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# Cartels

## Austria

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2020

# AUSTRIA

## Law and Practice

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## 1. Basic Legal Framework

### 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The Cartel Act of 2005 sets out the prohibitions against cartels and other horizontal or vertical restrictions (among other competition violations), including provisions regarding the enforcement of private damages actions. The Cartel Act also sets out the power and procedures of the Austrian Federal Antitrust Prosecutor (FAP), one of the so-called official parties responsible for enforcing competition laws in Austria. The Competition Act sets out the powers and procedures of the other official party, the Federal Competition Authority (FCA), which is the Austrian national competition authority. The Competition Act also governs the Commission on Competition, which is an advisory body to the FCA.

The Neighbourhood Supply Act sets out some additional competition rules, including non-discrimination provisions. Although that legislation primarily governs the relationship between suppliers and retailers, the Austrian Supreme Court has held that it also applies to relationships between any commercial entities that are not end customers (case 16 Ok 3/08 Sägerundholz).

### 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The FCA investigates violations of the competition laws and prosecutes them before the Cartel Court. Although the FCA is part of the Federal Ministry of Digital and Economic Affairs (BMDW), it is not bound by any government instructions. In addition to the FCA, the Federal Antitrust Prosecutor (FAP) (the other “official party” in Austria) also has the right to bring actions before the Cartel Court, but it is subject to instructions issued by the Federal Minister of Justice.

The Viennese Court of Appeals, sitting as the Cartel Court, hears all competition proceedings pursuant to the Cartel Act 2005, and has the sole right to issue binding decisions. Appeals from the Cartel Court are heard by the Supreme Court, sitting as the Cartel Court of Appeals.

The FCA has limited power to issue decisions. However, since a 2013 amendment to the Austrian Competition Act, the FCA can impose fines if its information requests are not followed by the receiving party. The party can appeal such a fine before the Administrative Court of Vienna in the first instance, and before the Supreme Administrative Court or the Constitutional Court in the second instance.

A cartel law infringement may lead to a cease-and-desist order (including an order requiring a change to the corporate structure of the undertaking, such as the breaking up of the company), the rendering of an agreement or contract as null or void, and an administrative fine of up to 10% of the defendant 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 on the calculation of administrative fines. In 2015, in a primarily vertical case that also had horizontal (ie, hub and spoke) elements, a large food retailer was fined EUR30 million for co-ordinating final selling prices in 2015 – the highest fine ever imposed on a single undertaking in Austria.

Under the current competition law regime in Austria, cartels do not trigger criminal sanctions, but cartel behaviour may qualify as bid rigging or fraud (or both), both of which are criminal offences under a separate statute – ie, Sections 168b and 146 of the Austrian Criminal Code, respectively.

Bid rigging is punishable by up to three years in prison, and fraud by up to ten years (and, notably, pursuant to the Corporate Liability Act, corporations may also be held liable for the criminal offences of their management and employees). Both offences also carry monetary fines. In one bid-rigging case, the defendants were subject to prison sentences ranging from nine to 11 months, in addition to monetary fines (see Supreme Court 26 September 2001, 13 Os 34/01). In another case, one defendant was sentenced to six months in prison (followed by 18 months of parole), and the other defendants were sentenced to up to 20 months in prison, although their sentences were suspended and they were released on three-year probation (see Supreme Court 6 October 2004, 13 Os 135/03 – Lower Austrian Window Cartel). In another case, the defence received a five-year prison sentence, although that case involved other crimes as well as serious fraud, including embezzlement (see Supreme Court 28 June 2000, 14 Os 107/99).

In addition, under the Austrian Federal Procurement Act, a criminal conviction may also lead to exclusion from future public tenders. According to Section 68(1) of the Austrian Federal Procurement Act, the contracting authority may (subject to some very limited exemptions) exclude undertakings from participation in a procurement procedure if it has knowledge of a conviction for bid rigging or fraud.

### 1.3 Private Challenges of Cartel Behaviour/Effects

Private enforcement motions may be brought before the Cartel Court to obtain cease-and-desist orders and declaratory judgments, but not to obtain fines. For actions seeking a declaratory judgment, the applicant must show that it has a legal interest in such a judgment.

Private actions seeking money damages need to be brought before the ordinary civil or commercial courts. See 5. **Private Civil Litigation Involving Alleged Cartels.**

## 1.4 Definition of “Cartel Conduct”

The prohibitions against cartel conduct pursuant to Section 1 of the Cartel Act are very similar to those of Article 101/1 of the Treaty on the Functioning of the European Union (TFEU). Since Austria is a member of the European Union, Article 101 of the TFEU and the case law of the European courts is directly applicable in Austria. Similarly, Commission enforcement practices and policies are generally observed in Austria.

Section 1(1) of the Cartel Act of 2005 prohibits all agreements between undertakings, 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, including:

- directly or indirectly fixing purchase and selling prices or any other trading conditions;
- limiting or controlling production, markets, technical development or investments;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other contract parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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 qualify as prohibited cartel behaviour.

