



DANISH COMPETITION AND CONSUMER AUTHORITY

Guideline on leniency

This guide explains how to apply for leniency for participation in a cartel.

How do I apply for leniency?

The best way to apply for leniency is to come to a meeting at the Danish Competition and Consumer Authority. The Authority can then obtain the necessary information immediately and provide an acknowledgement for the application.

You can arrange a meeting with the Danish Competition and Consumer Authority by calling one of the persons responsible for leniency directly:

+45 4171 5190 Stefan Kobbarnagel, Head of Department, stko@kfst.dk
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You may also send us an email (to all of the three email addresses).

What is a cartel?

A cartel is an illegal agreement which restricts competition between competitors. A cartel may, for example, be an agreement on:

Prices

- Purchase or selling prices, minimum prices or common price increases
- Discount rates or prohibition on discounts

Limitations in production or sale

- What or how much each participant in the cartel can produce or sell

Market sharing

- Geographical segmentation of the market
- Customer sharing

Bid rigging

- Coordination of offers in connection with a tender or an invitation for bids
- "Borrowing costs", where two or more competitors "lend" a competitor an offer and price, so that said competitor does not have to calculate an offer himself.

Cartels are prohibited

Cartel agreements are serious economic crimes which can result in higher prices and less choices for consumers. Therefore, participating in a cartel is a very serious infringement of the Competition Act, punishable by heavy fines and imprisonment. Agreements which restrict competition – and so-called concerted practices – between companies are prohibited under section 6 of the Competition Act and Article 101 of the TFEU.

Companies participating in a cartel can be punished by fines exceeding DKK 20 million. In some cases, there may be mitigating factors, resulting in a lower fine.

Executives and board members may also be punished by fines of up to several hundred thousand kroner. In addition, persons who enter into cartel agreements or seek to initiate or otherwise contribute to a cartel agreement are also punishable by imprisonment. In serious cases, cartel activities are punishable by eighteen months' imprisonment. In particularly aggravating circumstances, the penalty may increase to up to six years in prison.

Even if a person or company has participated in a cartel, the Danish Competition Act and the Danish Criminal Code allow the opportunity to obtain leniency, thereby either completely avoiding fines and/or imprisonment or having the fine or prison sentence reduced.

What does leniency mean?

Leniency for participation in a cartel is a collective term for either exemption from fine and/or imprisonment (withdrawal of charge) or reduction of fine and/or imprisonment (reduction of penalty).

Exemption from fine and/or imprisonment means that no charge is brought, i.e. the company and/or person is not punished at all for having participated in the cartel (withdrawal of charge). The exemption also includes any claim for confiscation. Only the first company/person to apply for leniency may be completely exempted from penalty – see more below.

Reduction of fine means that the fine for the company or person concerned is reduced (reduction of penalty).

Reduction of imprisonment means that the term of imprisonment is reduced for the person concerned on the basis of an assessment by the courts (reduction of penalty). A claim for confiscation may also be reduced.

At the time when a person or company applies for leniency, the applicant will not normally know if there are other applicants or their place in the queue of applicants. In addition, the applicant will generally not know whether a subsequent punishment may be a fine or imprisonment.

However, the same application form is to be used in all cases where a person or company wishes to apply for leniency for participation in a cartel.

Why is it possible to apply for leniency?

The possibility of leniency is designed to facilitate detection of cartels and reduce the desire to participate in a cartel at all. The possibility of leniency has great preventive effect. It prompts a higher risk of exposure to the cartel participants, since all companies have the opportunity to go to the authorities and provide information on a cartel which they have participated in and apply for leniency.

Exemption from fine and/or imprisonment

The following conditions must be met in order to be completely exempted from fines and/or imprisonment:

- The applicant is the first to contact the authorities about the cartel.
- The applicant must provide information about the cartel which has not previously been in the authorities' possession.
- The information must give the authorities cause to either:
 - a) conduct an inspection, a search or refer the case to the police or
 - b) determine an infringement of the Competition Act in the form of a cartel, as an inspection or search has already been conducted.
- The applicant must cooperate with the authorities throughout the proceedings.
- The applicant must have ended participation in the cartel at the time when exemption from penalty is applied for.
- The applicant must not have coerced others into participating in the cartel.

Both companies and individuals may apply for exemption from penalty. The key is that the applicant is the first to apply and that the applicant provides the authorities with information about a cartel, which has not previously been known.

On the basis of the applicant's information, the Danish Competition and Consumer Authority may carry out an inspection, or the Public Prosecutor for Serious Economic and International Crime (SEIC) may carry out a search at the cartel members.

