Cartel Regulation 2020

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.

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Austria

Astrid Ablasser-Neuhuber and Florian Neumayr
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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Cartel Act 2005 sets out rules on cartels and (other) horizontal restrictions, vertical agreements, abuse of dominance and mergers, as well as on enforcement of cartel regulation, including specific provisions on the enforcement of private damages claims. The Competition Act contains provisions relating to the Austrian national competition authority, the Federal Competition Authority (FCA), and its powers, as well as to the Commission on Competition, a body that advises the FCA.

Further, the Neighbourhood Supply Act includes certain rules on competition such as a non-discrimination obligation. While this piece of legislation primarily governs the relationship between suppliers and retailers, the Austrian Supreme Court has held that it basically applies to the relationships between all commercial entities that are not end customers (case 16 Ok 3/08 *Sägerundholz*). Finally, sector-specific legislation such as the Telecoms Act, which covers provisions on demonopolisation in formerly protected sectors, must be mentioned.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The FCA investigates possible restrictions of competition and prosecutes violations by bringing actions before the Cartel Court. While the FCA is formally part of the Federal Ministry of Digital and Economic Affairs (BMDW), it is not bound by any government instructions. 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.

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, in principle, the sole right to issue binding decisions. Appeals from the Cartel Court go to the second and last instance, the Supreme Court sitting as the Cartel Court of Appeals.

The FCA has limited power to issue decisions. Since the entry into force of an amendment to the Austrian competition rules on 1 March 2013, the FCA can itself issue information requests and subsequently impose fines in the event that its requests are not followed. An appeal can be brought before the Administrative Court Vienna against such decisions by the FCA. Subsequently, a further remedy may be lodged before the Supreme Administrative Court or the Constitutional Court.

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

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The most recent amendment to the Cartel Act 2005, as well as to the Competition Act, entered into force on 1 May 2017 through the adoption of the Cartel and Competition Amendment Act 2017. The amendment entails several significant changes to Austrian competition law and predominantly results from the implementation of Directive 2014/104/EU, the Damages Directive. The directive, and, in turn, its transposition into Austrian law, aims primarily at facilitating the enforcement of private damages claims following on from competition law infringements. In this regard, the key changes introduced by Chapter 5 of the Cartel Act include the introduction of a rebuttable presumption of harm, meaning that, if a cartel between competitors is established, the infliction of harm is assumed leading to a shift of the burden of proof towards the defendant. The provisions, however, stay silent on vertical agreements. Furthermore, the law provides joint and several liability of all cartel participants, except for immunity recipients, who enjoy a certain privilege as they are, in principle, liable only to their direct and indirect purchasers or suppliers.

The amendment incorporates an additional (rebuttable) and conditional presumption that damage inflicted by an infringer was passed on to next level of the supply chain. The defendant can involve its direct or indirect purchasers (or suppliers) in the damages proceedings via a third-party notice. In addition, limitation periods for damages claims have been extended to five years (from three years) starting from the cessation of the infringement. At the same time, an absolute limitation period of 10 years beginning with the occurrence of the damage has been introduced.

The most far-reaching change concerns rules governing the disclosure of evidence, which were previously unknown in the Austrian legal system. A court will be able to oblige the opposing party (claimant as well as defendant) or a third party (this may even be evidence from files of courts and authorities) to disclose evidence, even if it contains confidential information. Protection from disclosure is granted only to leniency statements and settlement submissions. Other aspects of the directive, such as an explicit rule on the right to claim compensation for damage resulting from antitrust infringements or the binding effect of final decisions by competition authorities, had already been existing law.

Another change concerns the opportunity to appeal against Cartel Court decisions on the ground of errors of fact, which had barely been possible previously. In addition, the amendment now allows for the exemption from the cartel prohibition for agreements between publishers and press wholesalers. As regards the power of the FCA to submit fining applications, from now on every act of investigation or enforcement by the FCA interrupts the limitation period (of five years) as long as the affected undertaking is notified of this measure. An absolute limitation period of 10 years from cessation of the infringement

still applies. The FCA is now also explicitly empowered in the context of dawn raids to inspect documents and data accessible at the premises of the undertaking irrespective of the place of storage and may enforce access by collecting penalty payments.

