



**International
Competition
Network**

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

**United States Department of
Justice Antitrust Division
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ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

[Please include, where applicable, any references to relevant statutory provisions, regulations or policies as well as references to publicly accessible sources, if any.]¹

1. Information on the law relating to cartels

A. Law(s) covering cartels: [availability (homepage address) and indication of the languages in which these materials are available]	15 U.S.C. §1 (Sherman Act) http://www.http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm#a1 The website is in English.
B. Implementing regulation(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]	Not Applicable.

¹ Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template, but will be removed once the completed template is made public.

<p>C. Interpretative guideline(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>Interpretative guidance may be found in the Antitrust Division's Criminal Policy Speeches located at</p> <p>http://www.usdoj/atr/public/criminal.htm</p> <p>http://www.usdoj.gov/atr/public/speeches/speech_criminal.htm</p> <p>The website is in English.</p>
<p>D. Other relevant materials (if any): [availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>Other relevant materials can be found at</p> <p>http://www.usdoj.gov/atr/public/criminal.htm</p> <p>The website is in English.</p>

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”? [Please quote.]</p> <p>If not, please indicate the term you use instead. [Please quote.]</p>	<p>The Sherman Act does not define the term cartel. Case law does describe cartel activity, but does not specifically define the term. The Antitrust Division also provides additional guidance on cartel activity in its policy speeches located at</p> <p>http://www.usdoj.gov/atr/public/speeches/speech_criminal.htm</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas²) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</p> <p>C. Scope of the prohibition of hardcore cartels: [including any</p>	<p>The Sherman Act, is broadly drafted and makes no distinction between hardcore and other cartel activity. Hardcore cartels, which case law has generally interpreted to encompass collusive agreements among horizontal competitors to fix prices, rig bids or allocate markets, are illegal and prosecuted criminally except where a type of immunity or exemption applies (see below).</p> <p>The prohibition of hardcore cartel activity is absolute. That is, agreements deemed to be hardcore cartel activity are illegal per se. However, certain immunities (such as agricultural, export-</p>

² In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the ban on hardcore cartels.]	trade, insurance, labor, fishing, defense preparedness, newspaper joint operating arrangements or state or foreign sovereign immunity) and other statutory exemptions may apply that limit the Antitrust Division's ability to prosecute otherwise anticompetitive activity. For a full discussion of such immunities see http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm#c
D. Is participation in a hardcore cartel illegal <i>per se</i> ? [If the situation differs for civil, administrative and criminal liability, please clarify this.]	Yes. U.S. courts have repeatedly found hardcore cartel activity to be <i>per se</i> illegal.
E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?	Participation in hardcore cartel activity is a criminal offense.

3. Investigating institution(s)

A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]	The United States Department of Justice, Antitrust Division investigates and criminally prosecutes hardcore cartels pursuant to federal law (the Sherman Act). Some states also have statutes which allow State Attorneys General Offices to prosecute antitrust cartel cases.
B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	U.S. Department of Justice, Antitrust Division Office of Criminal Enforcement 950 Pennsylvania Avenue, NW Rm. 3218 Washington, DC 20530 Tel: 202-514-3543 Fax: 202-307-9978 Website: http://www.usdoj.gov/atr/ Depending on location and jurisdiction, see listing of State Attorneys General offices: http://www.naag.org/issues/issue-antitrust.php http://www.naag.org/ag/full_ag_table.php
C. Information point for potential complainants:	See D below.
D. Contact point where complaints can be lodged:	Report Violations to: New Case Unit 950 Pennsylvania Ave., NW Suite 3322 Washington, DC 20530 Phone: 1-888-647-3258 (toll-free in the U.S. and Canada) E - mail: newcase.atr@usdoj.gov Web Address: http://www.usdoj.gov/atr/contact/newcase.htm
E. Are there other	Yes. Other law enforcement entities, primarily the Federal Bureau of Investigations, may assist Division staffs

authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	investigating cartels. Usually these entities provide assistance in conducting search warrants, consensual recordings, and conducting interviews with witnesses.
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4. Decision-making institution(s)³ [to be filled in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]	N/A: Same as investigating authority.
B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	
C. Contact point for questions and consultations:	
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	
E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?	

5. Handling complaints and initiation of proceedings

A. Basis for initiating	The Antitrust Division generates most of its international
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³ Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

<p>investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</p>	<p>investigations through corporate amnesty applications. It also detects cartel behavior through complaints directly to Division criminal offices and to the New Case Unit, inter-agency referrals, proactive community outreach and various enforcement/public awareness efforts.</p>
<p>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)? [If there is a requirement to complete a specific form, please, indicate its location (website address).]</p>	<p>No. The Antitrust Division accepts all complaints regardless of whether they are written, emailed or phoned-in.</p>
<p>C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]</p> <p>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect? [Please elaborate.]</p>	<p>None. The Antitrust Division accepts and evaluates all complaints.</p> <p>No. The Antitrust Division has the discretion to evaluate each complaint on the merits and act accordingly.</p>
<p>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</p>	<p>No. The Antitrust Division is not required to explain its decision not to pursue a specific complaint.</p>
<p>F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?</p>	<p>No, there is no official time limit. The Antitrust Division attempts to track and review each complaint and ensure that all matters are acted upon in a timely manner.</p>

6. Leniency policy⁴

⁴ For the purposes of this template the notion of ‘leniency’ covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like ‘leniency’ ‘amnesty’ and ‘immunity’ are considered as synonyms.