Section 2(1) of the Cartel Act 2005 provides for an exemption from the prohibition of cartels if the conduct contributes to improving the production or distribution of goods (or services) while allowing consumers a fair share of the resulting benefit, or to promoting technical or economic progress. Such conduct must be indispensable to the attainment of the beneficial objectives, and cannot eliminate competition in a substantial part of the relevant products (or services).

Section 2(2) of the Cartel Act sets out a *de minimis* exemption (based on the market shares of the involved undertakings not exceeding a certain level) and also carves out from the

prohibition of Section 1 certain limited conduct involving the following:

- books, art prints, sheet music, magazines, newspapers and publishers;
- co-operatives; and
- agricultural producers and associations of agricultural producers.

## 1.5 Limitation Periods

The Cartel Court may impose sanctions on violations of the Cartel Act when the application has been filed within five years of the termination of the violation. A continuous infringement is deemed to have ended when the last infringing action is completed. Different limitation periods apply under criminal law (ie, bid rigging, fraud, etc).

The limitation period is interrupted as of the date when the FCA notifies its investigation (or prosecution) to at least one of the undertakings that participated in the infringement. Each such interruption restarts the running of the limitation period. Notwithstanding any such interruptions, however, the limitation period expires no later than ten years from the termination of the infringement (although the limitation period does not run while any court proceedings are ongoing).

Private claims for damages are time-barred five years upon the existence of the claim becoming known (including the damages incurred, the party causing the damages, and the legal claim under competition law). Notwithstanding that, the limitation period runs no longer than ten years from when the damage was incurred. The limitation period is tolled (ie, put on pause) during any proceedings or investigations by the Competition Authority, as well as settlement negotiations.

## 1.6 Extent of Jurisdiction

Pursuant to Section 24(2) of the Cartel Act of 2005, Austrian competition law applies only to conduct that affects the domestic market. However, domestic effects are determined without regard to whether the conduct occurred in Austria or abroad. For example, the application of the Cartel Act does not depend on where an agreement was entered into, where an abusive practice originated, or whether Austrian undertakings are involved. The only criteria to establish jurisdiction is whether the agreement or behaviour had an effect on the Austrian market.

This effects principle also applies with regard to the above-mentioned Neighbourhood Supply Act (Austrian Supreme Court case 16 Ok 3/08 Sägerundholz).

## 1.7 Principles of Comity

The FCA is empowered to execute EU rules and to collaborate with the European Commission in its investigations, pursuant to, inter alia, Sections 3 and 12 of the Competition Act. The FCA is also integrated into the network of European national competition authorities.

In particular, the FCA exchanges information and documents with the Commission and competition authorities of other EU member states, pursuant to Section 10(1) of the Competition Act. However, information obtained therefrom in connection with a leniency application must not be used for an application for fines – such an application must be based on information obtained from other sources, pursuant to Section 11(7) of the Competition Act. The FCA has also signed memoranda of understanding with various national competition authorities, which allow for varying degrees of co-operation in the course of any investigation.

Contacts and co-operation are believed to be especially close with the German Federal Cartel Office.

## 2. Procedural Framework for Cartel Enforcement – Initial Steps

### 2.1 Initial Investigatory Steps

The FCA typically takes the first steps in opening an investigation. If the FCA believes that competition law has been infringed, the FCA or the FAP (or both) may file a motion with the Cartel Court for the parties to cease and desist their conduct or to impose fines. Often, the FCA enters into settlement talks with the parties prior to bringing an application before the Cartel Court. As part of that process, the parties must acknowledge certain facts about the underlying conduct, as well as the legal basis for the fine. The Cartel Court cannot go beyond the fine applied for by the official parties.

The Cartel Court is not restricted to the evidence offered by the parties to the proceeding; rather, it may conduct an ex officio investigation. The proceedings may end with a decision or dismissal (on technical grounds or on substance) of the government's 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.

The decision of the Cartel Court (unless the subject of a settlement with the official parties) can be appealed to the Cartel Court of Appeals, which usually takes at least six months to render a decision.

### 2.2 Dawn Raids

Dawn raids are an increasingly common tool employed by the government in the investigation of cartels in Austria. (Public reports indicate that the FCA conducted approximately 20 dawn raids in 2019 alone.) Upon request by the FCA, the Cartel Court can order an investigation of the business premises, pursuant to Section 12 of the Competition Act.

Generally, outside counsel can represent the company in all aspects of responding to and dealing with the dawn raid, and can be present onsite during the course of the raid to advise the company. During a dawn raid, the company has the right to ask for its legal advisers to be present, although the FCA is not obliged to wait for their arrival to start its search. Generally, the FCA does not conduct substantive interviews during a dawn raid. When it does, company counsel can usually be present. For senior representatives of the company (who are deemed to speak on behalf of the company), there arguably exists a right to counsel being present during such an interview. For other employees, the presence of individual counsel would only be necessary in extraordinary circumstances (for example, involving potential criminal liability as a result of suspected fraud).