If an applicant contacts the authorities at a time when inspections or searches of the cartel have already been performed, it is still possible to be exempted entirely from punishment. As in such cases, the authorities are already familiar with the cartel, it is a requirement that the applicant provides information which makes it possible to determine an infringement of the Competition Act, which it would not be possible for the authorities to determine without the new information. This means that the information must be much more detailed than the information which may have come into the possession of the Authority or SEIC via the inspection or search. The condition remains that the applicant must be the first of the cartel members to come forward and that the other requirements are met.

Achieve reduction of the fine and/or prison sentence

If the applicant is not the first in a particular cartel to contact the authorities, the application is automatically viewed as an application for reduction of the penalty. This applies regardless of whether the penalty which may later be imposed for participation in the cartel is a fine or a prison sentence. However, there are slightly different rules for reduction of fines and imprisonment, respectively. The rules are described below.

The following conditions must be met in order to have **fines** reduced:

- The information which the applicant provides about the cartel must contribute significant added value for the authorities beyond the information that the authorities already possess.
- The applicant must cooperate with the authorities throughout the proceedings.
- The applicant must have ended its participation in the cartel at the time when the application for leniency is submitted.
- The applicant must not have coerced others into participating in the cartel.

In these cases, the authorities already know about the cartel. The key, therefore, is that the applicant must provide information about the cartel which contributes "significant added value" beyond the information that the authorities already possess. "Significant added value" means that the information is of such quality and detail that it strengthens the chances of proving the cartel's existence.

If the candidate in question is second in the line of applicants, a fine may be reduced by 50 percent compared to the fine that would otherwise have been imposed. As already mentioned, this requires that the applicant's information should contribute significant added value to the information which the authorities have already received from the first applicant. This situation also covers an applicant who had originally applied for exemption from a fine but turns out not to be the first but the second applicant.

For the next applicant (no. 3), the penalty may be reduced by 30 percent, and for the subsequent applicants the penalty may be reduced by up to 20 percent. In each case, it is a requirement that the individual applicant should submit information which, in relation to the information which the authorities already possess, contributes significant added value.

If the applicant is not the first member of a particular cartel to approach the authorities, and if the penalty which may be considered for participation in the cartel is imprisonment, it is up to the courts to determine whether a contribution to the solution of the case must result in a reduction of the penalty.

In the court proceedings, the prosecuting authority will disclose the candidate's place in the queue of applicants. In this regard, the prosecution will argue that this circumstance should be given significant weight in the sentencing. According to the explanatory notes to the Competition Act, the courts should, when sentencing, consider the above graduation of discounts for fines, in order to ensure some uniformity to the graduation in the reduction of fines and imprisonment, respectively.

Practical issues in the application process

The application process includes a number of practical issues which are described below.

Who is covered by an application?

When a person applies for leniency, the application only covers that person. An application made by e.g. a salesperson employed in a company covers only the employed salesperson – not the company.

When an application is to include a company, it must be filed by a person who can sign for said company – e.g. a director – and the authorised person must expressly state that the company is applying for leniency.

An application by a company automatically covers all present and former board members, executives and other employees.

If an application is to cover companies in a group, it must be expressly stated in the application.

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

The application form is designed in such a way that a lawyer can apply for leniency on behalf of a person or a company.

What should the application contain?

The application form can be downloaded here:

[Application for leniency](#)

It is not a requirement that the application form must be used to apply for leniency. However, for the Danish Competition and Consumer Authority to be able to consider an application, it is necessary that, as a minimum, the authority receives the following information:

- Name and address of the applicant
- Names and addresses of companies which have participated in the cartel
- Which products the cartel has concerned
- The geographic markets which the cartel has covered
- What the cartel has been about (e.g. price agreements or market sharing)
- How long the cartel has existed

Marker

It is possible to apply for leniency through a marker.

When using a marker, the applicant can just give the following information in the first place:

- A description of the alleged infringement of the competition rules
- The parties involved in the infringement
- How the cartel has worked, e.g. how the parties have corresponded/met and documented their agreements and where to find this documentation
- The products affected
- The geographical markets affected
- The duration of the cartel
- Information on why the application is submitted

The application must be perfected within a time limit set out by the authorities. For example, the applicant may subsequently provide evidence of the alleged infringement of the competition rules or the exact time or geographical extent of the infringement if the documentation could not be provided at the time of submission of the marker. The situation can also be that the authority accepts that certain documents – which are too difficult or risky for the applicant to obtain – are not handed in. Instead, the applicant may provide the authority with information on where these documents can be found during a subsequent inspection or search.

