

# Handbook on Leniency Programme



Austrian Federal Competition Authority

**Handbook of the Federal Competition Authority (BWB)**  
**on the Application of**  
**Section 11b para. 1 to 4 of the Austrian Competition Act (WettbG)**  
**(“Leniency Programme“)**

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## 1. Introduction

1. One of the key tasks of the Federal Competition Authority (hereinafter referred to as BWB) is to enforce the ban on cartels as laid down in Section 1 Austrian Cartel Act 2005 (KartG 2005) and Article 101 of the Treaty on the Functioning of the European Union (TFEU) (Section 2 in conjunction with Section 1 WettbG). In many jurisdictions, including Austria, where the leniency programme was introduced in the amended Competition Act in 2005 (entering into force on 1<sup>st</sup> January 2006)<sup>1</sup>, leniency programmes have proven to be highly effective and successful tools to detect infringements of cartel law.
2. The BWB may refrain from requesting the imposition of fines or may request a reduction of fines (Section 11b para. 1 and 2 WettbG) for undertakings or associations of undertakings<sup>2</sup> which due to their cooperation contribute to detecting infringements of Section 1 KartG 2005 and/or Article 101 TFEU.
3. The leniency programme lays down the conditions under which immunity from fines or a reduction of fines has to be granted. However, even outside the scope of the leniency programme, the BWB may according to its best judgment refrain from requesting a fine or may request a reduced fine.
4. The practise applied by the BWB in the implementation of Section 11b para. 1 and 2 WettbG has to be laid down in a handbook (Section 11b para. 3 WettbG). Such a handbook was first published when the leniency programme entered into force. In 2012<sup>3</sup> this handbook was revised on the occasion of a reform of the Cartel Act and Competition Act, particularly taking into account – as was also the case in a previous revision<sup>4</sup> - decisions of the Cartel Court and the Supreme Cartel Court<sup>5</sup>, as well as developments on a European level (ECN Model Leniency Program<sup>6</sup>, hereinafter referred to as MLP). A further revision has been carried out in connection with the Cartel and Competition Law Amendment Act 2017 - KaWeRÄG 2017.<sup>7</sup> Also taken into account in the course of this revision was the provision of Section 209b StPO in the version of the Criminal Procedure Amendment Act II 2016<sup>8</sup>, which provides for a "penal immunity" for those employees of a company which have made a significant contribution to the clarification of an antitrust

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<sup>1</sup> Federal Law Gazette I No. 62/2002, as amended by: Federal Law Gazette I No. 62/2005.

<sup>2</sup> When hereinafter referring to undertakings with regard to the application of the leniency programme, this also includes associations of undertakings.

<sup>3</sup> Federal Act amending the Cartel Act 2005, the Competition Act and the Federal Act against Unfair Competition 1984, Federal Law Gazette I No. 13/2013.

<sup>4</sup> A revised version was published on 23 November 2011.

<sup>5</sup> See Supreme Cartel Court, 25<sup>th</sup> March 2009, case number 16 Ok 4/09; Supreme Cartel Court, 22<sup>nd</sup> June 2010, case number 16 Ok 3/2010; Supreme Cartel Court, 4<sup>th</sup> October 2010, case number 16 Ok 5/2010.

<sup>6</sup> [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf) (in a revised version published in November 2012; Version 2.11.2017).

<sup>7</sup> Federal Law Gazette I No. 56/2017.

<sup>8</sup> Federal Law Gazette I No. 121/2016.

infringement towards the BWB, European Commission or the competition authority of another EU Member State.

## **2. Scope of the Leniency Programme**

5. The scope of the leniency programme covers the full range of prohibitions laid down in Section 1 KartG 2005 and Article 101 TFEU and is not restricted to collusive agreements between two or more competitors on the same level of the production or distribution chain (Section 11b para. 1 subpara. 1 letter a WettbG).
  
6. For infringements of Section 18 KartG 1988<sup>9</sup>, the BWB applies the leniency programme by analogy. This concerns circumstances which already started before 1<sup>st</sup> January 2006 and are not capable of affecting trade between the EU Member States.