Many cartel investigations are begun with a dawn raid, during which the authorities request information from the parties, inspect and make copies of business documents or data that are accessible from the premises irrespective of their format (including electronic information), and may even question witnesses and representatives of the company (although this is not as common). The authorities also have the right to seal rooms of the premises during dawn raids, pursuant to a recent amendment to the Competition Act (Section 12(4)).

Although usually the authorities can only make copies of specific documents or files that are located on the premises, in some circumstances they can also confiscate company records if the success of the inspection cannot be served otherwise (for example, if files are not readable or have been deleted, the authorities can seize a laptop to conduct forensic work on it).

### 2.3 Restrictions on Dawn Raids

In theory, a party that is subject to a dawn raid can object to the collection of data or documents (or the interviewing of witnesses) on the basis of legal privilege or that the information sought falls outside the scope of the search warrant authorising the dawn raid. However, no clear legal protections exist in such circumstances as, following amendments to the Cartel Act in 2013, a dawn raid search can only be objected to with regard to individually specified documents and a categorical sealing of documents is not permitted, and even then only with respect to a very limited set of circumstances that are unrelated to the

scope of the search warrant or any legal privilege (per Sections 12(5) and (6) of the Competition Act).

As a matter of good practice, the FCA has stated that it will seal narrow categories of documents and keep them separate from its general case file if it is impractical for the party to specify individual documents during the dawn raid. The party will be given time to inspect the documents and identify those it wishes to object to within a reasonable period of time. Moreover, the FCA allows the party to obtain a copy of all files gathered in the dawn raid that the FCA has made a part of its record file, which the party can review and then submit a statement to the FCA lodging its objections.

Any objections lodged by the party against the FCA's collection of evidence can only be brought before the administrative court, which has rendered decisions that set out a very narrow and limited ability for the party to object.

Notably, the FCA has taken the position that there is no legal privilege under Austrian law. There is no settled jurisprudence on the existence of a legal privilege in the context of a dawn raid.

## **2.4 Spoliation of Information**

During a dawn raid, the company is usually informed by the authorities that the destruction of data or documents can be an aggravating factor during any subsequent fine proceedings. According to a handbook on dawn raids published by the FCA, full co-operation with the authorities' investigation (in the context of a leniency application or other opportunities for obtaining a reduction in fines) entails the company not allowing evidence to be concealed, falsified or destroyed.

Arguably, criminal investigations would also be subject to the Austrian Criminal Code, which includes a general prohibition on destroying, damaging or suppressing evidence to be used in a proceeding.

## **2.5 Procedure of Dawn Raids**

The FCA can request any information from the company and its personnel that it needs to carry out the dawn raid. For example, it may interview company personnel about the organisational structure of the company and where relevant files (physical and electronic) are stored. The FCA can also request documents and explanations from company personnel about facts or documents that are related to the subject and purpose of its investigation, such as explanations about the meaning of abbreviations used in email communication or access to sales representatives' laptops.

The FCA can also question company personnel about matters that extend beyond explanations of facts or documents. Prior to such questioning, witnesses are informed of their rights and

obligations, in particular their right to refuse to give evidence. Representatives of the company, such as managing directors, are questioned in their capacities as involved parties; other company personnel, such as staff, are questioned as witnesses. The FCA carries out such interviews independently as an administrative authority – as it would any interview subject to a summons – and not as part of the enforcement of the search warrant.

Under current law, the FCA may formally interview legal representatives of an undertaking. However, the FCA can also interview other employees during the inspection, although what they say will be taken as witness statements and not as statements made on behalf of the undertaking.

The FCA creates a copy of all data that is recorded during the dawn raid, and the company can make its own copy of the entire collected data at the end of the dawn raid, at its own cost.

## **2.6 Role of Counsel**

See **2.2 Dawn Raids**, **2.5 Procedure of Dawn Raids**, and **2.7 Requirement to Obtain Separate Counsel**.

## **2.7 Requirement to Obtain Separate Counsel**

Since administrative proceedings against individuals cannot result in fines, and criminal proceedings are limited to cases involving bid rigging or fraud, it is not usually necessary for individuals to have separate counsel from their employers. Counsel would also not be necessary for an employee whose employer submits a successful leniency application, as discussed in **2.17 Leniency, Immunity and/or Amnesty Regime**.

However, there may be other potential liability (labour or civil) that may require separate representation, during the course of the proceedings.

## **2.8 Initial Steps Taken by Defence Counsel**

In a dawn raid, apart from the usual steps taken in responding to a dawn raid, defence counsel will determine whether leniency is available and to what extent. If instead the initial steps are in response to an information request from the authority, then defence counsel likewise will need to quickly determine whether unlawful conduct has occurred and whether applying for leniency is a possibility.

## **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**

In addition to the documents and testimony collected during a dawn raid, the FCA may request information from the company during the course of its investigation. It can issue a summons to interview company personnel, and can also request that the company provides additional documents or data. Such requests

for information can also be sent to other persons or undertakings that may have helpful information.

In addition, the FCA can request official assistance from the general criminal prosecutor's office or other government institutions in the course of its investigation.