If the marker is perfected within the deadline, the application is deemed to be submitted at the time of the submission of the marker. The applicant thus keeps the place in the queue that he received when submitting the marker.

Which authority must receive the application?

An application must be submitted to the Danish Competition and Consumer Authority.

If the Public Prosecutor for Serious Economic and International Crime (SEIC) has already initiated a criminal case regarding the cartel, i.e. SEIC is currently investigating the cartel, or if SEIC has charged a company or a person, the application may also be submitted to SEIC.

If an application is submitted to SEIC at a time when SEIC has not already opened a case, SEIC will refer the applicant to the Authority. The application applies only from the time when it has been registered as received by the Authority. Therefore, the safest approach is always to submit an application to the Danish Competition and Consumer Authority.

What is the best way to submit an application?

The best way to apply for leniency is to come to a meeting at the Danish Competition and Consumer Authority. The Authority can then obtain the necessary information immediately and provide an acknowledgement for the application.

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

Yes. However, the authorities will already know about the cartel at this stage. In such cases, highly detailed information must be submitted on the cartel for the application to be considered.

What about participation in a cartel with companies from other EU countries?

For participation in a cartel with companies from other EU countries, leniency must be applied for in all the countries covered by the cartel.

If a cartel has covered three or fewer EU countries, leniency should be applied for in each of the three EU countries.

If a cartel has covered more than three EU countries, the application for leniency must be addressed to the European Commission. However, there is no guarantee that the Commission may consider all cartel cases in which more than three EU countries are involved.

Competition authorities in the EU countries¹ have therefore agreed on a system where a cartel member which has submitted the full application to the European Commission may, as a precaution, submit an abridged application to the competition authorities in other relevant EU countries. Such an application is called a summary application and will enter into force in the countries in which it has been submitted, provided the European Commission decides not to process the cartel.

The form to be used for submitting a summary application can be found here:

[Summary application](#)

¹ The EU countries are (August 2017): Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Greece, Ireland, Italy, Croatia, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom, Sweden, Czech Republic, Germany, Hungary and Austria.

Rights of the applicant

Is bringing a lawyer to meetings with the Danish Competition and Consumer Authority allowed?

Yes. We recommend bringing a lawyer to meetings with the Danish Competition and Consumer Authority.

Is confidentiality guaranteed?

The Danish Competition and Consumer Authority exercises great discretion when it comes to applications for leniency, and the employees who work with leniency are subject to duty of confidentiality.

However, the Authority cannot promise anonymity to an applicant for leniency throughout an entire case process which begins with an application for leniency.

If, for example, an application for leniency and any subsequent inspection demonstrates an infringement of the Competition Act, the Authority will refer the case to the Public Prosecutor for Serious Economic and International Crime (SEIC), and the question of anonymity will then be considered by SEIC.

In case of a cartel involving participants from other EU countries, the Authority is also obliged to inform the European Commission and the competition authorities in the other relevant Member States about the application for leniency and the applicant's identity.

In addition, the Authority is required to publish judgments and penalty decisions or a summary thereof, where prison or fine has been imposed, and this publication may also contain the name of the leniency applicant. However, such publication will be made so long after the submission of an application for leniency that the identity of the applicant would probably already be known, i.e. during court proceedings.

The applicant's obligations

Applicants for leniency also have duties.

The applicant MUST:

- Have ceased to participate in the cartel at the time an application for leniency is submitted.
- Cooperate loyally, fully and effectively throughout the proceedings.
- Provide all information and evidence concerning the cartel which the applicant has access to, comes into the possession of and is able to procure by reasonable means.
- Be available at all times to provide swift answers to questions from the authorities.

The applicant must NOT:

- Provide false or misleading information, conceal facts or distort the information provided.
- Make the other cartel participants aware that leniency has been applied for (e.g. by contacting the other participants or through a press release). However, this applies

only until the authorities have made the other cartel participants aware that the cartel is being investigated, e.g. through an inspection or search.

The applicant is ALLOWED TO:

- Submit an application for leniency to the competition authorities in other countries – this is not a breach of the duty of cooperation.

The proceedings of a case

If a case is opened regarding the cartel, a typical process can be split into the following three phases:

Phase 1:

The case begins with the submission of an application for leniency to the Authority. The applicant must have ceased to participate in the cartel at the time the application is submitted.

Applications can also be submitted to SEIC, provided that SEIC has already opened a case (i.e. initiated a criminal investigation or brought charges against a person or company).