Moreover, the scope of application of Austrian merger control has been extended as well. The legislature introduced a new notification threshold, which no longer takes only turnover figures into consideration, but also the transaction value. The objective is to cover acquisitions in the digital arena, where often target companies do not generate sufficient turnover to be governed by merger control provisions. From 1 November 2017, acquisitions have to be notified when:

- the combined worldwide turnover exceeds €300 million;
- the combined Austrian turnover exceeds €15 million;
- the value of the consideration of the transaction exceeds €200 million; and
- the target is to a significant extent active in Austria.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

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

Similar to article 101(1) of the Treaty on the Functioning of the European Union (TFEU), 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 101(3) TFEU, 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 the revised de minimis exemption and exempts certain practices from the prohibition in section 1. To come within the de minimis exemption, the undertakings concerned, provided that they are competitors, must not have a combined market share of more than 10 per cent of the relevant market or, in the case of non-competitors, their market shares must remain at or below 15 per cent. In addition, it is stipulated that agreements do not profit from the exemption if hard-core restrictions, such as price fixing or market allocation, are involved. Further specific exemptions relate to certain agreements in the book and press sector, now explicitly including agreements between publishers and press wholesalers, restrictions of competition between members of a cooperative insofar as they are justified by the aim of the cooperative and certain restrictions of competition within the agricultural sector.

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 101 TFEU is directly applicable, and the case law of the European courts, as well as Commission practice, is observed.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

5 | Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are certain industry-specific exemptions listed in section 2(2) of the Cartel Act 2005. Apart from that, competition law is fully applicable also to regulated sectors such as telecoms.

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

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 manner of financing.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

According to section 24(2) of the Cartel Act 2005, Austrian competition law applies only to facts that affect the domestic market; however, it does so regardless of whether they have occurred in Austria or abroad. This effects principle is also relevant with regard to the Neighbourhood Supply Act (Austrian Supreme Court case 16 Ok 3/08 *Sägerundholz*). The basis for such jurisdiction is seen in the statutes referred to in question 1. An effect on the Austrian market is regarded as sufficient nexus.

When Austrian procedural rules shall be invoked in the context of enforcing articles 101 or 102 TFEU abroad (in particular, when the FCA is requested by another competition authority to perform an investigation on its behalf), it is only relevant whether the facts of the case in question may affect trade between member states; if they do, Austrian procedural rules apply (Austrian Supreme Court case 16 Ok 7/09 Fire Trucks).

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The effects principle pursuant to section 24(2) of the Cartel Act 2005 has as a consequence that any conduct, which does not affect the domestic Austrian market, does not fall within the national jurisdiction. Therefore, even if the facts of the case are established in Austria, Austrian competition law is not applicable as long as only foreign markets are affected.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Typically, the FCA takes the first steps in an investigation (see below). The outcome may be shared with the undertakings concerned (section 13 of the Competition Act). If they consider competition law to be infringed, the FCA or the FAP (or both) may file a motion for cease and desist, finding or fines with the Cartel Court. Often, the FCA enters into settlement talks with the undertakings concerned prior to bringing an application before the Cartel Court. Typically, the undertakings are to acknowledge certain facts and their legal qualification for a reduced

fine. As the Cartel Court cannot go beyond the fine applied for by the official parties, an undertaking prepared to settle in such a way has some certainty what its fine will be and the proceedings are by far less elaborate (as taking of evidence and suchlike hardly takes place).

The Cartel Court is not restricted though 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 or dismissal (on technical grounds or on substance) of the motion. The duration of the proceedings (from the start of the investigation to the Cartel Court's decision) varies on a case-by-case basis and depends on the complexity of the particular case at issue.

An appeal to the Cartel Court of Appeals is available against a decision by the Cartel Court. Usually, it takes at least six months before a respective decision can be expected.

Meanwhile, Austria has also seen several follow-on private damage claims. For example, in the *Driving Schools of Graz* case, damages were awarded (Higher Regional Court of Graz for Civil Law Matters case 17 R 91/07p). In the *Europay* case, the Viennese Commercial Court has found the claims time-barred (case 22 Cg 138/07y). Other cases, in particular, following on from the *Austrian Elevators and Escalators* case, are still pending. As regards the time frame for civil proceedings, practice has shown that such proceedings can last several years but they may well take much less time to be finally decided.

Investigative powers of the authorities

10 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

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), which includes any documents or data accessible from premises of the undertaking affected, irrespective of the place of storage; and request the answering of questions (section 11a(1) of the Competition Act).

Since the amendment in 2013, the FCA can issue binding decisions in this respect (section 11a(3) of the Competition Act) instead of asking the Cartel Court for help (see question 2). Subsequently, in the event of failure to comply with such court order, it may impose administrative fines up to €75,000 (section 11a(5) of the Competition Act).

If necessary, the Cartel Court can also order an investigation of the business premises, often referred to as a dawn raid (section 12 of the Competition Act). In such an investigation, the FCA has the above-mentioned powers. The FCA's powers have also been strengthened in this regard. Since 1 March 2013, the search can only be objected to (claiming a legal privilege or that something falls outside the scope of the dawn raid) with regard to individually specified documents, whereas a general sealing of documents is no longer possible (section 12(5) and (6) of the Competition Act). It also has the right to seal rooms of the premises during such dawn raids (section 12(4) of the Competition Act).