<p>A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]</p> <p>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</p>	<p>Corporate Leniency Policy available at http://www.usdoj.gov/atr/public/guidelines/0091.htm</p> <p>Individual Leniency Policy available at http://www.usdoj.gov/atr/public/guidelines/0092.htm</p> <p>The Division's leniency or amnesty (we use these terms interchangeably) policies provide for full immunity from prosecution. Our leniency program does not provide for partial leniency or a reduction in fine.</p>
<p>C. Who is eligible for full leniency [only for the first one to come forward or for more participants in the cartel]?</p>	<p>The first one to come forward and meet the requirements set forth by the leniency policy.</p>
<p>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</p> <p>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</p>	<p>Yes. One of the requirements of the Corporate Leniency Policy is that the agency had no information about the illegal activity (Type A Amnesty) or insufficient evidence likely to result in a sustainable conviction (Type B Amnesty) at the time the corporation comes forward to report the illegal activity. Type B Amnesty is not available to individuals; under the Individual Leniency Policy only an individual reporting illegal antitrust activity before an investigation has begun is eligible for leniency.</p>
<p>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p>	<p>Under the Corporate Leniency Policy, a corporation and all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession are eligible for leniency. Under the Individual Leniency Policy, any individual reporting illegal antitrust activity before an investigation has begun is eligible for leniency.</p>
<p>F. What are the conditions of availability of full leniency: [e.g. provide decisive evidence, maintain cooperation throughout, not to be the ringleader, cease the infringement, restitution, etc.]</p>	<p>The provision of decisive evidence is not a requirement of leniency. The conditions for leniency are fully described in the leniency policies.</p>
<p>G. What are the conditions of availability of partial leniency (such as reduction of sanction /</p>	<p>Partial leniency is not available.</p>

<p>fine / imprisonment): [e.g.: valuable, potential, decisive evidence by witnesses or on basis of written documents, etc.? Must the information be sufficient to lead to an initiation of investigations?]</p> <p>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]</p>	<p>Beneficiaries of conditional leniency must be truthful and cooperate with the Antitrust Division throughout the investigation.</p>
<p>I. Are there formal requirements to make a leniency application? [e.g. must applications take a particular form or include particular information/data, must they be in writing or can they be made orally, etc.]</p>	<p>There is no formal requirements to make a leniency application and most applications are oral.</p>
<p>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency – PGL – and further steps leading to a final leniency agreement / decision)?]</p>	<p>If the applicant satisfies the requirements for leniency, the applicant will receive a conditional leniency letter. After fully satisfying its obligations under the leniency program, the applicant will receive a final leniency letter confirming that the application has been granted.</p>
<p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</p> <p>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</p>	<p>The conditional leniency letter gives an applicant certainty that it will receive leniency upon the completion of its obligations.</p> <p>Leniency is a written agreement between the Antitrust Division and the applicant. The Assistant Attorney General of the Antitrust Division has authority to grant leniency.</p>
<p>M. Does your legislation</p>	<p>Yes. A company can get a “marker” to secure its place in line for amnesty. The company then has a given amount of time to</p>

have a marker system? If yes, please describe it.	complete its internal investigation and perfect its leniency application.
N. Does the system provide for any extra credit⁵ for disclosing additional violations? [e.g. a hardcore cartel in another market]	Yes. The Division's amnesty plus program allows a company that does not qualify for amnesty for an initial matter under investigation to disclose a second cartel and receive amnesty for the second offense and a substantial additional reduction (the "plus") in the calculation of the fine for its participation in the first offense.
O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.	Yes. The Antitrust Division's confidentiality policy for amnesty applicants provides that the Division will not identify a leniency applicant or share information provided by the applicant, except that if the applicant identifies itself first the Division is free to confirm, or if authorized by court order, or if the applicant consents to waiver.
P. Is there a possibility of appealing an agency's decision rejecting a leniency application?	No.
Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:	Scott Hammond Deputy Assistant Attorney General for Criminal Enforcement U.S. Department of Justice, Antitrust Division Office of Criminal Enforcement 950 Pennsylvania Avenue, NW Rm. 3218 Washington, DC 20530 Tel: 202-514-3543 Fax: 202-307-9978
R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?	No, revocation is not specifically addressed in the leniency policy. No, there is no appeal from a decision to revoke leniency.
S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?	Yes.

