

## Competition - Austria

### New rules of the game for leniency applicants

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#### Introduction

On March 1 2013 the long-discussed changes to the Austrian competition laws finally became effective (for further details on the discussion please see "[Ministry proposes material changes to competition laws](#)"). These changes concern, among other things, the leniency programme implemented in Austria in 2006.

In contrast to the existing leniency regime, the amended Competition Act now makes it possible for undertakings to qualify for full immunity from fines on a leniency request even after the Federal Competition Authority has gained knowledge of the reported infringement. According to Section 11(3) of the amended act, the authority may refrain from applying for a fine at the Cartel Court for an undertaking that is the first to present information and evidence that enables the authority to file a founded motion (ie, supported by facts) with the court to:

- conduct a dawn raid; or
- if the authority is already in possession of such information and evidence from a different source, impose a fine.

In both cases, all other conditions must be fulfilled - namely, the respective undertaking must have:

- stopped its participation in the infringement;
- fully and speedily cooperated with the authority in order to investigate the infringement; and
- not forced others to participate in the cartel.

This change thus makes leniency requests for entrepreneurs and undertakings both easier and more difficult. While entrepreneurs and undertakings may still qualify for full immunity from fines at a later stage (ie, after the authority has gained knowledge of the infringement), the law now requires a minimum standard for the information and evidence that must be offered. Such information and evidence must place the authority in a position to be able to submit a founded motion with the Cartel Court.

The application of Section 11(3) has already given rise to discussion among competition law practitioners. Through a literal interpretation of the wording of the act, one undertaking could provide the first information and evidence enabling the authority to file a founded motion for a dawn raid, and a second undertaking could provide the first information and evidence enabling the authority to file a founded motion for imposing a fine. This implies that two leniency applicants could qualify for full immunity from fines.

#### New handbook

On March 15 2013 the authority issued a new handbook that offers guidelines on the implementation of the leniency programme set out in Section 11(3). The handbook states that if the authority already intends to grant full immunity to a leniency applicant that has presented sufficient information and evidence to file a founded motion for a dawn raid, full immunity from fines for another undertaking concerning the same alleged infringement will "typically" not be possible. It remains to be seen whether the authority will accept exceptions to this rule and, if so, when such exceptions would be possible.

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The new handbook also differs from the earlier handbook published by the authority for the 2006 leniency programme with regard to the following issues.

A detailed catalogue of the possible evidence and information that must be presented in order to qualify for full immunity from fines is now included. In short, a leniency applicant must offer information and evidence as to:

- the alleged cartelists;
- the collusion (ie, type, functions and content); and
- the timeframe.

As the collection of necessary evidence may take some time, the handbook also now makes it possible for an applicant to receive a 'marker' on submitting certain essential information relating to the infringement to the authority (preferably through the form attached to the handbook). The marker allows the applicant to stake its claim as the first to report the issue until further information and evidence can be gathered, provided that such information is presented to the authority within a set timeframe (a maximum of eight further weeks).

In addition, the duty to cooperate with the authority regarding employees who intend to leave the undertaking has been extended. A leniency applicant must obtain or secure all information and evidence that is in possession of an employee leaving the undertaking. Furthermore, the authority must be informed as soon as the applicant becomes aware that such an employee is planning to quit.

A 'summary application marker' will be granted in network cases (ie, those in which the European Commission is particularly well placed to deal with the case). The authority will use such a marker to confirm that the leniency applicant has a time limit in which to complete its application, in case the authority should become active in investigating the infringement. Further, the authority will notify such a leniency applicant if it is the first to report the infringement.

#### **Reduced fines**

As in the past, undertakings that make subsequent applications may still qualify for a fine reduction of up to 50% if they can present the authority with information that adds significant value to that which it already holds. Thus, it is worth considering leniency applications in Austria even if another undertaking has got there first.

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