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

Finally, 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

Inter-agency cooperation

11 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The FCA collaborates with the European Commission in its investigations. Moreover, the FCA is integrated into the network of European competition authorities. In particular, the FCA exchanges 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(7) of the Competition Act). The FCA is also very active in bilateral contracts with other national competition authorities and has signed memoranda of understanding with other competition authorities (see www.bwb.gv.at). Further, there is also an inter-agency cooperation on a national level that has experienced a strengthening by the recent amendment. It is now explicitly laid down in the Competition Act that the criminal police, the federal prosecutor's office and the courts can submit to the FCA personal data that they gained in criminal proceedings so that it can fulfil its tasks, in particular for the enforcement of the antitrust prohibition (section 14(3) of the Competition Act). Moreover, during dawn raids, the public security organs (ie, the police) may assist the FCA in securing documents (section 14(2) of the Competition Act). To the best of our knowledge, the FCA does have informal contact with other competition authorities, in particular with the German Federal Cartel Office.

Interplay between jurisdictions

12 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

See, in particular, questions 10 and 11.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The Cartel Court is solely competent to issue material 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.

Private enforcement motions may be brought before the Cartel Court if seeking cease-and-desist orders or decisions for fining; other private actions such as claiming damages need to be brought before the ordinary civil or commercial courts (see question 18).

Burden of proof

14 | Which party has the burden of proof? What is the level of proof required?

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

The Cartel Court is not restricted to the evidence offered. Austrian law does not restrict the forms of permissible evidence. Expert evidence is accepted, although in practice, the courts often only rely on expert

witnesses that they have appointed rather than on the opinions of expert witnesses instructed by one of the parties.

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 (see Supreme Court 8 October 2008, 16 Ok 8/08 *Immofinanz*).

Moreover, the court must be convinced by the relevant evidence. Regarding damages under the Unfair Competition Act (see question 18), the Supreme Court has lowered the standard of proof by holding that the plaintiff only has to establish with a high probability that (some) harm has occurred (see Supreme Court 15 September 2005, 4 Ob 74/05v).

Under certain circumstances (in particular, where the plaintiff has, for objective reasons, considerable difficulties in proving something), courts are also willing to accept some prima facie evidence. For example, in predatory pricing cases, it has been held sufficient that the applicant establishes that sales were below cost by analysing data of comparable undertakings (see Supreme Court 9 October 2000, 16 Ok 6/00 and 16 December 2002, 16 Ok 11/02).

Where a damages claim is based on the infringement of a protective rule (the prohibition of cartels is considered to be such a rule), the defendant must prove that it bears no fault. Moreover, according to court practice, which, however, can no longer be fully upheld, the plaintiff only has to prove the infringement and formerly was required to also prove that harm has occurred; it does not have to prove causality (see, eg, Supreme Court 16 September 1999, 6 Ob 147/99g).

Pursuant to the most recent amendment (section 37c(2) Cartel Act), there is a statutory presumption of harm caused by cartels between competitors – addressing the horizontal level – that shifts the burden of proof towards the defendant. There is no such presumption regarding vertical cartels. Moreover, if a final decision by the Cartel Court (of Appeals) has already established an infringement, a civil court is bound by the finding of an infringement of antitrust law. As a result, the plaintiff enjoys the presumption of harm, possibly together with a binding decision regarding an infringement, while the defendant in the future needs to rebut this presumption and prove that there was no harm.

Further, an indirect purchaser may claim damages from the defendant, if it proves that the damage has been passed on along the supply chain. Also in this context, the indirect purchaser benefits from the presumption of a passing-on, if it proves that:

- the defendant committed the infringement;
- the infringement resulted in a price mark-up; and
- it purchased goods or services that were affected by the infringement.

Also, the defendant may submit a passing-on defence against a direct purchaser claiming damages; however, the defendant bears the full burden of proof.

Circumstantial evidence

15 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In the context of an antitrust proceeding, the party claiming the infringement is required to state all facts based on which the alleged infringement may be found. As regards the evidence, prima facie or circumstantial evidence is, in principle, insufficient to prove the assertions and convince the court. However, it may well be that courts accept circumstantial evidence in individual cases where the plaintiff is objectively not in the position to provide full evidence of an infringement. As regards interim measures such as interim injunctions, the Cartel Court of Appeals accepts prima facie evidence owing to the proximity of the defendant to the evidence on condition that the facts are at least indirectly made probable (see, eg, Supreme Court 16 December 2002, 16 Ok 11/02).

Appeal process

16 | What is the appeal process?