If an application is submitted to SEIC at a time when SEIC has not already opened a case, SEIC will refer the applicant to the Authority. The application applies only from the time when it is registered as received by the Authority.

Applicants are then given an acknowledgement with the date and time of the receipt of the application.

Based on the applicant's information, the Authority or SEIC may carry out an inspection or a search. If an inspection or search has already been conducted, but the applicant is still the first to apply, the information must enable the Authority or SEIC to determine an infringement of the Competition Act.

If the applicant is not the first of the cartel members to provide information about the cartel, the information in the application must involve a significant added value to the Authority and SEIC. An application for exemption from penalty will automatically become an application for reduction of the penalty, if the applicant is not the first to apply for leniency.

Phase 2:

When it is found that the conditions for either exemption from the fine and/or imprisonment or reduction of the fine have been met, the applicant is given preliminary consent. The assurance is submitted on the condition that the applicant cooperates throughout all subsequent proceedings and that no information emerges that the applicant has coerced others into participating in the cartel.

A provisional assurance is issued by the authority which receives the application for leniency.

An applicant who has applied for leniency for participating in a cartel, where a prison sentence might come into consideration but whose application is not the first of a number of leniency applications, cannot have the charges withdrawn in respect of the prison sentence. This makes the application an application for the reduction of a possible prison sentence. The issue of reduction of a possible prison sentence can only be decided when the case is brought to court, and the applicant is thus not given provisional assurance in these cases.

Phase 3:

If the applicant qualifies for **exemption** from the fine and/or imprisonment, the applicant will be informed by SEIC in the form of a withdrawal of charges. The Authority does not hold the competence to grant withdrawal of charges. In most cases, however, withdrawal of charges will only be granted when the cases against the other cartel members have been decided by the courts.

Criminal cases against the other cartel members are decided upon by the courts.

If the applicant has applied for a **reduction of the fine**, the case against the applicant may be concluded with a fine notice or the acceptance of a fine from a court.

A fine notice means that the applicant – without a court being involved – pays the fine which either the Authority or SEIC indicates that the applicant must pay. However, this presupposes that the applicant pleads guilty of cartel participation and agrees that the case should be settled in this way. In the amount of the fine which the applicant must pay, it has been taken into account whether the applicant must be given a reduction of 50 percent, 30 percent or up to 20 percent, depending on which number the applicant is in the queue of applicants.

If the applicant wishes that a court metes out the fine, this may also happen, provided the applicant pleads guilty and the court accepts the plea.

If, in the processing of a case, the Authority or SEIC finds that the application will not be able to transition to the next phase, this means that one or more of the conditions have not been met, and that the applicant will not be able to obtain leniency for having participated in a cartel.

Cases of imprisonment are always determined by the courts. In cases where the applicant has applied for a reduction of the prison sentence, the case will therefore be determined by a court.

Questions and answers regarding leniency

In the following, we answer some questions which have not already been addressed above. The Danish Competition and Consumer Authority will be happy to answer further questions which may not have been addressed below.

Are there any times when it may be particularly appropriate to apply for leniency?

If you have participated in a cartel, you should always consider applying for leniency. If, as the buyer of a company, you come into the possession of material which might indicate that the company which you are buying has participated in cartel activities, it can be opportunity good idea to apply for leniency. This can also be the case if a new executive, board member or employee becomes aware of activities in the company which indicates participation in a cartel.

If the Authority or SEIC are in the process of conducting an inspection or search of a company, it may be relevant to apply for leniency, if one has actually participated in a cartel.

If the board of a company becomes aware that a former executive of the company participated in a cartel, it would also be relevant to apply for leniency.

Can you be granted leniency even if you were the instigator of a cartel?

Yes, it is possible to obtain leniency even if you were the instigator of the cartel or played a leading role. As an applicant, you should be aware that there may be different rules about this in other EU countries.

Can you also be granted leniency for resale price maintenance or for having abused a dominant position?

No Leniency can only be granted for cartel agreements, i.e. agreements between competitors which restrict competition.

Do you lose the option of leniency if a former employee obstructs investigations into a cartel?

No. A company which has applied for leniency does not lose the opportunity because a former employee obstructs the authorities' investigations into a cartel. After all, the company no longer has the power to instruct the person concerned.

Can I withdraw an application?

It is possible to indicate to the Authority that one does not wish to uphold an application for leniency. However, as an applicant, one should be aware that the Authority will retain the information and documents etc. which the applicant has already submitted and may continue work on the case regardless