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<sup>9</sup> Cartel Act 1988, Federal Law Gazette No. 1988/600, as amended by Federal Law Gazette I No. 2002/62.

**3. Immunity from fines (Section 11b para. 1 subpara. 1 to 4 WettbG)**

7. Section 11b para. 1 WettbG in the version of KaWeRÄG 2017 reads:

*The BWB may refrain from requesting to impose a fine on undertakings or association of undertakings which*

*1.*

*a) are the first to submit information and evidence to the BWB which enable the BWB, suspecting an infringement of Section 1 KartG 2005 or Article 101 para. 1 TFEU, to immediately file a well-founded application pursuant to Section 12 para. 1, or*

*b) if the BWB has already gained sufficient information and evidence from other sources to apply for a warrant to search premises, are the first to submit any additional information and evidence which enable the BWB to immediately file a well-founded application pursuant to Section 36 para. 1a KartG 2005 before the Cartel Court,*

*2. have terminated their participation in an infringement,*

*3. subsequently cooperate with the BWB genuinely, promptly and without restrictions to fully clarify all aspects of the case as well as submit all evidence of the suspected infringement which is in their possession or available to them,*

*4. have not coerced any other undertakings or associations of undertakings to participate in the infringement.*

8. Accordingly a procedure pursuant to Section 11b para. 1 WettbG may only be considered if all of the following requirements are met:

**3.1 Termination of participation in an infringement of Section 1 KartG 2005 or Article 101 para. 1 TFEU**

9. In order to qualify for the application of the leniency programme, the applicant undertaking terminates its participation in the alleged illegal act. In compliance with the obligation to cooperate as laid down in subpara. 3 (recital 19, last bullet point) the undertaking terminates its participation in such an illegal act in consultation with the BWB, which taking into account the progress of the investigations determines the timing and modalities in a way that ensures the success of the investigations.

10. The applicant undertaking has to submit an express statement declaring that its participation in the infringement has been terminated. This statement of the undertaking is required for the BWB to state its intention to apply the leniency programme (recital 45).

11. In cases in which a summary application may be submitted in compliance with the requirements laid down in item 5.4. of this document, terminating the participation in the infringement has to be timed in consultation with the European Commission (ECN Model Leniency Programme Explanatory Notes recital 48<sup>10</sup>).

### **3.2 Submission of information and evidence which enable the BWB to immediately apply for a warrant to search premises based on a well-founded suspicion of an infringement**

12. Immunity from fines may be considered if an undertaking is the first to submit information and evidence that enable the BWB to immediately file a reasoned request for a warrant to search premises pursuant to Section 12 para. 1 WettbG based on a well-founded suspicion of an infringement of Section 1 KartG 2005 or Article 101 para. 1 TFEU. Such immunity from fines pursuant to Section 11b para. 1 WettbG may only be considered if the BWB does not yet possess sufficient information or evidence at the time of submission to justify filing an application to request a search warrant.

13. The evidence and information to be provided by the applicant undertaking include in particular:

- Name and address of the applicant undertaking, as well as names and addresses of all other undertakings which were or are involved in the alleged infringement;
- A detailed description of the alleged infringement (type, functioning and targets);
- Information on the affected products or services, the geographic coverage, the duration and the estimated market volume affected by the alleged infringement;
- Detailed information on the alleged cartel contacts (dates, types of contact, places, persons involved);
- Names, positions and addresses (business or private addresses) of all natural persons involved in the alleged infringement to the knowledge of the applicant undertaking;
- Information on other Competition Authorities to which the applicant undertaking has submitted a leniency application or a similar application in connection with the alleged

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<sup>10</sup> [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf) (Version 2.11.2017).

infringement (indicating the date of application, the file number as well as a contact person including contact details within the respective Competition Authority);

- Any other evidence associated with the alleged infringement which may be in possession of or available to the applicant undertaking;
- Detailed explanations on the evidence submitted when filing the application.

