

Cartel Regulation

Getting the fine down
in 38 jurisdictions worldwide

2009

Contributing editor: William Rowley QC and Martin Low QC



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Austria

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

On 1 January 2006, the Cartel Act 2005 came in force. It includes rules on cartels and horizontal restrictions, vertical agreements, abuse of dominance and mergers, as well as on enforcement. The Competition Act contains provisions relating to the Federal Competition Agency (FCA) and its powers, as well as to the Commission on Competition.

Furthermore, the Neighbourhood Supply Act, which governs the relationship between suppliers and retailers, includes rules on competition, as do some sector-specific pieces of legislation such as the Telecoms Act, which cover provisions on de-monopolisation in formerly protected sectors.

The Viennese Court of Appeals, sitting as the Cartel Court, is competent for all competition proceedings provided for in the Cartel Act 2005 and has the sole right to issue binding decisions. Appeals from the Cartel Court go to the second and last instance, the Supreme Court of Austria sitting as Cartel Court of Appeals.

While the FCA is formally part of the Federal Ministry of Economic Affairs and Labour, it is not bound by any government instructions. Its main task is the investigation of possible restrictions of competition and prosecution of violations by bringing actions before the Cartel Court. The second ‘official party’, the Federal Antitrust Prosecutor (FAP), is subject to instructions issued by the Federal Minister of Justice. The FAP also has the right to bring actions before the Cartel Court.

Finally, the Commission on Competition is empowered to issue expert opinions on questions of competition policy and may give recommendations concerning notified mergers.

2 Substantive law

What is the substantive law on cartels in the jurisdiction?

The substantive law on cartels in Austria are sections 1 and 2 of the Cartel Act 2005.

Similar to article 81(1) EC, section 1(1) of the Cartel Act 2005 prohibits all agreements between undertakings and decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Section 1(2) sets out a non-exhaustive list of prohibited practices. Pursuant to section 1(4), cartels by recommendation, summarising recommendations to observe specific prices, price limits, rules of calculation, trade margins or rebates that restrict or are intended to restrict competition may also be caught by the prohibition of cartels.

Similar to article 81(3) EC, section 2(1) of the Cartel Act 2005 provides for an exemption from the prohibition of cartels where, the behaviour in question contributes to improving the production or distribution of goods, while allowing consumers a fair share of the resulting benefit; it also applies to promoting technical or economic progress and

does not impose restrictions that are not indispensable to the attainment of these objectives or afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Section 2(2) contains a de minimis exemption and exempts certain specific practices from the prohibition in section 1. To come within the de minimis exemption, the undertakings concerned must not have a market share of more than 5 per cent in Austria and no more than 25 per cent on any relevant local market. The specific exemptions relate to certain agreements in the book and press sector, restrictions of competition between members of a cooperative insofar as they are justified by the aim of the cooperative, restrictions of competition within the ‘decentralised banking sector’, and certain restrictions of competition within the agricultural sector.

It should also be mentioned that, according to section 3(1) of the Cartel Act 2005, the Federal Minister of Justice may exclude by block regulations certain groups of cartels from the cartel prohibition. However, since the Cartel Act 2005 came into force, the Federal Minister of Justice has not yet adopted such regulations.

Finally, as Austria is a member of the European Union, article 81 EC is directly applicable and the case law of the European courts, as well as Commission practice, are observed.

3 Industry-specific offences and defences

Are there any industry-specific offences and defences?

As mentioned above, there are certain industry-specific exemptions listed in section 2(2) of the Cartel Act 2005.

4 Application of the law

Does the law apply to individuals or corporations or both?

Section 1(1) of the Cartel Act 2005 refers to ‘entrepreneurs’, which includes individuals and corporations. The functional term comprises every independent economic entity, regardless of its legal form and way of financing.

5 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

According to section 24 of the Cartel Act 2005, Austrian competition law applies only to facts that affect the domestic market, regardless of whether they have occurred in Austria or abroad.

6 Proposals for change

Are there any proposals for change to the regime?

According to the 2008 to 2013 programme of the newly elected government, the FCA shall be strengthened in its powers and resources.

