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Cartels 2022

Austria: Law & Practice
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Law and Practice

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1. BASIC LEGAL FRAMEWORK

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The Cartel Act 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 Cartel Prosecutor (FCP), 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 Act on the Improvement of Competitive Conditions sets out 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 (Austrian Supreme Court 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, it is not bound by any government instructions. In addition to the FCA, the FCP can prosecute anti-competitive conduct before the Cartel Court. The FCP is subject to instructions issued by the Federal Minister of Justice. Both the FCA

and the FCP can request that the Cartel Court issue cease-and-desist orders.

The Cartel Court has sole jurisdiction over all competition proceedings pursuant to the Cartel Act 2005.

The FCA has limited power to issue decisions. It can impose fines for failing to comply with its information requests. A sanctioned 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.

Outcomes of Cartel Law Infringements

The cartel courts can impose fines of up to 10% of the defendant group's turnover in the year prior to the verdict (Section 29, Cartel Act 2005), declare anti-competitive agreements null and void, and (theoretically) order structural remedies, including the breaking up of an undertaking. In practice, fines range from mid-five-figure penalties for smaller infringements to multiple-million euros. 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. In 2022, an Austrian undertaking active in the construction industry was fined EUR62.35 million for its participation in the so-called construction cartel, the highest fine imposed on a single undertaking in Austria. The fine was imposed following a settlement.

In Austria, cartels are not threatened by criminal sanctions, unless they qualify as bid rigging or fraud (or both). Corporations can be prosecuted for criminal offences committed by their management and employees under the Corporate Criminal Liability Act.

Bid rigging (Section 168b, Criminal Code) is punishable by up to three years in prison, and

fraud (Section 146, Criminal Code) by up to ten years. Both offences also carry monetary fines. In one bid-rigging case, the defendants were sentenced to between 9 and 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).

Under the Austrian Federal Procurement Act, a criminal conviction may 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 2005 are very similar to those of Article 101/1 of the Treaty on the Functioning of the European Union (TFEU), which is also directly applicable in Austria. The European Commission’s enforcement practices and policies are generally observed in Austria.

Section 1(1) of the Cartel Act 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 – ie, recommendations to observe specific prices, price limits, rules of calculation, trade margins or rebates that restrict, or are intended to restrict, competition – also qualify as prohibited cartel behaviour. In contrast, bona fide recommendations without any assertion of economic pressure are not prohibited.

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). Consumers are also deemed to receive a fair share of the benefits if the benefits substantially contribute to an ecologically sustainable or climate-neutral economy.

Section 2(2) of the Cartel Act 2005 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 for 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 after becoming known to claimants (including knowledge of the damages incurred, the party causing the damages, and the legal claim under competition law) (“short limitation period”) and in any case – ie, irrespective of the claimant’s knowledge – ten years after the damage was caused (“absolute/long limitation period”). The limitation period is suspended during any proceedings or investigations by the FCA, as well as settlement negotiations.

1.6 Extent of Jurisdiction

Pursuant to Section 24(2) of the Cartel Act 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 criterion 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 Act on the Improvement of Competitive Conditions (Austrian Supreme Court case 16 Ok 3/08 Sägerundholz).

1.7 Principles of Comity

The FCA exercises its authorities to apply EU rules and collaborates 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, the FCA must not base applications to the Cartel Court to impose fines on information about leniency applications that it received from other competition authorities. 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 any investigation.

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

1.8 COVID-19

Austria signed the Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, by which national competition authorities indicated that they would not “actively intervene” in “necessary and temporary” co-operation between companies that is intended to ensure the supply of scarce products.

Austria has not published any additional or separate guidance with respect to its cartel enforcement policy during the COVID-19 pandemic. Nor have the enforcement practices of the FCA and FCP materially changed during the crisis, though the latter has indicated a special interest in investigating instances of excessive pricing, supply restrictions and cartel agreements with respect to health products such as protective masks, disinfectants and protective clothing. The authorities continue to actively pursue cartel violations, having conducted numerous dawn raids and pursued proceedings against violators.

