

Competition - Austria

Competition fines: undertakings face double impact under new tax law

Contributed by [Preslmayr Attorneys at Law](#)

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For some time, the official guidelines of the tax authorities on income tax have included the way in which competition fines should be treated under income tax law:

"EU fines or fines under the Austrian Cartel Act, which have been imposed by the European Commission or by the Austrian Cartel Court because of competition law infringements, can be deducted as operating expenditure to the extent, as they include a part skimming off gains from such infringement.... However, such deduction relating to the skimming off part is dependent on a respective clear wording in the fine decision, defining to which extent the fine relates to the skimming off of such gains." (non-official translation)

This regulation meant that in the absence of such clear wording in the fine decision, the skimming-off part could not be defined and consequently could be not be deducted as operative costs. The European Commission, however, takes the position that EU competition fines are purely penal and do not skim off any gains. Consequently, the tax deduction of EU fines is excluded.

However, on August 2 2011 the Act Changing Tax Law 2011 came into force (BGBl I 76/2011), and amended Section 20(1)(5) of the Income Tax Act and Section 12(1)(4) of the Corporate Income Tax Act as to a stricter wording, as compared to the quoted guidelines by tax authorities:

"With the various income the following must not be deducted:

(a) ...

(b) Penalties and fines, imposed by courts, administrative authorities or the institutions of the European Community." (non-official translation)

Consequently, the deduction of competition fines as a whole is now explicitly excluded.

A further issue arises relating to lawyers' fees connected to representation and advice in procedures on cartel infringements - namely, whether such fees may be treated under income tax law as 'operating expenditure'.

A similar issue arises regarding whether the value-added tax (VAT) included in such lawyers' fees may be recovered. Before the Act Changing Tax Law 2011, it was held by precedent literature that such fees were non-deductible as operating expenditure, but that VAT could still be recovered. It is now argued in literature that, because of the stricter wording of the new law, such VAT deduction is also eliminated.⁽¹⁾ However, respective case law must evolve to match the new law.

Undertakings hit by fines for infringing competition law (that can reach significant amounts in many cases) may therefore feel a double impact from the new tax law.

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Endnotes

(1) *Blazina*, Rechts- und Beratungskosten in Zusammenhang mit Kartellverfahren, taxlex 2011, 254.

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