of application for leniency.
- The applicant must not have taken steps to coerce one or more undertakings to join the cartel.

Both undertakings and persons may apply for leniency. The most important point is that the applicant is the first, and that the applicant provides the authorities with information about a cartel which was not previously known.

On the basis of the applicant's information, the Danish Competition Authority (DCA) may undertake an inspection, or the Public Prosecutor for Serious Economic Crime (SEC) may search the premises of the cartel participants. It may also be the case that the information is so detailed that the DCA may immediately lay information with SEC.

If an applicant approaches the authorities at a time when there have already been inspections or searches of the cartel, it is still possible to obtain immunity from fines. Since the authorities already know about the cartel, it is required in such a case that the applicant provides information that makes it possible for the authorities to verify an infringement. This means that the information must be much more detailed than the information of which the DCA or SEC may have come into possession via the inspection or search. It is still essential that the applicant should be the *first* of the cartel participants to approach the authorities, and that the other requirements are complied with.

## Reduction of fines

If the applicant is not the first in a particular cartel who approaches the authorities, the application is automatically dealt with as an application for reduction of fines.

The following conditions must be complied with for reduction of fines to be granted:

- The information that the applicant provides about the cartel must contain **significant added value** for the authorities as compared to the information already in the possession of the authorities.
- The applicant shall cooperate with the authorities throughout the procedure.
- The applicant shall have brought his participation in the cartel to an end at the time of application for leniency.
- The applicant must not have taken steps to coerce one or more undertakings to join the cartel.

In these cases, the authorities already know about the cartel. The most important thing is therefore that the applicant provides information about the cartel that constitutes “significant added value” as compared to the information already in possession of the authorities. “Significant added value” means that the information should be of such a quality and degree of detail that it increases the chances of proving the cartel’s existence.

If the applicant is the second one to apply, it may be possible to reduce the fine by 50% of the amount that would otherwise have been levied on the party concerned. This assumes, as already stated, that the applicant’s information constitutes significant added value as compared to the information which the authorities have already received from the first applicant. This situation also covers an applicant who had originally applied for immunity from fines, but where it proves to be the case that the party concerned is not the first but actually the second applicant.

In the case of the next applicant (no. 3), the reduction of fines may amount to 30%, and for subsequent applicants up to 20%. In each individual case it is a requirement that the specific applicant presents information which, seen in relation to the information already in possession of the authorities, represents significant added value.

## Practical aspects of the application process

The application process involves a number of practical aspects. See also *Questions and answers about leniency*.

### ***Who is covered by an application?***

When a person applies for leniency, the application applies only to the person concerned. By way of example: an application from a salesperson employed by an undertaking applies only to that salesperson – not to the undertaking as such.

If an application is to apply to an undertaking, it must be submitted by a person authorised to sign for the undertaking (such as a manager), and this authorised person must expressly state that it is the undertaking that is applying for leniency.

An application from an undertaking automatically covers all present and previous members of the board, managing directors and other employees.

If an application is to cover several companies within a group, this should be explicitly stated in the application.

***Can a lawyer apply for leniency on behalf of a client?***

The application form is drawn up in such a way that a lawyer may apply for leniency on behalf of a person or an undertaking.

***What should the application contain?***

An application form is available here. It is not a requirement that the application form be used in application for leniency. However, the following minimum information is necessary to allow the Danish Competition Authority to process the application:

- Name and address of the applicant.
- Names and addresses of the undertakings that have participated in the cartel.
- The products with which the cartel has been concerned.
- The geographical markets in which the cartel has operated.
- What the cartel has been aiming at (e.g. price agreement or market sharing).
- How long the cartel has been in existence.

***Which authority should the application be directed to?***

An application should be submitted to the Danish Competition Authority (DCA).

If the Public Prosecutor for Serious Economic Crime (SEC) has already initiated a criminal case concerning the cartel – i.e. if SEC is in the process of investigating the cartel, or SØK has brought a charge against an undertaking or a person – the application may also be submitted to SEC.

If an application is submitted to SEC at a time at which SEC has not already started a case, SEC will refer the applicant to the DCA. The application is not valid until the time its reception is recorded by the DCA. The safest course is therefore to submit applications to the Danish Competition Authority.

***What is the best way in which to submit an application?***

The best way to submit an application is by a personal visit to the Danish Competition Authority or SEC. In the reception, the applicant should ask to speak to one of leniency officers.

The address of the DCA:

**Konkurrencestyrelsen  
Nyropsgade 30  
DK - 1780 København V**

The address of SEC is:

**Statsadvokaten for Særlig Økonomisk Kriminalitet  
Bryggervangen 55, 3.  
DK - 2100 København Ø**

Personal attendance allows the applicant to pass on the necessary information in a safe and rapid manner. A receipt showing the date and time of reception of the application will also be issued.

However, personal attendance at the DCA does not prevent the applicant arranging an appointment by telephone in advance.