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 FCP (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 of a fine. The Cartel Court cannot go beyond the fine applied for by the FCA or the FCP.

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

General Overview and the Role of Outside Counsel

Dawn raids are an increasingly common tool employed by the government in the investigation of cartels in Austria. After the FCA conducted only three dawn raids in 2020 due to COVID-19,

its activities picked up again in March 2021 with dawn raids in the waste disposal sector across Austria, which it followed up in April 2022. Upon a request by the FCA, the Cartel Court can order an investigation of business premises, pursuant to Section 12 of the Competition Act.

Generally, outside counsel can represent the company in all aspects relating to the dawn raid, and can be present on-site during 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).

Procedure of Dawn Raids

Many cartel investigations begin 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 the authorities can usually only make copies of specific documents or files that are located on (or can be accessed from) the premises, in some circumstances they can also

confiscate company records if the success of the inspection cannot be secured otherwise (for example, if files are not readable or have been deleted, the authorities can seize a laptop to conduct forensic work on it).

The FCA can request information from the company and its personnel to carry out the dawn raid. For example, it may interview company personnel about the organisational structure of the company and ask for the location of relevant (physical and electronic) files. 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 interview company personnel about matters that extend beyond explanations of facts or documents. Prior to such interviews, witnesses must be informed of their rights and obligations. Representatives of the company, such as managing directors, are generally interviewed in their capacity as representatives of the parties. Other company personnel, such as staff, are interviewed as witnesses. Their statements will be taken as witness testimony and not as statements made on behalf of the undertaking. The FCA can issue summonses and conduct interviews independently of the enforcement of a search warrant.

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

The obligation of the undertaking's representatives to co-operate may be enforced by means of an administrative decision and/or fines pursuant to Section 11a of the Competition

Act. See in more detail at **4.1 Imposition of Sanctions**.

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. If a party refuses to have certain individually specified documents inspected or seized referring to legal privileges, such documents must be presented to the Cartel Court, which rules on whether and to what extent they may be inspected (Section 12(5), Cartel Act). The FCA may not inspect such documents in advance of such a ruling, 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 either if the information is legally privileged or other rights to refuse to testify on the basis of a professional duty of confidentiality, medical concerns or electoral secrecy 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 Federal 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.

2.3 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 the FCA's handbook on dawn raids, full co-operation with the investigation (in the context of a leniency application or other opportunities for obtaining a reduction in fines) entails that the company does not allow evidence to be concealed, falsified or destroyed.

Arguably, the effectiveness of cartel investigations is also protected by the Austrian Criminal Code, which includes a general prohibition of destroying, damaging or suppressing evidence.

2.4 Role of Counsel

For a broad overview on the role of outside counsel during a dawn raid, see **2.2 Dawn Raids**. Officers and employees have a right to counsel if they are representatives of the "involved" parties. "Involved" are those persons whose conduct is subject to the investigation and gives rise to antitrust proceedings (especially senior personnel with representative powers, such as board members) or employees suspected of potential antitrust infringements. Employees who are interviewed as witnesses have, in general, no

formal right to counsel. However, they must be properly informed of their rights and obligations.

Legal advice obtained from company counsel is not protected by legal privilege. Employees interviewed as involved parties have the right to involve a personal legal counsel. As regards the counsel's ability to speak or advise the interviewee during the interview, the general provisions and restrictions of the Austrian Professional Rules of Attorneys apply, pursuant to which, eg, a counsel may not unduly influence a witness's statement.

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 **2.11 Leniency and/or Immunity Regime** and **2.12 Amnesty Regime**.

However, there may be other potential liability risks for management or employees (eg, labour or civil recourse claims) that may require individual representation.

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, defence counsel likewise will need to quickly determine whether unlawful conduct has occurred and whether applying for leniency is a possibility.

2.5 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 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. Undertakings, their representatives and employees are, *inter alia*, obliged to provide information requested by the FCA, submit business documents or grant access to electronic documents pursuant to Section 11a of the Competition Act.

