

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

Bundeskartellamt, Germany

The following template is submitted by the Bundeskartellamt, Germany, pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The Bundeskartellamt (BKartA, www.bundeskartellamt.de) is an independent higher federal authority which is assigned to the Federal Ministry for Economic Affairs and Energy. The BKartA’s task is to protect competition in Germany. The BKartA bases its decisions solely on competitive criteria. It processes and decides individual cases independently without external instructions.

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

Competition leads to considerable benefits for the economy as a whole. All market players – producers, traders, service providers and, in particular consumers – benefit from price and cost reductions, improvements in quality, possibilities of choice or technical advancement. In Germany the German Competition Act (GWB) provides the legal framework for the protection of competition. With the fight against cartels, merger control and the control of abusive practices as its tools, the GWB serves to maintain competitive structures and to prevent anticompetitive practices by companies and their negative effect on the market opportunities of other companies. Competition in Germany is to be protected against all kinds of restraints, irrespective of whether they are caused within or outside Germany.

The GWB came into force on 1 January 1958. It has been amended several times since then. The second amendment in 1973 is of particular significance in terms of competition policy because of the introduction of merger control.

The BKartA applies European rules in addition to the provisions of the GWB if the anticompetitive practices are likely to affect trade between the EU Member States. The rules in the GWB and the Treaty on the Functioning of the European Union (TFEU) are fundamentally very similar.

For the purposes of this Template, the BKartA adopts the definitions in section A of the Annex to the ICN CAP.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

Under German competition law, the nationality, residence, or origin of a Person being investigated is irrelevant to the application of the laws, procedural rules and policies. The laws, procedural rules and policies afford Persons of other jurisdictions treatment no less

favourable in like circumstances. All persons and companies concerned are treated in the same way.

Germany is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

In Germany, no federal law is valid unless it has been published.

In addition, the BKartA makes available on its website a comprehensive collection of guidance documents, guidelines and notices, information leaflets and legislation.

This includes inter alia the German Competition Act, Guidelines for the setting of fines in cartel administrative offence proceedings, the leniency program, the ICN Anti-Cartel Enforcement Template, information leaflets on the settlement procedure used by the BKartA in fine proceedings and on the possibilities of cooperation for small and medium-sized enterprises.

A case database offers the possibility to search for published decisions and case summaries relating to the ban on cartels, control of abusive practices, merger control and public procurement law.

The Annual Report provides a concise overview of facts and figures as well as the most important cases of the year.

Activity Reports describe the BKartA's work of the last two years. The reports contain extensive statistics and are submitted to the Federal Government.

The German Monopolies Commission, an independent advisory body in the areas of competition policy and regulation, has the statutory responsibility to monitor effective competition in Germany in general and in specific sectors of industry. It prepares an expert opinion every two years which is submitted to the Federal Government.

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g.,*

forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.

- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.

The BKartA informs any Person that is the subject of an Investigation as soon as practically and legally permissible of that Investigation, according to the status and specific needs of the investigation.

In merger control proceedings the parties are in contact with the competent case handler from the beginning. Not every company transaction is subject to merger control by the BKartA. An obligation to notify only exists where a transaction is considered a concentration within the meaning of the German Competition Act and where certain thresholds are met. Until a notifiable merger project has been cleared by the BKartA a prohibition on its implementation applies (Sec. 41 (1) GWB). As a consequence of this ex-ante-notification system, the investigative process in merger control usually starts with the notification by the parties. The BKartA has investigatory powers to obtain a comprehensive picture of the market conditions. It may, for example, request information from competitors, suppliers and customers of the companies concerned and inspect business documents. Any formal decision to request information provides for a reasonable time frame to respond to the request and contains the legal basis, the factual basis and the reasoning for its order. An explanatory part clarifies the concrete relevance of the information requested for the assessment of the investigation. The investigatory measures that place the addressee under an obligation to comply can be appealed and are subject to judicial control. On the other hand, a substantial body of evidence is often provided to the BKartA on a voluntary basis. Mandatory requests for information are limited to the necessary for the assessment of the market conditions. The cooperation with the internal Economics Department ensures that a comprehensive investigation concept is in place.

In view of the relatively short time frame of a merger control procedure, the parties often contact the BKartA for preparatory talks. At this stage, the BKartA usually only starts investigatory measures and issues formal decisions if the parties sign a waiver.

As a consequence of the intense preparation and the interaction with the parties, the vast majority of mergers are cleared within the first phase.