In general, an appeal against a decision by the Cartel Court must be filed within four weeks of service of the decision. Since the 2013 amendment, the Cartel Act 2005 stipulates a shorter appeal period of two weeks for, inter alia, interim injunctions, as well as for decisions concerning the content of the publication of the decision (since 2013, all Cartel Court decisions have been published, but the parties may specify business secrets). The Cartel Court of Appeals serves as second and last instance; while errors of fact by the Cartel Court could rarely be challenged owing to tight limits and strict case law, the most recent amendment introduces the opportunity to base an appeal on the ground that there is substantial doubt as to the correctness of the facts underlying the Cartel Court's decision.

In private enforcement before the civil courts, there are typically three instances. Decisions must be appealed within four weeks. A respective appeal can be based on erroneous findings of facts as well as on an incorrect legal assessment. The Supreme Court as last instance only decides on questions of significant legal importance and provided that a specific jurisdictional value is at stake (over €30,000). For amounts between €5,000 and €30,000, the Court of Appeals must declare whether a subsequent appeal is admissible. As far as a motion for disclosure of evidence is concerned, the Cartel Court's disclosure order can be separately challenged within two weeks. On the contrary, the Cartel Court's decision to reject a disclosure motion may only be challenged together with the final decision.

SANCTIONS

Criminal sanctions

17 | What, if any, criminal sanctions are there for cartel activity?

Under the Austrian competition regime, cartels do not, in principle, trigger criminal sanctions. However, cartel behaviour may, in particular, qualify as bid rigging or fraud (or 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 the criminal offences of their management and employees. In one bid-rigging case, the defendants were subject to prison sentences ranging from nine to 11 months and fines (see Supreme Court 26 September 2001,13 Os 34/01). In another case, one defendant was sentenced to six months in prison and a further 18 months of parole. The other defendants in the case received prison sentences of up to 20 months, which were suspended and the other defendants were released on probation for a three-year period (see Supreme Court 6 October 2004, 13 Os 135/03 – Lower Austrian Window Cartel). Another trial resulted in a five-year prison sentence for the defendant. However, in that case, the defendant was charged not only for serious fraud, but also for other crimes, including embezzlement (see Supreme Court 28 June 2000, 14 Os 107/99).

Several criminal proceedings concerning bid rigging in the tender procedures for a long-distance heating plant in Vienna are currently pending (two convictions are not yet legally binding). The public prosecutor's office is not only investigating the individuals involved pursuant to the Criminal Procedure Act, but also the undertakings involved in accordance with the Corporate Liability Act. Owing to the limited number of decisions with regard to bid rigging and fraud (in cartel cases), no conclusions about a trend can be drawn.

Civil and administrative sanctions

18 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). Section 30 of the Cartel Act provides guidance as to the calculation of administrative fines (see question 19). In a primarily vertical case that also had horizontal elements (hub and spoke), Spar (a large food retailer) was fined €30 million for coordinating final selling prices in 2015 – the highest fine ever imposed on one single undertaking in Austria. According to the website of the FCA, in 2015, for example, the Cartel Court and the Cartel Court of Appeals (in the *Spar* case) imposed fines following applications by the Official Parties totalling about €34,436,735.

Apart from private actions before the ordinary civil courts or motions before the Cartel Court (see, in particular, question 13), private enforcement in Austria may also be based on section 1 of the Unfair Competition Act. Under the unfair competition law rules, the commercial courts may issue cease-and-desist orders, have judgments published and award damages if the cartel law infringement cannot be justified by a reasonable construction of the law (see Supreme Court 14 July 2009,4 Ob 60/09s *Anwaltssoftware*).

A number of civil cases are pending before the ordinary civil courts, but apart from the already mentioned Driving School case (which only concerned a small value at stake and is not as such publicly available since only the judgments rendered by the Supreme Court are generally publicised), no final decisions have been rendered. Private enforcement is further facilitated by section 37(i) of the Cartel Act, which declares final decisions by European competition authorities (such as, in Austria, the Cartel Court) binding on the civil court that hears a private enforcement case. As elaborated earlier (see question 3), the transposition of the EU Damages Directive into Austrian law foresees several further provisions that are meant to facilitate private enforcement, such as a presumption that a horizontal cartel causes harm.

No maximum amount of compensation for damages is set. In Austria, the inflicted damages are to be reimbursed. Tort law has no punitive character, meaning that there are, for example, no treble damages.

In principle, there are two methods for calculating damages. According to the specific calculation method, a comparison is made between the plaintiff's property after and (hypothetically) without the harmful event. Pursuant to the abstract calculation method, the specific circumstances (of the person harmed, etc) are not taken into account. Rather, the 'objective value' of the harmed items (typically, their market price) is determined. While the specific calculation quasi-automatically takes into account any passing on, etc (resulting in lower or no damages), the abstract calculation does not. For this reason, most commentators favour the specific calculation. However, there are dissenting opinions and cases (not concerning competition infringements) where the abstract calculation has been applied.