14. The information submitted by the applicant undertaking has to be assessed ex ante by the BWB, i.e. regardless of whether a search of premises has at all been (successfully) requested or conducted or whether the respective search of premises was successful or not. According to the Explanatory Notes on the 2012 Amendments to the Cartel Act and the Competition Act, this assessment of evidence has to *“be exclusively based on the type and quality of information and evidence submitted by the applicant”*.<sup>11</sup>

### **3.3 Submission of information and evidence which enable the BWB to immediately file a reasoned request pursuant to Section 36 para. 1a KartG 2005 before the Cartel Court**

15. After a point in time at which the BWB has already gained sufficient information and evidence to request a search of premises pursuant to Section § 12 Abs 1 WettbG, immunity from fines pursuant to Section 11b para. 1 WettbG will only be possible if the applicant undertaking is the first to submit additional information and evidence which enable the BWB to immediately file a reasoned request before the Cartel Court to impose fines pursuant to Section 36 para.1a KartG 2005.

16. According to the Explanatory Notes on Section 11 para. 3 WettbG<sup>12</sup> immunity from fines for the applicant undertaking requires in this case *“that it substantially contributes to the investigation and submits evidence to the BWB which immediately enables the BWB to successfully prove the existence of an infringement in antitrust proceedings in such a way that the preliminary investigations need not be continued”*. Immunity from fines, however, can by no means be granted *“if sufficient information and evidence are already available to the BWB to prove the existence of an infringement”*.

17. As a rule, immunity from fines cannot be considered if the BWB, due to an application of another undertaking pursuant to Section 11b para. 1 WettbG, intends to refrain from requesting to impose a fine on this undertaking concerning the same alleged infringement.

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<sup>11</sup> Compare Explanatory Notes on the 2012 Amendments to the Cartel Act and the Competition Act, No 1804 of the Supplements 24. legislative period, p. 14.

<sup>12</sup> No 1804 of the Supplements 24. legislative period, p. 14.



### **3.4 Full and prompt cooperation with the BWB during the investigations to fully clarify the matter**

18. The applicant undertaking has to cooperate with the BWB seriously, genuinely, fully, promptly and on a continuous basis during the entire duration of the proceedings. If the undertaking does not fulfil these requirements fully and unconditionally, the leniency programme will not be applicable.
19. The obligation to cooperate includes in particular the following duties:
- Submission of all information and evidence on an alleged infringement in possession of or otherwise available to the undertaking. Such information or evidence must not be concealed, falsified or destroyed;
  - Submission of a detailed written statement regarding all facts concerning the participation of the applicant undertaking as well as other cartel members, particularly taking into account aims, functioning, activities and structure of the cartel, including a detailed description and explanation of the individual cartel meetings and / or contacts (corporate statement). This corporate statement may also be provided orally;
  - Naming all former and current employees involved in cartel agreements, specifying their positions, periods of employment and scopes of responsibilities in the corporate statement. The applicant undertaking also has to ensure that all current employees and – as far as possible and feasible – also any former employees who can supply information or evidence cooperate with the BWB (e.g. being available for interviews). Furthermore, the applicant undertaking has to obtain and secure all relevant information and evidence in possession of an employee before this employee leaves the undertaking. The applicant undertaking immediately informs the BWB about any planned resignation of employees who might possess relevant information or evidence.
  - Submission of sworn statements of all current employees and (upon previous consultation with the BWB) – as far as possible and feasible – also of any former employees involved in the infringements, concerning their knowledge about the cartel and their specific roles within the cartel<sup>13</sup>;

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<sup>13</sup> This aspect of the obligation to cooperate has to be coordinated with the BWB in each individual case taking into account the prohibition of self-incrimination.