## **2.10 Procedure for Obtaining Other Types of Information**

See **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**.

Surveillance powers are granted for violations of criminal offences that, in the context of cartel conduct, typically involve bid rigging in violation of Section 168b of the Austrian Criminal Code or fraud in violation of Section 146 of the Austrian Criminal Code.

## **2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions**

Without an order from the Cartel Court, the FCA can order a company under investigation to present any files (including documents and data) that are stored on off-site servers, so long as they are normally accessible from the site of the dawn raid. With regard to information requests (outside the context of a dawn raid), the FCA can ask for all documents or files that are available to the undertaking, regardless of where they are located or stored. In this regard, the entire group of which the undertaking is a part is seen as a single business unit, which means that documents held abroad by an affiliate would need to be produced in response to the request.

However, if the data or other evidence is located outside of Austria, the FCA will likely have to engage a competition authority within the jurisdiction of the site in order to obtain the requested information, unless a direct connection to the location exists from the premises where the FCA has conducted its dawn raid.

## **2.12 Attorney-Client Privilege**

Under Austrian law, legal advice from in-house counsel is not protected by a statutory legal privilege. In addition, in the view of the Austrian authorities, Austrian law does not provide for the legal privilege of correspondence between a company and its outside counsel, unless the correspondence is in the possession of the lawyer. However, a lawyer cannot be compelled to testify against the interest of its client unless he or she is authorised by the client to do so.

When European competition law is enforced, the legal privilege set out in EU law may apply.

## **2.13 Other Relevant Privileges**

Neither a company nor its representatives can be compelled to admit to an infringement, either in an interview or in response to an information request. However, this privilege is limited, as all answers relating to the underlying facts of the infringement must be answered.

In criminal proceedings, there is a complete privilege against self-incrimination, including the right to refuse to testify.

## **2.14 Non-cooperation with Enforcement Agencies**

Failure to respond to a so-called simple information request does not lead to any sanctions. A full information request must be answered correctly and completely, otherwise the undertaking can be subject to administrative fines.

## **2.15 Protection of Confidential/Proprietary Information**

There is no right to access the record file of the FCA or FAP.

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

Section 39 of the Cartel Act states that non-parties may only access the record file of the Cartel Court with the consent of the parties to the proceedings. However, the ECJ has ruled that this provision is incompatible with EU law, and that a national court must determine whether to allow access to case files by balancing the legitimate interest of confidentiality and the protection of the leniency programme against the requesting individual's interest in the enforcement of its rights (C-536/11 Bundeswettbewerbsbehörde v Donau Chemie). However, with the entry into force of new laws implementing the EU damages directive in Austria, it is now unclear whether the ECJ ruling would continue to preclude the application of Section 39 of the Cartel Act, as the new laws providing for private damages claims in Austria grant the right to seek information from administrative proceedings (the absence of which was at issue in the ECJ decision).

Generally, proceedings before the Cartel Court are open to the public. However, upon application by a party to the proceedings, the general public can be excluded (partially or fully) from oral hearings if doing so is necessary to protect business secrets.

The Cartel Court is obliged to publish final decisions on the following:

- the cessation of violations;
- the finding of infringements or rejection of the application;
- the imposition of fines; and
- certain requests in concentration proceedings.

The operative portions of a final decision must be published on the FCA's website, and the name of the immunity recipient must be included in leniency cases. In settlement cases, the Cartel Court's decision must also include the reasoning for the resolution. The names of the undertakings concerned also have to be published, as well as the essential content of the decision, including imposed sanctions. Nevertheless, the Cartel Court must take into account the legitimate interests of undertakings in the protection of their business secrets, and must provide the parties with the opportunity to identify the parts of the decision that they wish not to be disclosed to the public.

The FCA is also empowered to inform the public about proceedings that are "of public importance."

Finally, since the implementation of the EU damages directive in Austria, specific rules apply in ordinary courts that govern which documents from the record file of the administrative proceeding can be sought by claimants in civil court. Pursuant to Section 37k(4) of the Cartel Act, leniency statements and settlement submissions are protected from disclosure, but files in the case record that were obtained independently of a proceeding are not protected. Other case records are subject to the balancing of interests test, taking into account the effectiveness of public enforcement.

## **2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement**

In principle, defence counsel can raise any legal or factual arguments at any point in the investigation or proceeding. In addition, as a matter of practice, in most cases a so-called statement of objections is issued by the FCA before it brings the case before the Cartel Court. The undertaking can respond to those objections before the case is brought to the Cartel Court upon the submission of an application by the FCA. Once the case is before the Cartel Court, there are multiple stages and exchanges of briefs (and oral hearings) between the FCA and the defendants.

## **2.17 Leniency, Immunity and/or Amnesty Regime**

A leniency programme has been in force in Austria since 1 January 2006, pursuant to Section 11 of the Competition Act (and as set out in a handbook published by the FCA on its website).