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

Criminal prosecutors have surveillance powers 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.

2.6 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 companies of which the investigated company is a part is seen as a single undertaking, 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 Austria, the FCA will likely have to engage a competition authority within the jurisdiction of the site to obtain the requested information, unless a direct connection to the location exists from the premises where the FCA has conducted its dawn raid. The FCA may ask other EU-based competition authorities to conduct a dawn raid pursuant to Article 22 of Regulation (EC) No 1/2003 by way of official assistance. According to the case law of the Austrian courts, such dawn raids are not attributable to the FCA and it is not for the Austrian courts to rule on the legality of such dawn raids.

2.7 Attorney-Client Privilege

Under Austrian law, legal advice from in-house counsel is not protected by statutory legal privilege. In addition, in the view of the Austrian authorities, Austrian law does not privilege 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 their client unless they are authorised by the client to do so. The legal privilege (within the outlined scope) is not limited to counsel admitted in Austria, but also applies to legal counsel of other EU member states.

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

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 company representatives are under an obligation to reply to all questions relating to the underlying facts of a potential infringement.

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

2.8 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. See in more detail at **2.2 Dawn Raids**.

2.9 Protection of Confidential/Proprietary Information

There is no general right to access the files of the FCA or FCP.

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

Section 39 of the Cartel Act states that non-parties may only access the file of the Cartel Court with the consent of the parties to the proceedings. In the context of cartel damages claims, the ECJ has ruled that this 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 implementation of the EU Damages Directive in Austria, it is now unclear if the ECJ's ruling would continue to preclude the application of Section 39 of the Cartel Act, as the new laws regulate 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, parties can apply to the court to exclude the general public (partially or fully) from oral hearings if doing so is necessary to protect business secrets.

The Cartel Court is obliged to publish final decisions granting, rejecting or dismissing an action, on the following:

- the termination of an infringement;
- the finding on an infringement; or
- the imposition of fines.

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 decision. 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 govern which documents from the record file of the cartel proceedings of the FCA and the Cartel Court can be sought by claimants in a 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.

2.10 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.

2.11 Leniency and/or Immunity Regime

A leniency programme has been in force in Austria since 1 January 2006. It is anchored in Section 11b of the Competition Act. In 2021, a Regulation on the Application of the Leniency Programme (the “Leniency Regulation”) was issued pursuant to Section 11b(4) of the Competition Act, comprising detailed information on the application of the leniency programme in Austria. Furthermore, the FCA published a [leniency handbook](#) on its website, although it has not been updated to the new Leniency Regulation yet.

The programme is administered exclusively by the FCA. Under Section 11b(1) 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 terminated its involvement in an infringement of Section 1 of the Cartel Act or Article 101(1) of the TFEU unless the FCA is of the opinion that the continuation of the infringement is necessary to preserve the integrity of its investigation;
- the undertaking co-operates truthfully, promptly and without restrictions to fully

- clarify all aspects of the case and submits complete evidence of the suspected infringement that is in its possession or available and – until permitted by the FCA – neither discloses the fact nor the substance of the request for leniency except as otherwise agreed with the FCA;
- it is the first undertaking to submit information and evidence to the FCA that enables the FCA to immediately file an application to conduct a dawn raid or it is the first undertaking to submit any additional information and evidence to the FCA that, if the FCA had already obtained sufficient information and evidence to apply for a search warrant to conduct a dawn raid, enables the FCA to immediately file an application to impose fines pursuant to Section 36(1a) of the Cartel Act; and
 - it did not coerce other undertakings to participate in the infringement.

Contrary to the leniency regime at EU level, the Austrian leniency programme is not limited to secret and horizontal agreements. Any type of infringement of Article 101(1) of the TFEU or Section 1 of the Cartel Act is covered (therefore also, eg, vertical agreements). Secrecy in the strict sense is also no precondition.