- Statement of agreement (“Waiver”) to contact other Competition Authorities<sup>14</sup> provided that the applicant undertaking has applied for leniency in other jurisdictions outside the European Union<sup>15</sup>;
- Prompt, complete and genuine replies to any of the BWB’s requests;
- Non-disclosure to other undertakings involved in the infringement as well as any third party of the fact that the applicant undertaking is cooperating with the BWB until the BWB releases the undertaking from its obligation of non-disclosure. In this context the undertaking also has to refrain from any actions or omissions which might indirectly suggest that such cooperation exists. Accordingly, the termination of the undertaking’s participation in the alleged infringement as required in Section 11b para. 1 subpara. 2 WettbG has to be coordinated with the BWB.

### **3.5 Other undertakings or associations of undertakings have not been coerced to participate in the infringement**

20. Eventually another requirement to be met for the application of the leniency programme is the fact that the applicant undertaking has not coerced other undertakings to participate in an infringement according to Section 1 KartG 2005 and/or Art 101 TFEU (Section 11b para. 1 subpara. 4 WettbG).

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<sup>14</sup> The exchange of information between the Competition Authorities in such cases is limited to the coordination of proceedings and investigative activities.

<sup>15</sup> In case of multiple parallel leniency applications to Competition Authorities which form part of the European Network of Competition Authorities (ECN) the exchange of information is based on Article 12 Regulation 1/2003 as well as the Commission Notice on Cooperation within the Network of Competition Authorities (recital 40 et seq.).

#### 4. Application for a reduction of fines (Section 11b para. 2 WettbG)

21. For undertakings which do not meet the requirements specified in Section 11b para. 1 subpara. 1 letter a or b, the BWB may request a reduction of fines (Section 11b para. 2 WettbG) in case all other requirements specified in Section 11 para. 1 subpara. 2 to 4 WettbG are met.
22. For the BWB to request a reduction of fines, the undertaking has to submit information and evidence on the alleged infringement to the BWB which represent significant added value (Section 11b para. 2 sentence 2 WettbG) with respect to the evidence already in the BWB's possession at the time of application.
23. The concept of "significant added value" refers to the extent to which the submitted information and evidence, due to their quality and/or level of detail, enable the BWB to prove the facts of the respective case in a more conclusive or more complete way than would have been possible without the provided information and evidence.
24. The BWB will reduce fines to the following extent:<sup>16</sup>
  - for the first undertaking to meet the requirements laid down in recital 23 (significant added value), between 30% and 50%;
  - for the second undertaking to meet the requirements laid down in recital 23 (significant added value), between 20% and 30%;
  - for any subsequent undertaking to meet the requirements laid down in recital 23 (significant added value), up to 20%.
25. In order to determine the level of reduction of fines within the above mentioned ranges which otherwise would have been requested by the BWB, the BWB will consider the time at which the information or evidence meeting the requirements laid down in recital 23 (significant added value) has been submitted as well as the actual added value associated with the submitted information or evidence (Section 11b para. 2 sentence 3 WettbG).
26. Pursuant to Section 36 para. 2 sentence 2 KartG 2005 the Cartel Court must not impose any higher fines than requested by the BWB. The amount quoted in the application for the fine to be imposed is based on the criteria laid down in Section 143 KartG 1988 and/or Section 30 KartG

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<sup>16</sup> In some specific cases, in which the added value of the submitted information or evidence is extraordinarily high, the BWB can provide for a reduction of fines which may be higher than the ranges specified above.

2005, applying the guidelines on the method of setting fines imposed pursuant to Article 23 para. 2 letter a of Regulation 1/2003/EC<sup>17</sup>.

27. If an undertaking that is no longer eligible for immunity from fines submits information or evidence regarding aspects of the case of which the BWB did not know before and which concern the immediate severity or duration of the investigated alleged infringement, the BWB will take this fact into account as far as possible when determining the fine to be imposed on the undertaking that has submitted this information or evidence.<sup>18</sup>
  
28. In addition, it is possible that companies eligible for a fine reduction pursuant to Section 11b para. 2 WettbG as well as those not fulfilling the conditions set out in Section 11b para. 1 or 2 WettbG seek an amicable termination of proceedings (settlement) and thus obtain a (further) reduction of the fine (settlement discount) of up to 20%. The view on settlements<sup>19</sup> published by the BWB provides assistance in this respect.