The programme is administered exclusively by the FCA. Under Section 11(3) of the Competition Act, the FCA can refrain from applying for a fine against an undertaking (ie, full amnesty) if the following four conditions are met:

- the undertaking has ended its involvement in an infringement of Section 1 of the Cartel Act or Article 101(1) of the TFEU;

- it has informed the FCA of this infringement prior to the FCA having knowledge about it, providing enough information to enable a dawn raid or a direct fine application to the Cartel Court;
- the undertaking co-operates fully, promptly and truthfully with the FCA and submits 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 to participate in the infringement.

Leniency applicants must co-operate completely, promptly and truthfully, and must submit all evidence concerning the infringement in their possession or available to them.

Only the "first in" leniency applicant may obtain full amnesty (ie, full reduction of fine). Subsequent undertakings can qualify for a reduction in their 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:

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

The Leniency Handbook provides for the possibility to obtain a "marker" upon submitting certain essential information concerning the infringement, such as the name and address of the undertaking seeking the marker and the undertaking participating in the conduct, the type of conduct, the duration of the conduct, the product and geographic markets affected by the conduct, and plans to apply for leniency with other competition authorities. When filing a marker, the FCA recommends using a standard form, and imposes an eight-week deadline for completing the application for leniency.

Individuals can also benefit from reporting cartel conduct to the authorities. Pursuant to Section 209b of the Code of Criminal Procedure, the FCA can inform the criminal prosecutor of an individual's co-operation, and the criminal prosecutor can close its investigation into an individual in light of his or her contribution to the FCA's investigation. However, in that instance, the immunity of the individual from criminal fines depends entirely on the success of the leniency application by his or her employer. Furthermore, pursuant to Section 209a of the Code of Criminal Procedure, individuals can directly approach the criminal prosecutor and provide them with information on cartel conduct on their own motion (although this is not typically done).

## **3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds**

### **3.1 Obtaining Information Directly from Employees**

See 2.2 Dawn Raids, 2.3 Restrictions on Dawn Raids and 2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony.

### **3.2 Obtaining Documentary Information from Target Company**

See 2.2 Dawn Raids, 2.3 Restrictions on Dawn Raids and 2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony.

### **3.3 Obtaining Information from Entities Located Outside this Jurisdiction**

The FCA can seek information directly from companies or individuals located outside of Austria, using the same procedures and relying on the same laws for information requests made within Austria. Such requests can be directed at a domestic affiliate of a foreign entity, or they can be directed at the foreign entity through a request lodged with the competition authority in its jurisdiction.

### **3.4 Inter-agency Co-operation/Co-ordination**

See 1.7 Principles of Comity.

### **3.5 Co-operation with Foreign Enforcement Agencies**

See 1.7 Principles of Comity.

### **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**

If there is a potential for criminal liability arising from cartel conduct, the criminal procedures would follow the general rules governing criminal proceedings in Austria, and any ongoing administrative proceedings would continue before the Cartel Court in parallel.

### **3.7 Procedure for Issuing Complaints/Indictments in Civil Cases**

Administrative proceedings brought by the FCA can be initiated upon a complaint lodged by an interested (ie, harmed) market participant. It is also possible for such a party to initiate a private action before the Cartel Court to seek an order to cease and desist the cartel conduct (or a declaratory judgment), although it is not possible to seek a fine or bring claims for consumer redress. In either case, the proceeding would follow the same basic rules and procedures.

With respect to private damages actions, see 5. **Private Civil Litigation Involving Alleged Cartels.**

### **3.8 Enforcement Against Multiple Parties**

The FCA has broad discretion in how to structure its proceedings. It can include multiple undertakings in a single proceeding, or may proceed against a single undertaking in other cases.

### **3.9 Burden of Proof**

In principle, the burden of proof rests with the FCA. However, the rules that apply to enforcement before the Cartel Court set forth that the court may establish facts on its own motion. It is ultimately the Cartel Court's decision whether a violation has occurred.

In proceedings seeking an injunction, a prima facie showing is sufficient. In cases in which the FCA is not seeking a fine, if an undertaking claims an exemption to the prohibition on cartel conduct, then the burden of proof lies with the undertaking claiming the exemption.

### **3.10 Finders of Fact**

The Cartel Court is solely competent to render decisions on the merits in competition cases brought by the official parties. It acts as the finder of fact and makes any legal rulings.

### **3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings**

Unless the proceedings have been formally joined, in principle, evidence cannot be obtained from a separate proceeding before the Cartel Court. However, a party may request that the Court obtains files from another proceeding in order to establish facts.

Evidence submitted by an applicant for leniency may be used by the FCA in other proceedings before the Cartel Court.

### **3.12 Rules of Evidence**

Proceedings before the Cartel Court are governed by specific procedural rules – including those concerning evidence – that generally stem from the areas of Austrian law in which the judge is not bound by the motions or evidence offered by the parties (eg, family law).

### **3.13 Role of Experts**

The Cartel Court is not restricted to the evidence offered, and there are no restrictions under Austrian law about the forms of permissible evidence that the official parties may present during the proceeding. Expert evidence is therefore accepted, although in practice the Cartel Court often relies on expert witnesses that it has appointed rather than on the opinions of expert witnesses instructed by one of the parties to the proceeding.