However, it shall not receive decision-making competence as has been suggested from different sides. Rather, the Cartel Court shall remain solely competent to issue binding decisions in cartel law matters. It is further foreseen that the Federal Cartel Prosecutor (FCP) shall receive the power to request an investigation by the FCA.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

Typically, the FCA takes the first steps in an investigation. The outcome is regularly shared with the undertakings concerned (section 13 of the Competition Act). Subsequently, the FCA or the FAP (or both) may file a motion for cease and desist, finding or fines with the Cartel Court.

The Cartel Court is not restricted to the evidence offered by the parties to the proceedings; rather, it may further investigate the truth *ex officio*. The proceedings may end with a decision following or dismissing (on technical grounds or on substance) the motion.

As mentioned above, an appeal to the Cartel Court of Appeals is available against a decision by the Cartel Court. However, only in very exceptional cases can facts be challenged in the appeal.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

Pursuant to section 11 of the Competition Act, the FCA may conduct any investigation necessary to fulfil its statutory purpose. It may employ (external) experts, question witnesses and (representatives of) the undertakings concerned.

In particular, the FCA may:

- request information from (associations of) undertakings;
- inspect and make copies of business documents, irrespective of their format (including electronic information); and
- request the answering of questions (section 11a(1) of the Competition Act).

Upon application by the FCA, the Cartel Court can order undertakings to comply with the abovementioned requests (section 11a(3) of the Competition Act). Failure to comply with such court order may result in a fine of up to 1 per cent of annual group turnover (section 29(2) of the Cartel Act 2005).

If necessary, the Cartel Court can also order an investigation of the business premises, often referred to as ‘dawn raid’ (section 12 of the Competition Act). In such an investigation, the FCA has the abovementioned powers.

The FCA is also empowered to execute Community rules and, in particular, to collaborate with the European Commission in its investigations (*inter alia*, sections 3 and 12 of the Competition Act).

Finally, it should be mentioned that the FCA may also conduct sector inquiries and collaborate with other authorities in competition matters (section 2(1), (3) and (4) of the Competition Act).

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

As mentioned above, the FCA collaborates with the European Commission in its investigations. Moreover, the FCA is integrated into the network of European competition authorities (ECN). In particular, the

FCA is to exchange information and documents with the Commission and competition authorities of other EU member states (section 10(1) of the Competition Act). Information obtained from the network in connection with a leniency application must, however, not be used for an application for fines – such application may be based on information obtained from other sources (section 11(6) of the Competition Act).

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

See, in particular, under questions 8 and 9.

11 Adjudication

How is a cartel matter adjudicated?

As mentioned above, the Cartel Court is solely competent to issue binding decisions in competition cases in Austria. It is, therefore, the Cartel Court that adjudicates cartel matters upon application by the official parties or – unless in fine proceedings and merger cases – by affected undertakings.

12 Appeal process

What is the appeal process?

An appeal against a decision by the Cartel Court has to be filed within four weeks of service with the decision. The Cartel Court of Appeals serves as second and last instance.

13 Burden of proof

With which party is the burden of proof?

In principle, the burden of proof rests on the party claiming a breach of competition law. Only in abuse cases are there some rebuttable presumptions in effect shifting the burden of proof.

As mentioned above, the Cartel Court is not restricted to the evidence offered. However, it is established case law that the party claiming a breach of competition law must state all relevant facts on the basis of which an infringement may be found.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Under the current Austrian competition regime, cartels do not, in principle, trigger criminal sanctions. However, cartel behaviour may qualify as bid rigging or fraud (or both), both being criminal offences (sections 168b and 146 *et seq* of the Austrian Criminal Code, respectively).

Bid rigging is punishable by up to three years in prison and fraud, depending on the severity of the offence, by up to 10 years. It should also be mentioned that, pursuant to the Corporate Liability Act, corporations may also be held liable for criminal offences of their management and employees.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

A cartel law infringement may lead to administrative fines of up to 10 per cent of the group’s turnover in the year prior to the verdict (section 29 of the Cartel Act 2005).

Apart from private damages claims (to date, only one case has been reported where a plaintiff was awarded damages in a follow-on

civil procedure), private enforcement in Austria may also be based on section 1 of the Act against Unfair Competition (UWG). Under this provision, the commercial courts may, in particular, issue cease-and-desist orders if the cartel law infringement cannot be justified by a reasonable construction of the law.