The leniency programme is not limited to the first undertaking seeking it. However, only the “first in” leniency applicant may obtain full amnesty (ie, full reduction of the fine). Subsequent undertakings can qualify for a reduction in their fines if they are able to provide significant added value to the FCA’s proceedings (Section 11b(2), Competition Act). See **2.12 Amnesty Regime** for further details on the amnesty regime.

Section 3 of the Leniency Regulation 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 cause for concern that led to the request to set a marker on 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.

The marker must be completed within a deadline imposed by the FCA (of, in general, up to eight weeks). If the marker is completed in time, all information is deemed to have been submitted to the FCA at the time of submission of the marker. The Leniency Regulation expands the possibility to obtain a marker over the “first” undertaking to subsequent undertakings (applying for a reduction of a fine). However, it is up to the FCA to publish how the multiple marker system shall work out in the future.

The Austrian leniency programme has turned out to be a very successful tool of public cartel enforcement. The majority of the large cartel cases in recent years have been triggered by leniency applications.

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’s conduct in light of their contribution to the FCA’s investigation. However, in that instance, the immunity of the individual from criminal fines depends, beyond their own active contribution to the clarification of the infringement, on the success of the leniency application by their 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).

2.12 Amnesty Regime

The “first” undertaking applying for leniency and meeting all the criteria of Section 11b(1) of the Competition Act may obtain full amnesty. The “second”, “third” and other subsequent undertakings that cannot meet the criteria of being “first” any more but meet all the other criteria of Section 11b(1), and are able to provide significant added value with respect to the information and evidence already in the possession of the FCA, may obtain a reduced fine (Section 11b(2), Competition Act).

In 2022, the FCA published a paper on the reduction of fines in the leniency programme. The following reductions will typically be granted to the “second” and further subsequent undertakings applying for a reduced fine, provided all the criteria of Section 11b(2) of the Competition Act are met:

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

In determining the reduction, the FCA considers when the additional information and evidence were provided as well as the added value with respect to already available information (Section 11b (2), Competition Act). In the case of exceptionally significant added value (eg, due to the high level of detail of the added information or evidence), the FCA may apply a reduction that exceeds the reduction ranges mentioned above.

At the earliest possible occasion after receipt of an application for a reduction, the FCA shall inform the applicant in a (legally non-binding)

written notification if the leniency status will be granted (subject to meeting the further co-operation obligations) and – if possible – shall inform the applicant on the prospective reduction range.

Undertakings applying for a fine reduction pursuant to Section 11b(2) of the Competition Act may obtain a further reduction of up to 20% of the (already reduced) fine by agreeing to a settlement of the case with the FCA (“settlement reduction”).

3. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – WHEN ENFORCEMENT ACTIVITY PROCEEDS

3.1 Obtaining Information Directly From Employees

See **2.2 Dawn Raids** and **2.5 Enforcement Agency’s Procedure for Obtaining Evidence/ Testimony**.

3.2 Obtaining Documentary Information From the Target Company

See **2.2 Dawn Raids** and **2.5 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 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. Ultimately, the Cartel Court decides if an undertaking violated competition law.

In proceedings seeking an injunction, prima facie evidence suffices.

If an undertaking claims an exemption to the prohibition of cartel conduct, the burden of proof lies with the undertaking.

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

The Cartel Court establishes the facts based on its own findings in the proceedings.

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 FCA or FCP may present during the proceeding. Expert evidence is

therefore accepted, although, in practice, the Cartel Court often appoints and relies on its own expert witnesses rather than party-instructed expert evidence.

3.14 Recognition of Privileges

See **2.7 Attorney-Client Privilege**.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

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

With regard 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 observed (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). Of particular importance in the assessment of *ne bis in idem* is the identity of the material of facts.

The ECJ recently ruled that the mere fact that an authority of one member state refers in its cartel decision to a factual element relating to another member state is not sufficient to exclude cartel proceedings in the latter member state based on *ne bis in idem*. It must rather be assessed (*inter alia*) whether the authority ruled on that factual element and, therefore, whether the decision also covered the territory of the other member state (C-151/20 Bundeswettbewerbsbehörde vs Nordzucker AG).