German law distinguishes two procedures which can be followed in the case of violations of antitrust rules: the administrative procedure which may inter alia result in a declaration that a certain behaviour is illegal and the fine procedures regulated in the Administrative Offences Act (OWiG) and the Code of Criminal Procedure (StPO). If there is a hard core violation, the BKartA will almost always follow the fine procedures.

In an administrative procedure, a notice is typically provided shortly after proceedings are initiated. The BKartA contacts the Person, informs it about the allegations and gives it the opportunity to comment.

In a fines procedure, an early notice might jeopardize the investigation, i.e. a notification would be inappropriate if there is an initial suspicion of an infringement and the BKartA intends to conduct a search. In this case the BKartA applies to the local court for a search warrant which will be handed over to the Person during the search and inform the Person about the alleged infringements and the legal basis for the investigation, the right not to make any statement on the charges and to consult a defence counsel.

During a fine procedure, the defence counsel has access to the file under the condition of not endangering the investigations for the period of the investigation. Before the fine decision is taken, the defence counsel has full and comprehensive access to the file. At that time the BKartA also informs the persons and companies concerned in writing of the accusation (statement of objections) and gives them the opportunity to comment.

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

Merger projects have to be notified to the BKartA and must not be implemented for the duration of the merger control proceeding. This prohibition prevents problematic mergers from having to be subsequently dissolved. In return, the law provides for strict time limits for merger control proceedings.

The proceeding begins upon receipt of the complete notification at the BKartA. The authority then has one month to decide whether the merger project needs to be examined in more detail or can be cleared (so-called first phase). The vast majority of the more than 1,000 merger cases notified to the BKartA every year can be cleared within the first phase of merger control proceedings. If there is any indication that the merger may cause competitive problems which cannot be dispelled during the first phase proceedings, a formal in-depth investigation is initiated (so-called second phase), extending the time frame to up to a total of four months from the date of notification (Sec. 40 (2) GWB). If the parties to the merger offer commitments to remedy the concerns, the deadline is extended for an additional month.

The GWB provides for a strict limitation period for the prosecution of cartels of five years commencing with the termination of the infringement (Sec. 81 (8) GWB, Sec. 31 (3) OWiG). The period of limitation can be interrupted inter alia by the notification of the BKartA that investigation proceedings have been initiated (Sec. 33 (1) OWiG). However, prosecution shall be barred by the statute of limitations at the latest after ten years (Sec. 81 (8) GWB, Sec. 33 (3) OWiG). In addition, there are several legal time limits with respect to investigative measures, e.g. the BKartA is only allowed to enforce search warrants within six months after their issue, and in the case of the seizure of evidence during a search the BKartA shall apply for judicial confirmation within three days.

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

Civil servants are bound by an obligation of confidentiality (Sec. 67 (1) Federal Civil Service Act, BBG) and subject to severe punishment if they violate their obligation of confidentiality. A public official that unlawfully discloses a business or trade secret shall be liable to imprisonment not exceeding one year or a fine. If the offender acts for material gain or with the intent of enriching himself or another or of harming another the penalty shall be imprisonment not exceeding two years or a fine. (Sec. 203 [Criminal Code](#)).

The BKartA treats confidential information in accordance with the law. Upon request, the BKartA grants the parties access to its file to enable the effective exercise of the rights of defence. As the file may include confidential information, access is typically granted to non-confidential versions. There are, however, provisions for a full disclosure of information from the authority's file, e.g. in fine proceedings comprehensive access to the file is granted to the counsel of defence that must ensure confidentiality (Sec. 147 (1) StPO). If third parties demand access to the file in fine proceedings, the BKartA shall use the statutory limits of its discretionary powers to grant or refuse access to documents which include competitively sensitive information (Sec. 46 (1) OWiG in combination with Sec. 474, 475, 406e StPO). Cartel agreement themselves are not business secrets and are not protected as such.

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

In the BKartA, decisions are jointly taken by the chairperson of the competent decision division and two associate members. The chairperson and associate members of the decision divisions must be civil servants appointed for life and must be qualified to serve as judges or senior civil servants (Sec. 51 (4) GWB).