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<sup>17</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1.

<sup>18</sup> Compare Cartel Court, 26<sup>th</sup> March 2010, case number 29 Kt 5/09.

<sup>19</sup> [https://www.en.bwb.gv.at/Documents/BWB%20Settlements\\_english.pdf](https://www.en.bwb.gv.at/Documents/BWB%20Settlements_english.pdf) (Version 2.11.2017).

## **5. Procedures**

### **5.1 General provisions**

29. An undertaking wishing to apply for leniency pursuant to Section 11b para. 1 or 2 WettbG gets in touch with the contact person within the BWB mentioned in item 8 of this document. This contact person within the BWB is also available for confidential contacts – if necessary guaranteeing non-disclosure of the identity of the undertaking while inquiring if immunity is available.
30. As a matter of principle, the BWB will not consider applications for a procedure pursuant to Section 11b para. 1 or 2 WettbG if such applications are filed by the BWB after a request for fines or for a declaratory judgment in respect of the same facts. In such cases it is possible to consider the cooperation of the undertaking in proceedings before the Cartel Court when fixing the fines (e.g. as a mitigating circumstance due to the substantial contribution to the investigation of a legal infringement pursuant to Section 30 para. 3 subpara. 3 KartG 2005).

### **5.2 Procedure when applying for immunity from fines**

31. The undertaking may either initially apply to the BWB for a so-called “marker” or immediately proceed to make an application for immunity from fines, which has to meet the requirements laid down in Section 11b para. 1 subpara. 1 letters a or b WettbG.
32. A marker secures an applicant’s place in the queue as first leniency applicant pursuant to Section 11 para. 1 subpara. 1 letters a and b for a given period of time. The allocation of a marker enables the applicant undertaking to contact the BWB as early as possible, to subsequently complete its internal investigations and to gather the required information and evidence in order to meet the relevant evidential threshold laid down in the mentioned applicable legal provisions.
33. If the applicant undertaking wishes to secure its place in the queue by requesting the BWB to grant a “marker”, the undertaking must provide the BWB with the following information:
- Name and address of the applicant undertaking;
  - Names and addresses of the other undertakings involved in the alleged infringement;
  - Products affected by the infringement;
  - Territories affected by the infringement;
  - Duration of the infringement;
  - Type of the alleged infringement;
  - Information on which other Competition Authorities have already been approached or are intended to be approached for leniency in connection with the alleged infringement.

34. The BWB recommends using the form (see Annex), which forms an integral part of this handbook. The above mentioned information may be submitted in writing or orally, in German or English. If the information is submitted in English, the BWB may later request a translation into German.
35. The BWB sets a time limit of a maximum of eight weeks within which the marker has to be perfected with the information that is required to meet the evidential threshold laid down in Section 11b para. 1 subpara. 1 letters a and b WettbG (please also refer to items 3.2 and 3.3 above). In case of multiple parallel applications to several Competition Authorities, the BWB will try to consider the respective proceedings of the other Competition Authorities when setting the time limit.
36. If the applicant undertaking perfects the marker by submitting the required information to meet the relevant evidential threshold within the set time limit, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

### **5.3 Procedure when applying for a reduction of fines**

37. An undertaking wishing to benefit from a reduction of fines has to submit a formal application to the BWB. This application has to be submitted to one of the contacts mentioned in item 8 of the present document. The application for a reduction of fines has to be accompanied by sufficient evidence for the alleged infringement in order to qualify for a reduction of fines pursuant Section 11b para. 2 WettbG.