Moreover, where it is certain that a party is entitled to damages but the exact amount is impossible or unreasonably difficult to establish, section 273, paragraph 1 of the Code of Civil Procedure entitles the court to assess the amount in its discretion. The interplay of this provision with the implementation of the EU Damages Directive (establishing a presumption of harm) can be expected to further facilitate private enforcement. Where some claims raised within the same action are comparatively insignificant, or where single claims do not exceed €1,000, the court may even assess both whether damages should be granted at all and the exact amount that should be awarded according to its discretion (section 273, paragraph 2).

Exemplary damages are not available under Austrian law. Since the amendment, the Cartel Act foresees that the court, when ascertaining the damage pursuant to section 273 of the Civil Procedure Code, may take into account the advantage gained by the defendant or defendants as a result of the infringement (section 37a paragraph 1 of the Cartel Act).

Guidelines for sanction levels

19 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to section 30 of the Cartel Act, the criteria taken into account when determining the amount of a fine are:

- the gravity and duration of the infringement;
- the gains (if any);
- the level of fault involved; and
- the economic strength of the infringing undertaking.

The provision additionally contains aggravating and mitigating circumstances (similar to those in the fining guidelines of the European Commission). Notably, one aggravating reason that allows for the imposition of higher fines is repeated offending (eg, when a fine has already been imposed on an undertaking, or where the undertaking has previously been found guilty of committing a violation of cartel law). Equally, where the respective undertaking was the leader or instigator of the infringement of cartel law, this will lead to a higher fine. On the other hand, mitigating reasons are taken into account in particular cases, such as if the undertaking's involvement in the infringement is substantially limited; the undertaking stopped the infringement itself; or the undertaking has significantly contributed to the clarification of the infringement.

In the case of an infringement of the prohibition of cartels, the cooperation of the undertaking in relation to the infringement will also be taken into account (as an attenuating factor). Jurisprudence has made it clear that the geographic scope of the market concerned, the market shares of the cartelists and the type of infringement are also important factors that will be taken into account when ascertaining a fine. In view of these rather general principles, both the FCA and the Cartel Court have taken the fining guidelines of the European Commission into consideration in past cases, although they have not applied them word for word.

Compliance programmes

20 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The FCA has developed informal criteria according to which compliance measures – depending on the individual case – can be recognised as a reason for mitigation and thus lead to lower fines. So far, it has been controversial whether compliance measures should be reflected in the size of the fine (and if so, whether negative or positive). In the future, there is at least a chance that a single-digit percentage reduction in fines might be granted if compliance measures were taken.

According to the those criteria, compliance measures will be assessed along the following 12 points:

- Compliance programme backed by management ('tone from the top').
- Programme 'seriously' and distribute at all relevant levels.
- Tailored to the individual needs of the company (no 'one fits all').
- (Attendance) trainings and educations.
- Efficiency of the measures (withstand internal and external stress tests, such as mock dawn raids).
- Quality measures (no minimum standards).

- Consistent documentation and traceability of measures taken.
- Regular monitoring and updates.
- Full cooperation with the authorities necessary in the event of infringement.
- Cooperation must continue until the antitrust proceedings are concluded.
- Disclosure of evidence and, where appropriate, provision as principal witness is welcomed.
- Prevention of a new violation.

Director disqualification

21 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Within the framework of procurement procedures, contracting authorities must check the professional reliability of companies and individuals with powers of representation, decision-making or control – for example, management board members, managing directors, supervisory board members. If there is a reason for exclusion, a company is generally excluded from further procurement procedures owing to a lack of professional reliability. A case of professional unreliability occurs, for example, when a legally binding court conviction has been imposed for certain criminal offences committed by the company or the individuals named above. In connection with conduct contrary to antitrust law, fraud in particular should be mentioned.

Debarment

22 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Yes, a conviction may lead to the exclusion from future public tenders pursuant to the Austrian Federal Procurement Act. According to section 68(1) Austrian Federal Procurement Act, the contracting authority has to exclude undertakings – save for very limited exemptions – from the participation in a procurement procedure in case that the contracting authority has knowledge of a final conviction for bid rigging or fraud.

However, under certain conditions, it is possible – after taking certain quite rigorous internal measures – to become eligible as a bidder again.

Parallel proceedings

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

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

PRIVATE RIGHTS OF ACTION

Private damage claims

24 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Private damage claims can be brought under general Austrian civil law before the ordinary courts. Most commentators and the Supreme Court agree that the prohibition of cartels (as well as the abuse of market dominance provisions) are protective rules within the meaning of section 1311 of the Austrian General Civil Code that also protects customers (and not only competitors). Further, the Cartel Act now contains special provisions on private enforcement. According to these rules, an aggrieved competitor as well as harmed customers may bring damage claims against undertakings that have violated competition law. Private plaintiffs may of course also invoke contractual claims and concepts such as illicit gains.

