

Cartel Regulation

Contributing editor
A Neil Campbell



2016

GETTING THE
DEAL THROUGH

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Cartel Regulation 2016

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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First published 2001
Sixteenth edition
ISSN 1473-3420

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Legislation and institutions

1 Relevant legislation

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. The Competition Act contains provisions relating to the Austrian national competition authority, the Federal Competition Agency (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.

2 Relevant institutions

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 Economic Affairs, 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.

3 Changes

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

The recent amendment to the Cartel Act 2005, as well as to the Competition Act, entered into force on 1 March 2013. The core changes include a revised de minimis rule, which, similarly to the situation under

the European Commission's de minimis notice, does not benefit hard-core restrictions. However, it makes no distinction between restrictions by object and such by effect. Further, the notion of collective dominance and presumptions thereof were explicitly incorporated in the Cartel Act 2005. The amendment also led to a further alignment of the rules on the determination of fines to the European Commission's fining guidelines. Moreover, a separate section in the Cartel Act 2005 now deals with private enforcement issues, namely compensation for damages as a result of infringements of cartel law and, inter alia, stipulates that civil law courts are bound by final decisions by the Cartel Court or by the European Commission. However, not only private enforcement but also public enforcement has been strengthened as more powers are attributed to the FCA and, in particular, with regard to dawn raids, further align them with the competences of the European Commission. In merger proceedings, the notifying parties may now ask for an extension of the decision deadlines in both Phase I and Phase II.

4 Substantive law

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, 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

5 Industry-specific provisions

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?

As mentioned above, 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.

6 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 manner of financing.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

According to section 24 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 above-mentioned Neighbourhood Supply Act (Austrian Supreme Court case 16 Ok 3/08 *Sagerundholz*). 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*).

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Typically, the FCA takes the first steps in an investigation. 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 way has some certainty what its fine will be and the proceedings are by far less elaborate (as taking of evidence, etc hardly take 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.

As mentioned above, 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). A further payment card case, as well as numerous cases 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 shorter to be finally decided.

9 Investigative powers of the authorities

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); and request the answering of questions (section 11a(1) of the Competition Act).

Since the amendment, 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

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? 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. 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).

11 Interplay between jurisdictions

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 your jurisdiction?

See, in particular, questions 9 and 10.

Cartel proceedings

12 Adjudication**How is a cartel proceeding adjudicated or determined?**

As mentioned above, 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 finding; other private actions need to be brought before the ordinary civil or commercial courts (see also question 16).

13 Burden of proof**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 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. 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 case 16 Ok 8/08 *Immofinanz*).

Moreover, the court must be convinced by the relevant evidence. Regarding damages under the Unfair Competition Act (see question 16), 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 OGH 15-9-2005, 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 establish that sales were below cost by analysing data of comparable undertakings (see OGH 9-10-2000, 16 Ok 6/00 and 16-12-2002, 16 Ok 11/02).

Where a damage 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, the plaintiff only has to prove the infringement and that harm has occurred; it does not have to prove causality (see, eg, OGH 16-9-1999, 6 Ob 147/99g).

14 Appeal process**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 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 the recent amendment, all Cartel Court decisions are published, but the parties may specify business secrets). The Cartel Court of Appeals serves as second and last instance; however, only in very exceptional cases can facts be challenged in the appeal.

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.

Sanctions

15 Criminal sanctions**What, if any, criminal sanctions are there for cartel activity?**

Under the current 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 (Austrian Supreme Court case 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 parole sentences of up to 20 months (Austrian Supreme Court case 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 (Austrian Supreme Court case 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.

16 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). Section 30 of the Cartel Act provides guidance as to the calculation of administrative fines (see question 17). In 2014, for example, the Cartel Court imposed fines following applications by the Official Parties in the amount of about €22,000,000 (partially not yet final).

Apart from private actions before the ordinary civil courts or motions before the Cartel Court (see, in particular, question 12), 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 (Supreme Court case 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 judgements rendered by the Supreme Court are generally published), no final decisions have been rendered. Private enforcement is further facilitated by section 37a of the Cartel Act, which, inter alia, declares final decisions by European competition authorities (like, in Austria, the Cartel Court) binding on the civil court that hears a private enforcement case. Moreover, it may be noted that the EU Damages Directive, which will have to be implemented into Austrian law, foresees several further provisions that are meant to facilitate private enforcement such a presumption that a 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).

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

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.

Since its most recent amendment, the provision now 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 cartellists 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.

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements? If so, what is the usual time period?

Yes, a conviction may lead to the exclusion from future public tenders pursuant to the Austrian Federal Procurement Act.

19 Parallel proceedings

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.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims may 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 also protecting customers (and not only competitors). As a consequence, aggrieved competitors as well as harmed customers may bring a tort claim. Private plaintiffs may also invoke contractual claims and concepts such as illicit gains. Further, as mentioned above, private actions may be based on the Unfair Competition Act. In Austria, only single damages will be awarded (see question 16). As to the reimbursement of legal costs, see question 34. A party bringing an action must have active standing. Those indirectly harmed (eg, the customer of someone who purchased from a cartellist) generally only have a valid claim under very limited circumstances.