7. Investigative powers of the enforcing institution(s)⁶

⁵ Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

⁶ "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

<p>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information,⁷ searches/raids, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>Search warrants must be authorizing by a court. Computers can be searched and seized if necessary pursuant to a search warrant. Subpoenas are issued by the grand jury for testimony and documents, including electronic documents. We can also ask for voluntary cooperation, including interviews and document production.</p>
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Yes, private locations, automobiles, briefcases and persons may be searched pursuant to a search warrant if authorized by a court.</p>
<p>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</p>	<p>No, evidence outside the scope of the warrant may not be seized without additional court authorization.</p>
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>No.</p>

8. Procedural rights of businesses / individuals

<p>A. Key rights of defence in cartel cases: [e. g.: right of access to documents in the possession of the enforcing authority, right to a written statement of the case against the defendant, right to respond to that case in</p>	<p>Defendants have the right to a trial at which the government must prove the alleged violation beyond a reasonable doubt. Defendants are entitled to legal counsel at trial, to confront the witnesses against them, and to refuse to incriminate themselves. In advance of trial, defendants are generally entitled to discovery and inspection of their statements and their employees' statements (if the defendant is an organization). Defendants are also entitled to certain documents, including documents that are in the government's possession and are either material to the defense or belong to</p>
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⁷ "Searches/raids" means all types of search, raid or inspection measures.

<p>writing, right to respond orally, right to confront companies or individuals that make allegations against the defendant, right to legal representation before the enforcing authorities, right not to self-incriminate, etc. Please indicate the relevant legal provisions.]</p>	<p>the defendants or if the governments intends to use them at trial against the defendants.</p>
<p>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation? [Please indicate the relevant legal provisions.]</p>	<p>It is the Division's policy that sensitive information will only be used by the Division for a legitimate law enforcement purpose and the Division will not disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In the Division's experience, the need to disclose sensitive material occurs rarely. In addition, sensitive information provided by an amnesty applicant is covered under the amnesty confidentiality policy discussed above and in other instances sensitive information may be covered under the rule of grand jury secrecy which would bar disclosure.</p>

9. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?</p>	<p>A case must be brought within 5 years of the end of the illegal activity.</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</p>	<p>The investigation and decision on the merits must be completed in sufficient time to bring a case within the statute of limitations (5 years).</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?</p>	<p>None.</p>

10. Types of decisions

<p>A. Please list which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]</p>	<p>At the conclusion of a trial, defendants are found by a jury to be guilty or not guilty. Individuals can be sent to jail for up to 10 years and fined \$1 Million and Corporations can be fined up to \$100 Million or double the gain or loss caused by the cartel. Restitution payments to victims can also be ordered.</p>
<p>B. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).</p>	<p>See response to A.</p>
<p>C. Can interim measures⁸ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁹.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</p>	<p>No.</p>

11. Sanctions for procedural breaches (non-compliance with procedural obligations)¹⁰

⁸ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

⁹ Only for agencies which answered “yes” to question 2.C. above

¹⁰ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of

A. Grounds for the imposition of procedural sanctions / fines:	The Antitrust Division will actively protect the integrity of its grand jury investigations. Depending on the conduct, the Division may seek an order to compel production of documents and where appropriate prosecute those who attempt to thwart a Division investigation for contempt, perjury or obstruction of justice.
B. Type and nature of the sanction (civil, administrative, criminal, combined):	Depending on the conduct, sanctions may be criminal, civil or both.
C. On whom can procedural sanctions be imposed?	Sanctions can be imposed against both the individual and the company
D. Criteria for determining the sanction / fine:	Sanctions are imposed by a court; may be agreed upon pursuant to a plea agreement.
E. Are there maximum and / or minimum sanctions / fines?	Yes. The United States Code sets forth the maximum sentence for violation of a particular crime. The advisory sentencing guidelines must be taken into account by the sentencing court.

12. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined): On whom can sanctions be imposed? [E.g.: representatives of businesses, (imprisonment for individuals), businesses, in the case of associations of companies the associations or the individual companies?]	An individual may be fined, incarcerated or both. Corporations can be criminally fined. In addition, where appropriate, the defendant may be ordered to make restitution. Sanctions may be imposed on both individuals and companies.
B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]	Sentencing is handled by the court, who is assisted by the Probation Office. The advisory sentencing guidelines must be taken into account by the sentencing court. Usually in Antitrust cases the sentencing is determined by the volume of commerce affected, the criminal history, and role in the offense.
C. Are there maximum and / or minimum sanctions / fines?	Yes.
D. Guideline(s) on	Although the United States Sentencing Guidelines are no

justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

<p>calculation of fines: [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>longer mandatory, courts are required to consider them when determining a sentence.</p>
<p>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</p>	<p>If the appeal concerns the amount of a fine or incarceration, then a defendant may apply to temporarily stay its imposition pending a decision by a higher court.</p>

13. Possibilities of appeal

<p>A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</p>	<p>Yes. A defendant may appeal on errors of law, fact or procedural breach to a higher court.</p>
<p>B. Before which court or agency should such a challenge be made? [if the answer to question 13/A is affirmative]</p>	<p>Appeals are filed with the appropriate Circuit Court of Appeals or in rare instances, filed directly to the Supreme Court of the United States.</p>