In addition, those indirectly harmed (eg, the customer of someone who purchased from a cartelist) can have standing, if they show that damages were passed on to them. The defendant cartelist can notify the direct and indirect customers, respectively, with a view to show that passing-on took place or did not take place (as the case may be). Pursuant to the private enforcement provisions in the Cartel Act, a private damage claim by the direct purchaser is not excluded by the fact that the goods or services have been sold on, which constitutes – to some extent – a limitation of the passing-on defence; however, on the level of ascertaining the damage, passing-on issues may be brought up (potentially limiting the compensation to the directly harmed).

In Austria, only single damages will be awarded but interest is generally payable as from the point in time when the harm occurred, which can lead to very substantial claims. The new rules in the Cartel Act now also expressly refer to section 273 of the Austrian Code of Civil Procedure, which, under certain circumstances, allows the civil courts to estimate (rather than strictly ascertain) the compensation to be awarded to plaintiffs; the amendment made it also clear that when estimating compensation, the civil courts can take into account any gains from the cartel behaviour. As to the reimbursement of legal costs, see question 36.

Class actions

25 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Regarding class actions, a draft amendment to the Code of Civil Procedure, which would have introduced group trials and what could be referred to as 'specimen proceedings', was heavily criticised and has not become law. Thus, there is only limited scope for collective claims. Individual proceedings can be brought together typically by way of assignments or subsequently be joined by the competent court. In that regard, it can also be possible to sue several defendants in Austria even if only one of them is seated in Austria.

COOPERATING PARTIES

Immunity

26 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

As of 1 January 2006, a leniency programme has been in force in Austria. The statutory basis is section 11 of the Competition Act; it is supplemented by a handbook published on the FCA's website. It has to be noted, that in Austria leniency is exclusively administered by the FCA and not in court proceedings.

According to section 11(3) of the Competition Act, the FCA can (entirely) refrain from applying for a fine against an undertaking (full leniency, amnesty), if four conditions are met, which are:

- the respective undertaking has ended its involvement in an infringement of section 1 of the Cartel Act or of article 101(1) TFEU;
- it has informed the FCA of this infringement prior to the FCA having knowledge about the infringement, the leniency applicant provides

enough information to enable a dawn raid or even a direct fine application to the Cartel Court;
- the undertaking cooperates fully, promptly and truthfully with the FCA and must submit all evidence concerning the infringement in its possession or available to it to clarify the circumstances of the case completely; and
- it did not coerce other undertakings or associations of undertakings to participate in the infringement.

Subsequent cooperating parties

27 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Principally, only the 'first in' may obtain full leniency (see question 26). However, if the 'second in' provided so much information to directly allow for an application for fines to the Cartel Court while the 'first in' had only provided enough to enable a dawn raid or less, there may still be amnesty.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Subsequent undertakings can qualify for reductions of fines. According to the leniency handbook, the following reductions will typically be granted if all the criteria of section 11(3) of the Competition Act are met and information of significant additional value is provided to the FCA:
- a second undertaking, reduction of 30 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.

Approaching the authorities

29 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

It is important to be as early as possible in contacting the FCA. Where the FCA already has knowledge, the leniency applicant must provide enough information to enable a dawn raid, or even enough details to enable the FCA to directly apply for a fine before the Cartel Court. There are no deadlines in the narrow sense. However, when pursuing a marker-type approach, it is advisable to also try to discuss expectations regarding the swiftness of cooperation with the FCA.

Cooperation

30 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Leniency applicants must not only cooperate fully and promptly, but also truthfully, and must submit all evidence concerning the infringement that is in their possession or available to them. This may be seen in the *Print Chemicals* case, where the original leniency applicant was eventually fined the highest amount as it had not included a market affected by the cartel in its leniency cooperation. Moreover, there is a different expectation in relation to subsequent cooperating parties, since they must provide significant additional value (eg, information that the FCA does not already possess).

Confidentiality

31 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

In general, all leniency information is kept confidential. In this regard, section 39, paragraph 2 of the Cartel Act provides that, in principle, third persons may only access the cartel court file with the consent of the parties to the proceedings concerned. This provision was tested in a request for preliminary ruling before the ECJ (C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie*), where the court indeed found this provision to be incompatible with EU law. Rather, the national court must determine whether access is allowed by balancing the legitimate interest of confidentiality and the protection of the leniency programme against the individual's interest in the enforcement of its rights. The most recent amendment explicitly determines in section 37k(4) Cartel Act that leniency statements and settlement submissions enjoy absolute protection from disclosure. This, however, does not hold true for documents that are part of the authority's file independently of any proceedings. As regards other files of a competition authority, the balancing of interests conducted by the court also has to take the effectiveness of public enforcement into consideration.