Although not a sanction *stricto sensu*, but worth mentioning, a conviction may lead to the exclusion from future public tenders pursuant to the Austrian Federal Procurement Act.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The same conduct may well lead to criminal, civil and administrative sanctions in Austria.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Private damage claims may be brought under general Austrian civil law before the ordinary courts. Most commentators agree that the prohibition of cartels (as well as the abuse of market dominance provisions) are protective rules within the meaning of section 1331 of the Austrian General Civil Code (ABGB) also protecting customers (and not only competitors). As a consequence, aggrieved competitors as well as harmed customers may bring a tort claim.

As mentioned above, a private claim may also be based on the Unfair Competition Act.

As regards class actions, a draft amendment to the Austrian Code of Civil Procedure (ZPO), which would have introduced group trials and what could be referred to as 'specimen proceedings' was heavily criticised and has not become law. There is, thus, only limited scope for collective claims. Pursuant to section 11 of the Code of Civil Procedure, individual proceedings may be joined under certain conditions. Moreover, potential claimants may assign their claims to one entity that then brings the assigned claims together in its own name. Under the Unfair Competition Act, certain representative bodies also have standing.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

As mentioned above, administrative fines may go up to 10 per cent of the group's turnover in the preceding business year (as to their calculation, see question 19).

This maximum has not yet been imposed. However, in September 2007, the Cartel Court of Appeals raised the €5 million fine imposed by the Cartel Court against Europay (now Paylife), which operates Maestro in Austria, to €7 million (which amounted to 7.8 per cent of that company's turnover). Europay had been found to be engaging in a hard-core cartel and a severe abuse of market dominance.

The highest fines imposed so far occurred in the Austrian elevators and escalators case. A fine of €75.4 million against five Austrian elevator companies was confirmed in November 2008 by the Cartel Court of Appeals. Criminal sanctions have in the past been imposed against individuals in the construction industry. Criminal proceedings against the background of the elevators and escalators case are still pending.

Sanctions

19 Sentencing guidelines

Do sentencing guidelines exist?

Section 30 of the Cartel Act 2005 stipulates that when assessing the fine the court shall, in particular, take into account the gravity and duration of the infringement, the amount of illicit gains, the degree of fault, the economic capability of the offender and its collaboration in the investigation. In view of these rather general principles, both the FCA and the Cartel Court have taken some recourse in past cases to the fining guidelines of the European Commission, but not applied them word for word.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

As mentioned above, there are no Austrian sentencing guidelines in the narrow sense. Section 30 of the Cartel Act 2005 is obviously binding on the Cartel Court. However, it is well established that the Cartel Court has a wide discretion in ascertaining the fine.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

Since 1 January 2006, a leniency programme has been in force in Austria. The main rules are contained in section 11(3) to (6) of the Competition Act and section 36 (3) of the Cartel Act 2005. In addition, the FCA has published a 'leniency handbook' on its website.

For further details on the Austrian leniency regime, see the following questions.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

According to the Competition Act, the FCA may refrain from applying for fines (and the FCP is barred from making an application) if the (association of) undertakings in question:

- has ended its involvement in an infringement of section 1 of the Cartel Act or of article 81(1) EC (however, according to the leniency handbook, undertakings should, without exceptions, contact the FCA before ending the infringement);
- has informed the FCA of this infringement before the FCA has had knowledge about it;
- cooperates fully and on a continuous basis with the FCA in order to fully clarify the circumstances of the case; and
- did not coerce other (associations of) undertakings into participating in the infringement.

There is a sliding scale of leniency depending on whether the undertaking is the first or a subsequent applicant. For the determination of the exact reduction of the fine, the FCA takes into account the point in time at which it was contacted by the undertaking and the additional value of the information given.

The leniency programme does not cover, among other things, civil claims for damages and criminal sanctions.

23 First in

What is the importance of being 'first in' to cooperate?

For full immunity, the applicant must be first in. Moreover it must give all the evidence in its possession or available to it to the FCA. The undertaking should provide fast, truthful and complete answers to any (further) questions the FCA may have.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

Subsequent undertakings can qualify for reductions of fines. According to the leniency handbook, the following reduction will typically be granted if all the criteria of section 11(3) of the Competition Act are met and information of additional value is provided to the FCA:

- a second undertaking reduction of 20 per cent to 50 per cent;
- a third undertaking reduction of 20 per cent to 30 per cent; and
- all later undertakings, reductions of up to 20 per cent.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

As mentioned above, it is essential to be the first to contact the FCA and to do so before it has learned about the facts from other sources.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

In completing a leniency application the applicant's name and contact details are required. However, during an FCA investigation, the applicant's identity is not disclosed to third parties or the public. Moreover, there is no access to the FCA's files.