Applicable legislation defines strict rules to ensure that officials, including decision makers, are objective and impartial, and to prevent any conflicts of interest (Sec. 60 BBG). Officials with a close relationship to the subject matter of the proceedings or the parties involved are excluded from working on a case. This includes any person who is himself a participant, a relative of a participant, represents a participant by virtue of the law or of a general authorisation or in the specific administrative proceedings, a relative of a person who is representing a participant in the proceedings, a person employed by a participant and receiving remuneration from him, or one active on his board of management, supervisory board or similar body, any person who, outside his official capacity, has furnished an opinion

or otherwise been active in the matter and any person who may benefit or suffer directly as a result of the action or the decision. Furthermore, where grounds exist to justify fears of prejudice in the exercise of official duty, or if a participant maintains that such grounds exist, anyone who is to be involved in administrative proceedings on behalf of an authority shall inform the head of the authority or the person appointed by him and shall at his request refrain from such involvement (Sec. 20, 21 Administrative Procedure Act, VwVfG). Members of the BKartA may not own or manage any undertakings, nor may they be members of the management board or supervisory board of an undertaking, a cartel, or a business and trade association or professional organisation (Sec. 51 (5) GWB).

According to the law, no rewards or gifts are to be accepted in connection with official activities (Sec. 71 BBG). Officials, including decision makers and staff, are also subject to a gifts and rewards policy.

The BKartA periodically informs and educates staff and senior leadership based on internal rules, policies and guidelines. It is mandatory to attend the corresponding briefings.

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

If the BKartA considers the prohibition of a merger, the parties will receive a statement of objections and will be granted the opportunity of reasonable and timely access to the information related to the matter and can exercise their right to be heard. If the parties ask for a state of play meeting, such an opportunity is usually granted. In certain case scenarios, with the help of commitments, the parties can modify their project post-notification, remedy the competition concerns and avoid a prohibition.

Both in administrative and fines procedures, the participants have a right to be heard guaranteed by Art. 103 (1) of the German Constitution. They receive a statement of objections and are given the opportunity to express their views and to present their case before a decision is adopted. Upon request, the BKartA grants the parties access to its file to enable the effective exercise of the rights of defence.

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

The Person has a right to legal representation throughout the entire proceedings (Sec. 137 (1) StPO). However, when conducting dawn raids according to a court-ordered search warrant, the investigators do not have to await the arrival of the defence counsel.

The BKartA recognizes the attorney's right to refuse testimony on professional grounds concerning the information that was entrusted to the attorney or became known to the attorney in this capacity (Sec. 53 (1) StPO) and seizure prohibitions concerning communication between affected parties and their legal counsel (Sec. 97 (1) StPO) in accordance with the legal norms.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

Decisions of the BKartA are in writing and contain a statement of reasons and are served upon the parties together with advice as to the available legal remedies.

The BKartA communicates on its website each fining decision concerning a violation of Sec. 1 or 19-21 GWB or Art. 101 or 102 of the TFEU no later than upon conclusion of the authority's fine proceedings. The notice contains inter alia: information on the facts established in the fining decision, information on the type of the infringement and the period during which the infringement occurred, information on the undertakings which were involved in the infringement and information on the goods and services affected (Sec. 53 (5) GBW).

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an

opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

Each binding decision - not only the fining decision - of the BKartA is subject to judicial review. Investigative measures may be appealed to the Local Court.

The BKartA's fining decisions may be appealed to the Düsseldorf Higher Regional Court. The appeal will be followed by a full judicial review of the case. If an order imposing a fine is appealed against, the BKartA will examine first of all whether the order will be upheld or revoked (so-called intermediate proceedings). If the BKartA upholds its decision, the facts of the case will be examined and decided on by the court. For this purpose the BKartA first refers the proceedings to the Düsseldorf General Prosecutor's Office which will again examine the charge. If it is considered that there is reasonable suspicion of an infringement, the General Prosecutor's Office will submit the files to the Düsseldorf Higher Regional Court which has six specialised cartel divisions. With the start of the main hearing, the BKartA's order imposing a fine assumes the function of an indictment.

In the main hearing, witnesses will again be heard, documents will be submitted and experts interviewed. The court generally orders that the cartel participants appear personally in court for the main hearing. Throughout the hearing the BKartA is represented in court, in addition to the General Prosecutor's Office, in order to contribute its case expertise.

Based on the insights obtained from the main hearing, the Düsseldorf Higher Regional Court makes a new decision on the case and, if applicable, imposes a fine, which is not limited to the fine imposed by the BKartA, i.e. the Court can increase the BKartA's fine. At the end of the main hearing the Higher Regional Court will give judgment.

A judgement of the Düsseldorf Higher Regional Court may be appealed for legal not factual review to the Federal Court of Justice.