Further, the Austrian Supreme Court (28 November 2014, 16 Ok 10/14b and 16 Ok 9/14f) has held that access to file must also not be generally denied in cases not containing a 'foreign element'. The Austrian Supreme Court further stated, that the criteria for being granted access to file must not impose an excessive burden on the ones who seek damages. The most recent amendment has now clarified that in damages proceedings, the court may, on the basis of a reasoned request and after having balanced the various interests, oblige the opposing party or a third party to disclose evidence. The court applying this proportionality test may even order to disclose confidential information pursuant to section 37j (2) and (4) Cartel Act.

In addition, the Supreme Court has made it clear that the Cartel Court's file is to be given to the criminal prosecutor upon request (OGH 22 June 2010, 16Ok 3/10).

Generally, proceedings before the Cartel Court are public; everyone can follow the proceedings. However, upon application by a party the general public can be (partially or fully) excluded from oral hearings if regarded necessary for protecting business secrets. In addition, the Cartel Court is obliged to publish final decisions on:
- the cessation of violations;
- the finding of infringements;
- the imposition of fines; and
- certain requests in concentration proceedings.

The names of the undertakings concerned as well as the essential content of the decision, including imposed sanctions, have to be published. Nevertheless, the Cartel Court has to take into account the legitimate interests of undertakings in the protection of their business secrets. Further, the Cartel Court must provide the parties with the opportunity to identify the parts of the decision, which they want to have excluded. The new legislation, which primarily covers the implementation of the Damages Directive, introduces minor changes as regards the publication of Cartel Court decisions. First, also decisions rejecting or dismissing (not only granting) an application have to be published. In addition, the operative part of final decisions has to be published on the FCA's website immediately (in leniency cases the name of the immunity recipient has to be included). Further, also in settlement cases, the Cartel Court's written decision has to contain a detailed reasoning. The FCA on its part is empowered to inform the public about proceedings

'of public importance'. In general, the decisions of the Cartel Court of Appeals are also published.

Settlements

32 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Although a settlement procedure is not explicitly provided for by the law, settlement procedures are available. The FCA published a guideline on settlements reflecting its practice. The FCA being in favour of settlements is of importance, since it is for the FCA to negotiate settlements with the undertakings concerned. Both sides agree on the facts of the case and the amount of the fine to be paid. The settlement reached, however, must not be misunderstood as ceasing the proceedings as a whole. Rather, the undertaking acknowledges its misconduct and the Cartel Court, on the basis of the application filed by the FCA, renders a decision. As regards oversight, the Cartel Court examines the FCA's application only concerning its conclusiveness, but without conducting its own evidence taking. The Cartel Court is bound by the FCA's application as it cannot impose higher fines than determined by the FCA; but the court is free to impose lower fines.

As far as legal protection is concerned, the undertaking in any case has the right to appeal against the Cartel Court's decision, although from a practical point of view, the chances of success are negligible, because the misconduct had to be acknowledged in the first place. A settlement as such therefore needs to be carefully considered, as this decision by the Cartel Court is binding on the civil courts adjudicating follow-on private enforcement cases.

Corporate defendant and employees

33 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

An undertaking's employee (or ex-employee) who has personally participated in illicit behaviour may be subject to individual (criminal or private) prosecution. Individuals who have helped in uncovering cartel behaviour may, however (like the corporate defendant), profit from section 209b of the Code of Criminal Procedure. Pursuant to this provision, the FCA can inform the criminal prosecutor, and the criminal prosecutor can close investigations if the contribution to the uncovering of cartel behaviour was such that a criminal prosecution would not be appropriate. Further, individuals may also try to avail themselves of section 209a of the Code of Criminal Procedure if they directly approach the criminal prosecutor and provide (comprehensively) their information on cartel behaviour.

Dealing with the enforcement agency

34 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

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

DEFENDING A CASE

Disclosure

35 What information or evidence is disclosed to a defendant by the enforcement authorities?

Pursuant to the Cartel Act, both the Cartel Court and the Cartel Court of Appeals have to apply the proceedings as in non-litigious matters. In the proceedings before the Cartel Court, the parties must be given the opportunity to gain knowledge about the matter of the proceedings, the requests, the pleading of the other parties as well as of the findings of the investigations and they must also be given the opportunity to comment on them. The parties must be provided with the opportunity to comment on all facts and results of evidence on which the decision will be based.

As regards investigations by the FCA (including requests for information and dawn raids), the FCA must give the defendant to the application the opportunity to gain knowledge about the results of the investigation and to comment on them within reasonable time in case the FCA intends to file certain applications to the Cartel Court (application to cease, application to declare commitments binding or application for a declaratory judgment).

Representing employees

36 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

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

Multiple corporate defendants

37 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Again (at least under Austrian Bar rules), this mainly depends on whether the defendants may have a conflict of interest. In practice, counsels regularly represent multiple corporate defendants.