### 3.14 Recognition of Privileges

See 2.12 Attorney-Client Privilege and 2.13 Other Relevant Privileges.

### 3.15 Possibility for Multiple Proceedings Involving the Same Facts

It is possible for parallel proceedings to be brought by the FCA (or FAP) and the general criminal prosecutor's office.

With regards to whether multiple proceedings can be brought against different undertakings, please see 3.8 Enforcement Against Multiple Parties.

Multiple proceedings against a single undertaking based on the same facts can be conducted as long as the principle of *ne bis in idem* is not infringed (eg, it is possible to have one proceeding concerning abuse of dominance and another concerning a prohibited cartel, but not two coinciding proceedings involving the same prohibited cartel).

## 4. Sanctions and Remedies in Government Cartel Enforcement

### 4.1 Imposition of Sanctions

Only the Cartel Court may render decisions on the merits in cartel proceedings, including imposing fines. The Cartel Court is bound by the FCA's application, as it cannot impose higher fines than those proposed by the FCA, although it may impose lower fines. Moreover, the FCA may choose not to specify the amount of the recommended fine, leaving the Cartel Court to determine it on its own.

If the owners or representatives of a company give incorrect or misleading information, this constitutes an administrative offence imposed by the FCA, which is punishable by a fine of up to EUR25,000, pursuant to Section 11a of the Competition Act.

The FCA may also order the disclosure of information and the submission of documents by itself and, in the event of default, may order periodic penalty payments pursuant to Section 5 (3) of the Administrative Enforcement Act (the maximum amount of which for each day of default amounts to 5% of the average daily turnover achieved in the preceding financial year, pursuant to Section 11a of the Competition Act). If incorrect, misleading or incomplete information is disclosed, this also constitutes an administrative offence punishable by a fine of up to EUR75,000, pursuant to Section 11a of the Competition Act.

### 4.2 Procedure for Plea Bargaining or Settlement

Neither the Cartel Act nor the Competition Act sets out any specific procedures for settlement or plea bargaining to resolve

an investigation. However, in recent years the FCA has extensively used negotiated settlements, and continues to heavily promote them.

The FCA published a guideline on settlements reflecting its practice. In negotiated resolutions, both sides (which is often the FCA in regular consultation with the FAP) agree on the facts of the case and the amount of the fine to be paid. However, this does not cease the proceeding. Upon the company's acknowledgement of its misconduct and the legal basis for a fine, and also on the basis of the application filed by the FCA, the Cartel Court renders a decision on the merits and imposes a fine.

There is no fixed timeline for when plea bargaining is to occur, or for how long it will take until resolution. The discussions can be initiated by either party, although the FCA is not likely to entertain settlement until it has obtained all the requisite information in its investigation. Settlement is often viewed by the FCA as a mitigating factor in setting the fine, which can result in a reduction of up to 20%.

### 4.3 Collateral Effects of Establishing Liability/Responsibility

If a final decision by the Cartel Court establishes an infringement of the competition laws, a civil court is bound by that decision in its own proceedings. The resulting effect is that the plaintiff enjoys a presumption of harm, together with a binding finding of an infringement (where the Cartel Court has ruled as such). In that instance, the defendant to the civil case would need to rebut the presumptions.

A criminal conviction stemming from cartel conduct (as discussed above, for fraud or bid rigging) can lead to exclusion from future public tenders, pursuant to Section 68(1) of the Austrian Federal Procurement Act.

### 4.4 Sanctions and Penalties Available in Criminal Proceedings

The Cartel Act of 2005 does not foresee the imposition of criminal sanctions for breach of competition laws. However, Section 168b of the Criminal Code makes bid rigging a criminal offence, punishable by a prison sentence of up to three years. Moreover, certain cartel behaviour may also qualify as fraud, which is a criminal offence under Section 146 of the Criminal Code and punishable with imprisonment of up to ten years.

Under certain conditions, criminal sanctions could also be imposed on companies for "bid rigging" or other criminal infringements by employees pursuant to the Act on Responsibility of Legal Entities for Criminal Acts, although that has rarely been applied to date.

There are no specific procedures for imposing criminal sanctions in the cartel context, as the general criminal procedure is followed.

See also **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards.**

#### **4.5 Sanctions and Penalties Available in Civil Proceedings**

Under Section 1 of the Cartel Act of 2005, agreements and decisions that infringe the prohibition on cartel conduct are deemed null and void. In addition, the Cartel Court can impose fines of up to a maximum of 10% of the turnover of the undertaking during the last business year.

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

- the gravity and duration of the infringement (including geographic scope and market shares of the cartelists);
- the gains (if any);
- the level of fault involved; and
- the economic strength of the infringing undertaking.