### **5.4 Summary leniency applications within the ECN**

38. In cases where the European Commission is *particularly well placed* to deal with a case pursuant to recital 14 of the Network Commission Notice<sup>20</sup>, the applicant undertaking that has filed or is in the process of filing a leniency application for immunity from fines with the European Commission<sup>21</sup>, only has to use the BWB form or the form annexed to the ECN Model Leniency Programme<sup>22</sup> (“Template for the Submission of a Summary Leniency Application within the ECN”). For the submission of a summary application the general provisions (see item 5.1 above) apply. Such summary applications are possible regardless of the place in the queue the requesting undertaking as a leniency applicant holds in the proceedings before the European Commission or the BWB, i.e. not only for the first leniency applicant, but also in cases in which the applicant undertaking is only eligible for a reduction of fines.
39. Having received such a summary application, the BWB acknowledges receipt and grants the applicant undertaking a “Summary Application Marker“. With this marker the BWB confirms that

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<sup>20</sup> Commission Notice on the Cooperation within the Network of Competition Authorities, OJ C 2004/101, 43 et seq.

<sup>21</sup> Commission Notice on Immunity from Fines or Reduction of Fines in Cartel Cases, OJ C 2006/298, 17ff.

<sup>22</sup> [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_annex\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf) (Version 2.11.2017).

the applicant undertaking will be granted a period of time to perfect the marker in case the BWB acts upon the case. If the summary applicant is the first applicant turning to the BWB in respect of the alleged infringement, the BWB will inform the applicant accordingly.

40. Further information and evidence only have to be submitted by the applicant undertaking if the BWB explicitly requests the undertaking to do so. In case the applicant undertaking provides information and evidence to the European Commission which suggest that the alleged infringement is significantly different in scope regarding nature, territory or duration from information provided in the summary application, it is recommended to consider supplementing or modifying the summary application.
41. Should the BWB, based on the results of case allocation within the network of Competition Authorities, decide to act upon the case, it will determine a period of time pursuant to the provisions laid down in recital 35 within which the applicant undertaking must complete its submissions.
42. Otherwise, recitals 24 to 27 of the ECN Model Leniency Programme apply to summary applications within the ECN.

## **5.5 Statements of the BWB on the application of the leniency programme**

### ***a. Acknowledgement of Receipt / Marker***

43. The BWB confirms to the applicant undertaking that a marker has been granted and/or acknowledges receipt of the application for proceedings pursuant to Section 11b para. 1 or 2 WettbG. This acknowledgement will be in writing, indicating the date and time of the application.

### ***b. Notice of acceptance***

44. If an undertaking wishes to benefit from Section 11b para. 1 or 2 WettbG, the BWB, within a reasonable time period and in compliance with Section 11b para. 4 WettbG, has to make a non-binding statement as to whether it will apply these provisions.
45. In accordance with these provisions, after having carefully examined the submitted information and evidence with regard to whether the evidential thresholds laid down in Section 11b para. 1 subpara. 1 letter a or b WettbG have been met or with regard to whether this information or evidence represent a significant added value pursuant to Section 11b para. 2 WettbG, as well as after careful examination of any other requirements for the application of these provisions, the BWB notifies the applicant undertaking whether it intends to refrain from requesting a fine or intends to request a reduction of fines (Section 11b para 4 WettbG), however subject to the undertaking's on-going complete fulfilment of the obligation to cooperate as laid down in Section

11b para. 1 subpara. 3 WettbG. In case of requesting a reduced fine, the BWB also informs the applicant undertaking of the prospective range of reduction (recital 25).

**c. Notification of the Federal Cartel Prosecutor**

46. The BWB notifies the Federal Cartel Prosecutor of the receipt of an application for proceedings pursuant to Section 11b para. 1 or 2 WettbG. Furthermore, the BWB notifies the Federal Cartel Prosecutor of issuing a notice of the acceptance of a leniency application.

47. The BWB's notifications of the Federal Cartel Prosecutor are relevant in two respects:

- On the one hand, the Federal Cartel Prosecutor is no longer authorized to request a fine pursuant to Section 36 para. 3 KartG 2005, in case he/she has been informed by the BWB that it has initiated proceedings against an undertaking or association of undertakings pursuant to Section 11b para 1 or 2 WettbG;
- On the other hand, prompt notification of the Federal Cartel Prosecutor is essential regarding his/her duties as laid down in Section 209b StPO (Code of Criminal Procedure) (refraining from prosecution due to cooperation with the Public Prosecutor's Office in connection with infringements against cartel law) concerning any possible prosecution of alleged infringements under penal law (see recital 49 et seq. on Section 209b StPO and detailed conditions under which the Federal Cartel Prosecutor is obliged to take action).