Payment of penalties and legal costs

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

In general, a corporation may pay the legal costs of and penalties imposed on its employees. It is prohibited, however, to guarantee upfront, meaning before any infringement has happened, to pay all the costs, if the case comes up. Since fines against single employees are meant to punish the individual, even a guarantee by the corporation to pay could not be enforced. The employee would have to pay by himself or herself. The company still remains free to reimburse its employees for fines and legal costs.

Taxes

39 Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Since the coming into force of section 20(1) subparagraph 5 lit b of the Income Tax Code, fines or other penalties paid after 1 August 2011 are expressly not tax-deductible.

Private damage awards, on the other hand, can be tax-deductible if the relevant wrongdoing is attributable to the business sphere

(as opposed to private actions) (Supreme Administrative Court 2008/15/0259). With cartel activities, this will usually be the case.

International double jeopardy

40 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In general, any infringements that have effects in Austria may lead to fines imposed by the Cartel Court. Hence, provided that such effects can be determined, a fine will be imposed regardless of whether an undertaking has already been fined in another country. It can thus be concluded that there is no double jeopardy defence available for infringing undertakings.

Getting the fine down

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

There is no optimal way, but timely leniency applications and thorough collaboration with the FCA, a settlement where possible and subsequently the Cartel Court may get the fine down or even result in immunity from fines.

It may be noted in this context that a compliance programme does not in itself mean that there is a reduction in fines (Supreme Court 27 June 2013, 16 Ok 2/13). However, a working compliance scheme may well help to prevent a fine in the first place. Compliance initiatives undertaken after the beginning of the investigation will generally not affect the level of the fine. (In Austria, there is no such scheme as in France, where the fine can be reduced by 10 per cent in the case of an introduction of a compliance scheme, which corresponds to certain guidelines published by the French competition authority.)

UPDATE AND TRENDS

Recent cases

42 | What were the key cases, judgments and other developments of the past year?

FCA installed a new whistle-blowing system in February 2019, allowing anyone to contact FCA anonymously around the clock to report any antitrust violations. According to FCA, a total of 39 reports were submitted in 2018, of which four were forwarded to the relevant authorities and 13 are still in an intensive examination phase.

In 2018, investigations in the construction sector were continued by the Office of the Public Prosecutor for Economic Affairs and Corruption and the Federal Office for the Prevention of and Fight against Corruption and numerous Austrian construction companies were raided. The starting point of the investigations in the construction sector was a file found by tax auditors in a Carinthian company. The documents contained in the file suggested the suspicion that price agreements might have been reached in tenders for construction projects. The ongoing investigations of the FCA are very extensive and include a large number of construction projects with varying order volumes.

On 22 November 2018, Signa Holding submitted a notification to FCA of its acquisition of a non-controlling interest of about 49.5 per cent in WAZ Ausland Holding, Essen, Germany. The remaining 50.5 per cent of shares in WAZ are held by Funke Österreich Holding, which thus remains the controlling shareholder. FCA did not submit a request for review to the Cartel Court since FCA considered that the acquisition of a minority shareholding could strengthen a dominant position only in exceptional cases. This was not the case in the present transaction as Signa does not carry out any activities in the media sector or on upstream markets.

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Regime reviews and modifications

43 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Within the framework of the obligations under Directive (EU) 2019/1 (ECN+ Directive), which is intended to ensure more effective enforcement of European competition rules and which must be implemented by the member states by 4 February 2021, Austrian law must be adapted.

This concerns, in particular, amendments relating to the acceptance of commitments. Until now, it is unclear whether commitments could only be declared binding once there had been an infringement. This uncertainty has now been removed by the Directive's provisions, according to which 'concerns' will suffice in the future – as it is in the case of the Commission's acceptance of commitments.

To comply with the requirements of the ECN+ Directive, Austria also has to implement the European level default liability of companies for the fine imposed on an association of undertakings.

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 chapter.

Austria	
Is the regime criminal, civil or administrative?	The Austrian cartel regime is in essence a civil regime with certain specifics. The investigative phase before the Federal Competition Agency is governed by administrative rules. The proceedings before the Cartel Court follow special civil procedural rules.
What is the maximum sanction?	The Cartel Court may impose a fine of up to 10 per cent of the group's turnover in the previous business year. If the behaviour also qualifies as (severe) fraud, jail terms of up to 10 years may be handed down.
Are there immunity or leniency programmes?	Austria has had a leniency regime since 1 January 2006, which is being used increasingly.
Does the regime extend to conduct outside the jurisdiction?	Austrian competition law also applies to conduct carried out abroad as long as there is some effect on the domestic market.
Remarks	Austria is one of the jurisdictions where many private enforcement cases are pending.

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