Once the FCA files an application for fines with the Cartel Court, however, the identity of the leniency applicant will become apparent at least to the other undertakings concerned. While access to the Cartel Court's files by third parties is restricted, there are several unresolved issues in particular as to the extent that other courts or authorities may request the files of the Cartel Court (and, thereby, indirectly allowing third parties access). Furthermore, oral hearings before the Cartel Court are generally open to the public.

Final decisions by the Cartel Court may be published and final decisions by the Cartel Court of Appeals are usually published with the names of the parties deleted.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

As mentioned above, the application should be made in a timely fashion with the FCA.

For the application, the FCA has published a form on its website. The applicant must complete the form and submit it by fax or email to the FCA. The FCA may also accept oral applications. The time at which the FCA receives the correctly completed form and available evidence is crucial in determining the amount of any reduction.

As regards the evidence and, in particular, the question of added value, the applicant should provide all documents, statements (such as sworn affidavits of the individuals involved) concerning the time when the infringement occurred. Evidence that relates directly to the infringement is of greater value.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

While there is no formal plea bargain regime, an undertaking may well attempt to settle a case up front with the FCA. To date, there is one reported case where a settlement was reached prior to the application for fines by the FCA. The undertakings concerned waived

their rights to appeal and the Cartel Court's decision was limited to a view lines imposing the fines agreed upon between the FCA and the undertakings.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

An undertaking's employee, who has personally participated in illicit behaviour, may be subject to individual (criminal or private) prosecution. There is currently no leniency protection available against such prosecution.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

There is no legal guarantee of leniency. Pursuant to section 11(5) of the Competition Act, the FCA is to issue a non-binding declaration to the applicant upon request whether or not it intends to apply the leniency provisions in the case at hand. Moreover, the FCA sees itself bound by the leniency handbook.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

As mentioned above, the leniency application form should be completed and any queries by FCA responded to accurately, comprehensively and swiftly.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

There is no reform of the leniency programme planned. However, the director general of the FCA announced at a conference some time ago that the FCA is planning to publish its first experiences with the Austrian leniency programme.

Defending a case**33 Representation**

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As there can easily be a conflict of interest between the corporation and its employees, it is generally advisable that employees seek their individual legal advice as early as possible, as they may have to disclose information that might also be used against them.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Again (at least under Austrian bar rules), it mainly depends on whether the defendants may have a conflict of interest. In the Austrian elevators and escalators case, for instance, three undertakings in different factual positions but at the time of the proceedings all belonging to the same group have been represented by the same counsel.

Update and trends

In November 2008, the Cartel Court of Appeals has confirmed the current highest fine of €75.4 million against five undertakings for cartel behaviour in the Austrian elevators and escalators case. This case has also been the first leniency case in Austria. Meanwhile, a second leniency case has resulted in a (not yet final) fine decision confirming that leniency also plays a significant role in cartel

enforcement in Austria.

It now remains to be seen how private enforcement in the form of follow-on damage claims will evolve. To date, there is only one reported case where a plaintiff has been awarded damages against a driving school that had been found by the Cartel Court to have engaged in cartel behaviour.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

In general, a corporation may pay the legal costs of and penalties imposed on its employees. In the Austrian banks case (currently pending before the ECJ), which triggered criminal proceedings, the banks reimbursed their managers who had been made to pay some compensation payments.

36 Getting the fine down

What is the optimal way in which to get the fine down?

There is no optimal way except for leniency or collaboration with the FCA and, subsequently, the Cartel Court may well get the fine down.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice.

The information in each table has been supplied by the authors of the relevant chapter.

Austria				
Is the regime criminal or civil/administrative?	What is the maximum sanction?	Is there a leniency programme?	Does the regime extend to conduct that takes place outside the jurisdiction?	Remarks
The Austrian cartel regime is in essence a civil regime with certain specifics. The investigative phase before the FCA is governed by administrative rules. The proceedings before the Cartel Court follow certain civil procedural rules.	The Cartel Court may impose a fine up to 10% of the group's turnover in the previous business year.	Since 1 January 2006, Austria has a leniency regime that is being increasingly used.	The Austrian Cartel Act 2005 also applies to conduct carried out abroad but affecting the domestic market.	

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