**5.6 Application to the Cartel Court**

48. The immunity from fines pursuant to Section 11b para. 1 WettbG may only be applied in respect of a single company, even if, for example, another applicant fulfils the conditions of Section 11b para. 1 WettbG (see recital 17). If the BWB has submitted an application for the imposition of a fine upon at least one of the companies involved in the infringement, the BWB will file an application for a declaratory judgment pursuant to Section 28 para. 1a KartG 2005 against the first leniency applicant fulfilling the conditions of Section 11b para. 1 WettbG.



## 6. Leniency Notice of Section 209b StPO

49. Section 209b StPO introduces the possibility of a "penal immunity" for employees of a company which have made an important contribution to the clarification of an antitrust infringement towards the BWB, the European Commission or the competition authority of another EU Member State. A similar possibility is also provided for in the proceedings against associations pursuant to VbVG<sup>23</sup>. Section 209b StPO is applicable to cases in which the same facts violate antitrust prohibition norms (Section 1 KartG 2005, Art 101 TFEU) and fulfil the conditions for a criminal offence of restrictive arrangements in award procedures (Section 168b StGB) and/or submission fraud (Section 146 et seq. StGB).
50. The Federal Cartel Prosecutor must notify the Public Prosecutor's Office of any action taken by the BWB in accordance with Section 11 para. 3 and 4 WettbG<sup>24</sup> (now Section 11b para. 1 and 2), as well as any such action taken by the European Commission or competition authorities of other EU Member States (Section 84 KartG 2005), if the persecution of the employees for involvement in the infringement of the company is disproportionate to the weight of their contribution to the clarification of the infringement within the meaning of Section 11 para. 3 subpara. 1 WettbG<sup>25</sup>. The company employees are not legally entitled to claim intervention by the Federal Cartel Prosecutor.
51. Following such notification by the Federal Cartel Prosecutor, the Public Prosecutor's Office must, subject to subsequent persecution, terminate the investigation against employees which have made a declaration towards the Public Prosecutor's Office and the court to disclose all information in respect of their own acts as well as other facts which are considered to be of a decisive importance for the clarification of the committed offences.
52. The "Handbook on the Leniency Notice" issued by the Federal Ministry of Justice (BMJ) provides a guide for the interpretation of Section 209b StPO. Sections 209a, 209b StPO in the version of the Criminal Procedure Law Amendment Act II 2016.<sup>26</sup>

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<sup>23</sup> Federal Act on Responsibility of Legal Entities (Verbandsverantwortlichkeitsgesetz-VbVG), Federal Law Gazette I No. I Nr 151/2005.

<sup>24</sup> The version of Section 209b StPO is linguistically subject to the old legal framework before the KaWeRÄG 2017, Federal Law Gazette I No. 56/2017.

<sup>25</sup> The version of Section 209b StPO is linguistically subject to the old legal framework before the KaWeRÄG 2017, Federal Law Gazette I No. 56/2017.

<sup>26</sup> [https://www.justiz.gv.at/web2013/file/2c94848a580590360159b1ae791f03c9.de.0/handbuch\\_zur\\_kronzeugenregelung.pdf](https://www.justiz.gv.at/web2013/file/2c94848a580590360159b1ae791f03c9.de.0/handbuch_zur_kronzeugenregelung.pdf) (only German version available, 1.1.2017).

## **7. The privileging of the leniency applicant in antitrust damage proceedings**

53. The Directive on Antitrust Damages Actions 2014/104/EU<sup>27</sup> was transposed into national law by KaWeRÄG 2017. The provisions contained therein, which aim to guarantee the effective enforcement of damage claims arising out of infringements of competition law (private enforcement) include a number of special provisions, particularly in regard to the maintenance of the attractiveness of the Leniency Programme pursuant to antitrust law. These provisions entered into force on 27 December 2016, at the end of the transposition period of the Directive.