The provision also contains aggravating and mitigating factors. Notably, one aggravating factor that increases the fine is being a repeat offender of the cartel laws. A prior offence is one for which a fine was imposed, or where the undertaking was previously found guilty of committing a violation of the cartel laws. Similarly, where an undertaking was the “ringleader” or instigator of the infringement, a higher fine can be imposed. Mitigating factors can include that the undertaking’s involvement in the infringement was substantially limited, that the undertaking stopped the infringement on its own accord, or that the undertaking has significantly contributed to the FCA’s understanding of the infringement during the course of the investigation. In particular, the co-operation of the undertaking in relation to the FCA’s investigation of the infringement acts as a mitigating factor.

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 verbatim.

See also **5. Private Civil Litigation Involving Alleged Cartels.**

#### **4.6 Relevance of “Effective Compliance Programmes”**

In general, a compliance programme does not, in and of itself, ensure a reduction in sanctions for participating in cartel conduct (Supreme Court 27 June 2013, 16 Ok 2/13). However, more recently, the FCA has begun to draw up internal guidelines

according to which having in place an effective compliance programme would be recognised as a mitigating factor for lowering a fine (understood to be by no more than a single-digit percentage). Factors that are expected to be considered in determining whether an effective compliance regime is in place include a top-down approach, broad distribution within the organisation, solutions tailored to the organisation, training and education, efficiency (including the ability to withstand stress tests such as mock dawn raids), quality of measures taken, documentation of measures taken, and regular review and updates.

#### **4.7 Mandatory Consumer Redress**

Sanctions in administrative proceedings for violation of competition laws, or in a criminal proceeding for fraud or bid rigging violations, do not generally include consumer redress. However, in criminal proceedings, consumers may seek compensation for damages, although in practice it is rarely awarded. Therefore, consumers typically seek such redress by filing a private damages claim in civil court.

#### **4.8 Available Forms of Judicial Review or Appeal**

Decisions of the Cartel Court can be appealed to the Supreme Court sitting as the Cartel Court of Appeals, whose decision is final. Normally, the Supreme Court will only consider questions of law, although amendments in 2017 to the competition laws include a basis for a limited review of important questions of fact (although it is not clear yet whether, and to what extent, the Court will do so).

## **5. Private Civil Litigation Involving Alleged Cartels**

### **5.1 Private Right of Action**

Private damages claims can be brought under general Austrian civil law before the ordinary civil or commercial courts. Most commentators and the Supreme Court agree that the prohibitions against cartels fall within the protections guaranteed to customers by Section 1311 of the Austrian General Civil Code. The commercial courts may issue cease-and-desist orders and award damages under Section 1 of the Unfair Competition Act (see Supreme Court 14 July 2009, 4 Ob 60/09s Anwaltssoftware). There is no maximum to the damages that can be sought in a private action, other than that they must reflect the harm inflicted as a result of the conduct. Interest is generally payable from the time when the harm was incurred, but punitive damages are not available. Damages are typically calculated by making a comparison between the plaintiff’s position following the conduct and its position in a hypothetical scenario in which the conduct does not occur; for example, in the price paid.

Since it was amended in 2017, the Cartel Act now contains specific provisions on the bringing of private damages claims, according to which, aggrieved competitors as well as harmed customers may bring damages claims against undertakings that have violated the competition laws against cartel conduct. This is in addition to any ordinary contractual claims or claims for illicit gains that a consumer may pursue in civil court. The new rules in the Cartel Act now expressly refer to Section 273 of the 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 also made it clear that the civil courts can take into account any gains from the cartel conduct.

Under established case law, the party claiming a breach of competition law must state all relevant facts that form the basis of the infringement (see Supreme Court 8 October 2008, 16 Ok 8/08 *Immofinanz*). For claims under the Unfair Competition Act, 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). Critically, pursuant to the 2017 amendments to the Cartel Act, under Section 37c(2) there is now a statutory presumption of harm caused by cartels between competitors that shifts the burden of proof towards the defendant in civil follow-on cases.

## 5.2 Collective Action

A draft amendment to the Code of Civil Procedure that would have introduced group proceedings and what are referred to as “specimen proceedings” was heavily criticised and did not become law, so there is limited availability to bring collective claims in Austria. Individual proceedings can be brought together, typically by way of (i) assignment of individual claims to a collective plaintiff or (ii) subsequent joinder of individual claims into a single proceeding, although it must be shown in such cases that the claims result from the same set of facts or are based on the same legal title.

## 5.3 Indirect Purchasers and “Passing-On” Defences

Those indirectly harmed (eg, the customer of someone who purchased from a cartelist) can establish standing to seek monetary damages if they can show that the overcharge resulting from the cartel conduct was passed on to them. In a lawsuit against elevator manufacturers stemming from a European Commission decision and fine, the ECJ in 2019, in a preliminary ruling, clarified that, under the EU cartel prohibition of Article 101(1) of the TFEU, compensation for infringements is not only limited to customers and suppliers in the market affected by the cartel since this would not be compliant with the principle of effectiveness. Therefore, persons may seek compensation for the

losses they suffered in their capacity as a public body granting subsidies. However, such loss must have a causal connection with the infringement of the EU cartel prohibition. The national court must determine whether the claimant actually had the possibility to make more profitable investments and whether he has sufficiently established the existence of a causal connection between the indirect losses and the cartel.