The recent amendment (see question 2) has led to a strengthening of private enforcement, inter alia, in the context of applications for finding before the Cartel Court. In this respect, a legal interest for the finding is always required as a condition for a corresponding decision to be rendered that shall establish anti-competitive behaviour. The Cartel Act now contains an explicit provision stating that the required legal interest is also given if a decision for finding is applied for to seek compensation for damages later on (section 28(1a) of the Cartel Act 2005). Prior to the amendment, this was not considered to be sufficient to establish the required interest. Moreover, a separate section in the Cartel Act 2005 clarifies that anyone infringing competition law is liable for any damages caused thereby, including interest as of the damaging event (section 37a of the Cartel Act 2005).

Pursuant to the new provision, 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. It also now expressly refers 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 clear that when estimating the compensation, the civil courts can take into account any gains from the cartel behaviour. Further, civil courts can interrupt private enforcement proceedings for such time as a case concerning the cartel in question is pending before the European Commission or any competition authority of a member state. Moreover, the limitation period for damage claims is suspended for the time of the duration of respective cartel proceedings and six subsequent months after the final decision in or other termination of such proceedings. Please also see the answer to question 16 above.

21 Class actions

Are class actions possible? If yes, 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. Under certain conditions, however, individual proceedings can be brought together 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. Moreover, (potential) plaintiffs may assign their claims to one entity that then brings the assigned claims together in its own name. Hence, the persons concerned have to take action in assigning their claims. Therefore, such a 'group action' is based on an 'opt-in' basis. It should be noted that such assignment does not necessarily mean that the values of the various claims are to be added together. Hence, the district (generally competent for claims of up to €20,000) rather than the regional court may remain competent for such a 'group action'.

Cooperating parties

22 Immunity

Is there an immunity programme? 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:

- 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 in order to clarify the circumstances of the case completely; and
- it did not coerce other undertakings or associations of undertakings to participate in the infringement.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 22 above). 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.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? 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 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

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?

As mentioned above, 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.

26 Cooperation

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?

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 additional value (eg, information that the FCA does not already possess).

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

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 recently tested in a request for preliminary ruling before the ECJ (C-536/11 *Bundeswettbewerbsbehorde 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. Further, the Austrian Supreme Court (28-11-2014, 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.

Besides, the Supreme Court has made it clear that the Cartel Court’s file is to be given to the criminal prosecutor upon request (OGH 22-6-2010, 16Ok 3/10). The implementation of the EU Directive on Antitrust Damages Actions will likely bring further clarity and, inter alia, an explicit protection of leniency statements.

28 Settlements

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?

While there is no formal plea bargain regime, an undertaking and the FCA may attempt to settle a case up-front. In a case concerning the Austrian telecom incumbent, such settlement was reached; upon waiver by all parties of their rights to appeal, the Cartel Court’s decisions was limited to imposing the fines applied for by the FCA and accepted by the undertaking concerned (case 29 Kt 4/09). A settlement also took place in the recent brewery cartel case. There are no formal rules applicable to such settlements, and settlement talks may vary from case to case. Generally speaking, parties do not require permission to discontinue proceedings and instead try to reach a settlement. Typically, the parties negotiate the settlements with the FCA, and thereby can even avoid a procedure before the Cartel Court.

29 Corporate defendant and employees

When immunity or 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 FCP 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,

Update and trends

Currently, there is a legislative process to implement the EU Directive on Antitrust Damages Actions, which will bring about some changes to the law as it stands. Generally, private enforcement plays an increasingly important role.

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.

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

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

31 Policy assessments and reviews**Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?**

The FCA has recently published a leniency handbook on its website (see www.bwb.gv.at/SiteCollectionDocuments/Leniency%20Handbuch%20BWB%2003%2013.pdf) setting out details on the law and practice of leniency and immunity applications in Austria.

Defending a case**32 Representing employees****May counsel represent employees under investigation in addition to the corporation that employs them? 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 individual legal advice as early as possible, as they may have to disclose information that might be used against them.

33 Multiple corporate defendants**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.

34 Payment of penalties and legal costs**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. In the *Austrian Banks* case (see ECJ decision in joint cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P), which triggered criminal proceedings in Austria, the banks reimbursed their managers, who had been made to pay some compensation payments.

35 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Since the coming into force of section 20(1) sub-para 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.

36 International double jeopardy**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.

As regards private damages claims, principally everyone (allegedly) harmed by a cartel may approach the ordinary Austrian courts; most relevant is that they have jurisdiction as long as at least one defendant has its seat in Austria. Liability for damages in other jurisdictions is principally not taken into account.

37 Getting the fine down**What is the optimal way in which to get the fine down? Does the existence of a compliance programme affect the level of the fine?**

There is no optimal way, but timely leniency applications and thorough collaboration with the FCA 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 leniency programme does not in itself mean that there is a reduction in fines (cf Austrian Supreme Court case 16 Ok 2/13). However, a working compliance scheme may well help to prevent a fine in the first place.

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Cartel Regulation
ISSN 1473-3420



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