### **7.1 Definitions**

54. As the provisions of Chapter 5 of the KartG 2005 ("Reimbursement of damages arising out of infringements of competition law") are attributable to the Directive on Antitrust Damages Actions, they contain definitions which partly differ from those of national antitrust law. The concept of leniency according to law on damages ("A person who has voluntarily disclosed to a competition authority knowledge of and participation in a secret cartel between competitors and who in turn by decision or termination of proceedings benefits from immunity from fines to be imposed for the infringement", § 37e KartG 2005) is significantly narrower, since in contrast to the national leniency programme (see above recital 5), only companies are included which have obtained a complete immunity from fines (Section 11b para. 1 WettbG). In addition, this concept of leniency only covers secret horizontal cartels based on European Union law, but not vertical or non-secret cartels.

### **7.2 The privileging of the leniency applicant set out in the provisions on damages**

55. A leniency applicant (secret cartel) is only liable to his direct and indirect customers or suppliers, unless other injured parties are unable to obtain full reimbursement from the other liable parties (Section 37e para. 3 KartG 2005).

56. The reimbursement claim of an infringer against such a leniency applicant (compensation amount) for the damage incurred by direct or indirect purchasers or suppliers of the infringer is limited to the amount of damage caused by the leniency applicant to his own direct or indirect customers or suppliers (Section 37e para. 4 KartG 2005).

57. Section 37k KartG 2005 allows requests for disclosure of evidence against courts or authorities "if such evidence cannot be provided by the parties or a third party with reasonable effort". However, the disclosure of a leniency declaration ("a statement provided voluntarily by a person involved in a cartel between competitors to a competition authority, describing the knowledge of that person of a cartel and describing its role therein, with a view to obtaining immunity or a

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<sup>27</sup> Directive 2014/104/EU of the European Parliament and of the Council dated 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1.

reduction of fines to be imposed due to such involvement by means of decision or termination of proceedings; this shall also apply to the record of such statement;" Section 37b subpara. 4 KartG 2005) is not obligatory. This prohibition does not include information which is available irrespective of a competition procedure, even if such information is contained in the files of the competition authority (e.g. e-mail constituting evidence).

**8. Contact to the BWB**

58. Applications of undertakings to the BWB to proceed pursuant to Section 11b para. 1 or 2 WettbG have to be submitted to the following person(s) or in their absence to the designated persons in charge:

**Head of Agency:**

**Dr. Peter Matousek**

*Tel: (+ 43 1) 245 08 815303*

*peter.matousek@bwb.gv.at*

or

**Head of Legal Department and Deputy Head of Agency:**

**Dr. Natalie Harsdorf LL.M.**

*Tel: (+ 43 1) 245 08 815126*

*natalie.harsdorf@bwb.gv.at*

*Austrian Federal Competition Authority*

*Radetzkystraße 2*

*1030 Vienna*

*Tel: (+43 1) 245 08 0*

*Fax: (+43 1) 587 42 00*

## **LENIENCY APPLICATION FORM**

### **Application for a procedure pursuant to section 11b para. 1 or 2 WettbG**

1. **Details of the undertaking submitting the application:**
  - 1.1 Name and legal form of the undertaking
  - 1.2 Address
  - 1.3 Contact person in the undertaking (name, position, telephone number, fax, e-mail)
  - 1.4 Legal representative (name, address, telephone number, fax, e-mail)
2. **Description of the type of infringement (e.g. price fixing, market sharing, price maintenance etc.)**
3. **Details on the affected markets:**
  - 3.1 Which products /services were / are affected by the infringement?
  - 3.2 Which geographic area was / is affected by the infringement?
  - 3.3 During which period of time did the infringement take place / has the infringement taken place?
4. **Indicate other undertakings involved in the infringement (names, legal forms and addresses of the undertakings).**
5. **Indicate the Competition Authorities to which you have also applied or to which you intend to apply for leniency.**