In turn, the defendant can argue such pass-on in its defence against a direct purchaser that is seeking monetary damages (although, pursuant to the private enforcement provisions in the Cartel Act of 2005, a private damages claim by the direct purchaser is not precluded by the mere fact that the goods or services have been sold on to another buyer). The defendant bears the full burden of proof in arguing a pass-on defence. By contrast, the indirect purchaser benefits from a presumption that the overcharge was passed on to them if it proves the following:

- that the defendant committed the infringement;
- that the infringement resulted in an overcharge; and
- that it purchased goods or services that were affected by the infringement.

## 5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

In Austria, there are no rules that would prevent any evidence from being admissible in a civil action. To the extent information from an administrative proceeding becomes available to a civil plaintiff, such evidence can be introduced in the civil case.

## 5.5 Frequency of Completion of Litigation

In Austria, there has been only one instance of a successful follow-on civil damages claim for cartel conduct that resulted in a damage award. Currently, several large damages cases are ongoing, including ones following Cartel Court decisions in the payment card and elevators cases.

Proceedings in Austria typically last a year in each instance. However, trials may last significantly longer in cases that make “new law” – such as the still relatively new field of private enforcement.

## 5.6 Compensation of Legal Representatives

Austria follows the “lose or pay” principle, which means that the winning party is entitled to the reimbursement of legal fees at statutory levels, which are based on the amount in dispute. When the amount in dispute is high, the legal fees awarded can be significantly higher than customary fee arrangements based on hourly rates.

## 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Civil follow-on private damages claims in cartel cases apply the general attorney costs and fees rules of the Code of Civil Procedure. The losing party of the civil proceeding must pay its own costs and the costs of the winning party. If one party is only partially successful, such party's legal costs will only be reimbursed by the other party in proportion to its success. The amount of the costs is based on statutory lawyers' rates.

## 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

In civil proceedings, there is always the possibility to appeal. Under certain circumstances, the case may also be appealed all the way to the Austrian Supreme Court (the highest level of appeal).

## 6. Supplementary Information

### 6.1 Other Pertinent Information

There is no other pertinent information in this jurisdiction.

### 6.2 Guides Published by Governmental Authorities

Handbook on Leniency: [www.bwb.gv.at/fileadmin/user\\_upload/PDFs/PDFs3/BWB\\_Leniency\\_english.pdf](http://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Leniency_english.pdf).

Standpoint on Resale Price Maintenance: [www.bwb.gv.at/fileadmin/user\\_upload/PDFs/PDFs3/BWB\\_Standpoint\\_on\\_Resale\\_Price\\_Maintenance\\_english.pdf](http://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf).

Guidance on Dawn Raids: [www.bwb.gv.at/fileadmin/user\\_upload/Englische\\_PDFs/Standpoints%20and%20Handbooks/Guidance\\_on\\_dawn\\_raids\\_final.pdf](http://www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Standpoints%20and%20Handbooks/Guidance_on_dawn_raids_final.pdf).

General information about cartels: [www.bwb.gv.at/en/cartels\\_and\\_abuse\\_control/](http://www.bwb.gv.at/en/cartels_and_abuse_control/).

Whistleblowing system and explanation: [www.bwb.gv.at/en/cartels\\_and\\_abuse\\_control/whistleblowing\\_system](http://www.bwb.gv.at/en/cartels_and_abuse_control/whistleblowing_system).

## 7. COVID-19

### 7.1 Cartels and COVID-19

The Austrian authorities have signalled that they will continue to enforce the antitrust laws in full, including cartel enforcement, during the COVID-19 crisis. The FCA has stated that it will pay especially close attention to conduct impacting markets for protective health products, such as masks and disinfectants. In addition, the FCA has published a joint statement with the European Competition Network stating that temporary co-operation between competitors that is necessary to secure supply chains and avoid imminent supply bottlenecks of scarce products may be lawful under the antitrust laws.

On 22 March 2020, the Federal Act on Accompanying Measures for COVID-19 in the Judiciary (as part of the 2nd COVID-19 Act), a sweeping emergency law that extends deadlines across-the-board in legal proceedings, came into force in Austria. Absent a court order indicating otherwise, all procedural deadlines that were in effect as of the law's entry, whether in a government proceeding before the Cartel Court or a private damages claim before the civil/commercial courts, were suspended and did not run anew until 1 May 2020. Further extensions are possible, but have not yet been determined as of the time of publication.

# AUSTRIA LAW AND PRACTICE

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**bpv Huegel** has one of the premier competition groups in Austria, with an 11-strong experienced team of specialists representing blue-chip clients from around the world in headline competition matters. With offices in Vienna and Brussels, bpv Huegel offers expertise in both Austrian and European practice. Its affiliation with bpv LEGAL offices in the Czech Re-

public, Slovakia, Hungary and Romania provides clients with a seamless cross-border service in the CEE. The firm advises companies on the full spectrum of competition matters, including cartels, merger control, abuse of dominance, joint ventures, cross-border transactions, private damages claims, state aid and compliance.

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