Telephone the Danish Competition Authority on telephone number: +45 2547 2222

***Is it possible to ring, send an e-mail, a fax or a letter?***

It is possible to apply for leniency by ringing, sending an e-mail, a fax or a letter to the DCA, but a receipt (i.e. the document that also determines the applicant's status in terms of time) is not issued until the applicant has provided information about the cartel that is of sufficient quality.

By sufficient quality is meant that

(a) The information puts the DCA or SEC in a position to consider whether to carry out inspections, searches or inform the police.

Or

(b) Inspections or searches have already been carried out, but the information puts the DCA or SEC in a position to verify an infringement of the Danish Competition Act as a consequence of the cartel activities.

If an application is sent by ordinary post to the Danish Competition Authority, it should be directed to "the leniency officer".

An application delivered on a working day (to the DCA letterbox, or without simultaneous personal attendance) to the Danish Competition Authority before 10.00 a.m. is considered to have been received on that day at 10.00 a.m.

An application that is delivered to the Danish Competition Authority on a working day after 10.00

a.m. and before 4.00 p.m. (NB: Friday 3.00 p.m.) is considered to have been received at the actual time when the leniency officer receives it.

An application that is delivered to the Danish Competition Authority on a Saturday, Sunday, holiday or a day on which the Danish Competition Authority is closed is considered to have been delivered on the first working day thereafter. Applicants should be aware that there may be special non-working days, e.g. in connection with festivals.

NB: If two or more cartel participants agree or otherwise coordinate their action in order to submit an application at the same time, neither of the applicants qualifies for leniency.

***Is it possible to apply for leniency during an inspection or a search?***

It is possible to apply for leniency during an inspection or a search. However, by this time the authorities will often already know about the cartel. If this is the case, highly detailed information about the cartel must be provided if an application is to be feasible.

***Can you “reserve a place in the queue”?***

The Danish Competition Authority cannot give consideration to an application if, for example, an applicant says he is applying for leniency but that information about the cartel will be provided only at a later time. Detailed information about the cartel must be provided at the time the application for leniency is submitted.

***What is the procedure in the event of a cartel with undertakings in other EU states?***

In the event of participation in a cartel with undertakings from other EU states, leniency for infringement of the competition rules in the other states cannot be obtained by an application to the DCA or SEC. Leniency must therefore be sought in each of the other states covered by the cartel. The Danish Competition Authority can provide the address details etc. for competition authorities in the other EU states, including the EU Commission.

If a cartel has been operating in three or fewer EU states, an application for leniency should be submitted in each of the three EU states.

If a cartel has been operating in more than three EU states, an application for leniency should be directed to the EU Commission.

However, the competition authorities in the EU states<sup>1</sup> have agreed on a system in which a cartel participant can submit a full application to the EU Commission a summary application to the competition authorities in other relevant EU states.

---

<sup>1</sup> The EU states (as of 1 January 2007) are: Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Great Britain, Sweden, the Czech Republic, Germany, Hungary and Austria.

## The rights of an applicant

### ***Is it possible to take a lawyer to meetings with the Danish Competition Authority?***

We recommend that those applying for leniency are accompanied by a lawyer at meetings with the Danish Competition Authority.

### ***Is an applicant guaranteed confidentiality?***

The DCA has a general interest in ensuring confidence in the administration of the leniency rules. This also means that the DCA will pay the necessary consideration to discretion. Furthermore, the Danish Competition Authority staff is subject to duty of confidentiality and will therefore treat an application accordingly.

However, applicants should be aware that it is impossible to preserve complete anonymity. For example, in the case of a cartel in which both Danish undertakings and undertakings from other EU states have been participating, the DCA is obliged to inform the Commission and the competition authorities in the other EU states of the application for leniency.

It should also be noted that the DCA is obliged under the Danish Competition Act to publish a summary of cases in which an undertaking has accepted a fine before the DCA, SEC or a court.

### ***Is the applicant entitled to access the details the DCA holds concerning the case?***

When an application for leniency is submitted to the DCA, a case will be initiated in which the applicant will be a party.

A party is entitled to access to the documents in the case, though this does not apply to the DCA's internal working documents. Furthermore, verification and prosecution of a breach of the law may involve certain documents that the applicant is not entitled to see.

## The duties of an applicant

Applicants for leniency also have some duties.

### **The applicant MUST:**

- have ceased to participate in the cartel when the application for leniency is submitted.
- cooperate faithfully, fully and effectively throughout the case.
- present all information and all evidence about the cartel to which the applicant has access, comes into possession of and by reasonable means can obtain.
- at any time be available to give a prompt answer to questions from the authorities.

**The applicant must NOT:**

- give incorrect or misleading information, suppress factual details or distort the information given.
- draw the attention of the other cartel participants to the fact that an application has been submitted (e.g. by approaching the other participants or through a press announcement). However, this applies only until the authorities have informed the other cartel participants that the cartel is being investigated through an inspection or a search.