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.

Besides the imposition of fines sanctioning a cartel infringement, fines may also be imposed on undertakings by the FCA pursuant to Section 11a(5) of the Competition Act to secure the effectiveness of its cartel proceeding. If company representatives provide the FCA with incorrect or misleading statements or fail to provide information, or provide incorrect, misleading or incomplete information, the FCA may sanction the undertaking with a fine of up to 0.5% of the undertaking's total turnover in the preceding business year.

If the obligation to provide information has already been issued by way of an administrative decision pursuant to Section 11b(3) of the Competition Act, the FCA may impose a fine of up to 1% of the total turnover achieved in the preceding business year. The FCA may also impose a fine of up to 1% of the total turnover in the preceding business year if the undertaking does not ensure that its representatives comply with summonses issued by the FCA pursuant to Section 19 of the General Administrative Procedure Act.

4.2 Procedure for Plea Bargaining or Settlement

Neither the Cartel Act nor the Competition Act sets out any specific procedures for settlements 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 FCP) 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 plea bargaining. The discussions can be initiated by any 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 caused by the infringement established by the Cartel Court. The defendant in the civil case can rebut the presumption of harm caused.

Cartel conduct as well as 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 78(1) of the Austrian Federal Procurement Act.

4.4 Sanctions and Penalties Available in Criminal Proceedings

The Cartel Act 2005 does not provide for 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 for up to ten years. Depending on the facts of each case, cartel behaviour – or conduct accompanying cartel behaviour – may also qualify as other criminal offences.

Under certain conditions, criminal sanctions could also be imposed on companies for “bid rigging” or other criminal infringements by employees pursuant to the Corporate Criminal Liability Act.

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

Public enforcement by the FCA and the FCP in Austria takes place before the civil courts (as cartel courts). Under Section 1 of the Cartel Act 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. Only the FCA and the FCP can

apply for cartel fines. No fines may be imposed in the process of private enforcement.

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 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 cartel proceedings for violation of competition laws, or in a criminal proceeding for fraud or bid-rigging violations, do not generally include consumer redress. 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 a 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 for a final decision. In principle, the Supreme Court only reviews issues of law.

Amendments in 2017 to the competition laws include a basis for a limited review of important questions of fact. In practice, the Supreme Court sets a very high bar.

5. PRIVATE CIVIL LITIGATION INVOLVING ALLEGED CARTELS

5.1 Private Right of Action

Private damages claims in Austria are regulated by the special provisions of Section 37a et seq of the Cartel Act and complemented by the general provisions of Austrian civil law. According to Section 37c(1) of the Cartel Act, undertakings culpably committing an infringement of competition law shall be liable to compensate for the harm. Private damages claims must be brought before the civil courts.

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. Punitive damages are not available. Damages are typically calculated by comparing the plaintiff's financial situation following the conduct and a counterfactual scenario without the cartel.

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). Importantly, pursuant to the 2017 amendments to the Cartel Act 2005, 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.

The commercial courts may also 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). 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).

5.2 Collective Action

Currently, collective claims are not explicitly recognised and regulated under Austrian law, but organised doctrinally by way of assignment of individual claims to a collective plaintiff or subsequent joinder of individual claims into a single proceeding. 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 cartel member) 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, in 2019 the ECJ, in a preliminary ruling, clarified that, under the EU cartel prohibition of Article 101(1) of the TFEU, compensation for infringements is not 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.

In turn, the defendant can argue such pass-on in its defence against a direct purchaser who is seeking monetary damages (pursuant to the private enforcement provisions in the Cartel Act 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. In 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 that 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 take one 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 “loser pays” principle, which means that the winning party is entitled to the reimbursement of regulated 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

The following written guides relate to cartel conduct and enforcement:

- the [Handbook on Leniency Programme](#);
- the [Standpoint on Resale Price Maintenance](#);
- the [Guidance on Dawn Raids](#);
- general information about cartels;
- the whistle-blowing system and explanation;
- and
- the Position on Settlements.

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