**The applicant may IF HE WISHES:**

- submit an application for leniency to the competition authorities in other countries (this is not a breach of his duty to cooperate).

**The course of a case**

If a criminal case is brought against the cartel, its course may typically involve the following three phases:

***Phase 1:***

The case starts with the submission of an application for leniency to the Danish Competition Authority (DCA). The applicant must have ceased its participation in the cartel.

An application may also be submitted to the Public Prosecutor for Serious Economic Crimes (SEC) if SEC has already started a case (i.e. initiated a criminal investigation or brought a charge against a person or an undertaking).

If an application is submitted to SEC at a time at which SEC has not already started a case, SEC will refer the applicant to the DCA. The application is not valid until the time its reception is recorded by the DCA.

The applicant will then be issued with a receipt showing the date and time of reception of the application.

If the applicant is the first, the DCA or SEC will be able to undertake an inspection or search on the basis of the applicant's information. If an inspection or a search has already been carried out, but the applicant is still the first of the cartel participants to approach the DCA or SEC, the information must put the DCA or SEC in a position to confirm that there has been an infringement of the Danish Competition Act.

If the applicant is not the first of the cartel participants to provide information about the cartel, the information must constitute significant added value to the DCA and SEC.

**Phase 2:**

The applicant receives a provisional assurance that the conditions either for immunity from fines or reduction of fines have been met. The applicant is also told where in the queue his application is placed. The assurance is issued subject to the proviso that the applicant cooperates throughout the rest of the case, and that information does not emerge to the effect that the applicant has taken steps to coerce others to join the cartel.

A provisional assurance is issued by the authority that has received an application for leniency.

**Phase 3:**

If the applicant meets the conditions for immunity from fines, he will be informed of this by the Public Prosecutor for Serious Economic Crimes (SEC). This is because the DCA is not competent to issue a dismissal of all charges.

The criminal case against the other cartel participants will be judged by a court. If the applicant has applied for reduction of fines, the case may then be concluded by a fixed penalty notice or acceptance of a fine before a court.

A fixed penalty notice means that the applicant – without the involvement of a court – pays the fine that either the DCA or SEC dictates he must pay. This however assumes that the applicant declares himself guilty of participating in a cartel and agrees that the case should be settled in this manner. The fine that the applicant is to pay takes into account whether the applicant qualifies for a fine reduction of 50%, 30% or up to 20%.

If the applicant wishes it to be a court that imposes the fine, this is also possible provided the applicant declares himself guilty and the judge is in no doubt.

If during the processing of a case the DCA or SEC decides that the application is not capable of proceeding to the next phase, this implies that one or more of the conditions has not been complied with, and the applicant will not qualify for leniency for having participated in a cartel.

**Questions and answers about leniency**

Below we answer some questions that have not already been dealt with. The Danish Competition Authority will be happy to answer any additional questions that may not be referred to below.

***Are only “new” cartels covered?***

No. It is possible to receive leniency for cartel activities that existed before the rules came into force on 1 July 2007. It is also possible to receive leniency for cartel activities that had ceased prior to 1 July 2007.

***Are there times when it is particularly appropriate to apply for leniency?***

Any party who has participated in a cartel should always consider applying for leniency. If as the purchaser of an undertaking a party comes into possession of material that may indicate that the undertaking being purchased has participated in cartel activities, there may be occasion to apply for leniency. The same may apply if a new manager, board member or employee becomes aware of activities indicating that the undertaking has participated in a cartel.

If the DCA or SEC are engaged in an inspection or search of an undertaking, it may be appropriate to apply for leniency – provided, of course, that the undertaking has participated in a cartel.

If the board of an undertaking becomes aware that a previous manager has participated in a cartel, it will also be appropriate to apply for leniency.

***Is it still possible to obtain leniency if an undertaking has been the initiator of a cartel?***

Yes, leniency may be obtained even if an undertaking has initiated the cartel or played a leading part in it, but the undertaking should be aware that there may be different rules about this in other EU states.

***Can an undertaking also obtain leniency for having agreed binding resale prices or abused a dominant position?***

No. Leniency may be obtained only for cartel agreements, i.e. agreements between competitors that restrict competition.

***Is the option of leniency forfeit if a previous employee attempts to thwart the cartel investigations?***

No. An undertaking that has applied for leniency does not forfeit that option if a previous employee attempts to thwart the authorities' investigations of a cartel, since the undertaking no longer has authority to instruct the person concerned.

***Can an application be withdrawn?***

It is possible for an applicant to inform the DCA that he no longer wishes to proceed with an application for leniency. The applicant should however be aware that the DCA will retain the information and documents etc. that the applicant has already handed over.

***Will it become public knowledge that an undertaking has received leniency for having participated in a cartel?***

Yes. The DCA is obliged under the Danish Competition Act to publish a summary of cases in which an undertaking has accepted a fine before the DCA, SEC or a court.