



# ICLG

The International Comparative Legal Guide to:

## **Cartels & Leniency 2019**

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A practical cross-border insight into cartels and leniency

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# Austria

Preslmayr Rechtsanwälte OG

Dieter Hauck



## 1 The Legislative Framework of the Cartel Prohibition

### 1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for Cartel Prohibition in Austria is the Cartel Act (*Kartellgesetz* 2005), as amended – most recently in 2017. Sec. 1 paras. 1 to 3 of the Cartel Act correspond to Art. 101 paras. 1 and 2 of the Treaty on the Functioning of the European Union (TFEU). Sec. 2 para. 1 of the Cartel Act corresponds to Art. 101 para. 3 TFEU. Furthermore, the Austria-specific *de minimis* exception widely corresponds to the “*De minimis* Notice” of the European Commission. Accordingly, cartel agreements of competing undertakings with an aggregate market share not exceeding 10 per cent of the market share or of non-competing undertakings not exceeding 15 per cent of the market share on any of the relevant markets affected by the agreement are exempted from the cartel ban, unless the agreement in question aims to fix prices, limit production or sale or share markets. The notion of the cumulative foreclosure effect has not been included in the Cartel Act.

The Minister of Justice is empowered to issue ordinances to exempt certain groups of cartels from the Cartel Prohibition. Those ordinances can refer to the ordinances issued according to Art. 101 para. 3 TFEU. As Austria is an EU Member State, Council Regulation 1/2003 allows the authorities to enforce the Cartel Prohibition under Art. 101 TFEU.

The Cartel Prohibition under the Cartel Act is addressed to entrepreneurs (companies and individuals); sanctions for infringements are not regarded *strictu sensu* as criminal law. However, regarding the specific area of tendering procedures, Sec. 168b of the Austrian Criminal Code (*Strafgesetzbuch*) still provides for up to three years’ imprisonment (“bid-rigging”). Very few convictions on that basis have occurred so far. Further, cartel collusion, in particular “bid-rigging”, could also be prosecuted as serious fraud, carrying a maximum sentence of 10 years’ imprisonment.

### 1.2 What are the specific substantive provisions for the cartel prohibition?

Sec. 1 of the Cartel Act prohibits – with wording very close to Art. 101 TFEU – agreements between entrepreneurs, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion

of competition (i.e. cartels). Sec. 1 para. 2 of the Cartel Act states typical cases which restrict competition, such as (i) price fixing, (ii) limitation or control of production, markets, technical development or investment, (iii) share markets or sources of supply, (iv) application of dissimilar conditions to equivalent transactions with other trading parties, and (v) conclusion of contracts subject to acceptance of supplementary obligations by other parties which have no connection with the subject of such contracts. Sec. 1 para. 3 of the Cartel Act declares agreements or decisions violating the Cartel Prohibition to be void.

The Cartel Act prohibits so-called “recommendation cartels” (*Empfehlungskartelle*), which are unilateral practices providing recommendations such as the usage of fixed prices. However, there is an explicit exemption for such recommendations, if they are explicitly marked as non-binding and for the implementation of which neither economic nor social pressure is applied.

### 1.3 Who enforces the cartel prohibition?

The Higher Court of Vienna as the Cartel Court (*Kartellgericht*) and in second instance the Supreme Court as the Higher Cartel Court (*Kartellobergericht*) are the competent Courts to decide on violations of the Cartel Act or other antitrust regulations.

The Cartel Court does not decide *ex officio*. The Federal Competition Authority (FCA), the Federal Cartel Prosecutor (FCP), regulators of certain economic branches, the Chamber of Commerce, the Chamber of Labour, the Presidential Conference of the Austrian Chamber of Agriculture and any other undertaking or association of undertakings with legal or economic interest in a decision can file petitions to the Cartel Court.

The FCA is Austria’s independent investigating authority and therefore files most of the petitions. The FCP represents the public interest in competition matters and is accountable to the Minister of Justice. The FCA and the FCP together are referred to as “Official Parties” in the law and in the Cartel Court’s proceedings. Only these Official Parties may move for fines to be imposed or a merger to be prohibited; these and the other bodies may move to petition to stop infringements or to establish the existence of (past) infringements under certain circumstances.

### 1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The opening of an investigation is usually conducted by the FCA, Austria’s investigating authority. The FCA has been quite active and

opened investigations in various industries, including retailers and suppliers for food, electronic appliances and construction. In many cases the FCA started the investigations by unannounced on-site inspections (“dawn raids”). The FCA – or any of the other authorised parties – can file a petition to the Cartel Court. This petition can aim towards a decision for fines (if filed by the FCA or the FCP) or towards the determination of an infringement or a judicial order to cease an infringement. The Cartel Court then conducts the proceedings and files a judicial order or dismisses the petition. Against this decision, parties may appeal to the Supreme Court acting as the Higher Cartel Court.

### 1.5 Are there any sector-specific offences or exemptions?

Sec. 2 para. 2 of the Cartel Act lists sector-specific exemptions from the cartel ban. Exempted from the cartel ban are: 1) agreements with retailers of books, art prints, music, journals and newspapers, fixing the retail price and further agreements necessary for a widespread and non-discriminatory distribution of newspapers and journals; 2) certain restrictions of competition among members of cooperative societies as well as between cooperative societies and their members; and 3) certain agreements, decisions and attitudes between producers of agricultural products or their interest groups.

### 1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Austrian Courts decide on violations of the Cartel Act with an impact on the Austrian market irrespective of whether the infringement against the cartel ban was conducted in Austria or abroad.

The definition of the relevant market is not limited to the Austrian territory. The relevant market may also be defined as European or even worldwide, thus including the Austrian market. This is of great importance regarding the abuse of a market-dominant position as well as in merger control.

## 2 Investigative Powers

### 2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory Power	Civil/Administrative	Criminal
Order the production of specific documents or information	Yes	Partly applicable, see question 1.1
Carry out compulsory interviews with individuals	Yes	Partly applicable, see question 1.1
Carry out an unannounced search of business premises	Yes*	Partly applicable, see question 1.1
Carry out an unannounced search of residential premises	Yes*	Partly applicable, see question 1.1
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes*	Partly applicable, see question 1.1
■ Right to retain original documents	Yes*	Partly applicable, see question 1.1

Investigatory Power	Civil/Administrative	Criminal
■ Right to require an explanation of documents or information supplied	Yes*	Partly applicable, see question 1.1
■ Right to secure premises overnight (e.g. by seal)	Yes*	Partly applicable, see question 1.1

**Please Note:** \* indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

### 2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The right of the parties to object to the access or seizure of documents is limited. Such is possible only if recognised confidentiality obligations and rights to refuse to give evidence as listed in the Criminal Procedure Act (*Strafprozessordnung*) could be violated. These are the privileges to refuse testimony of attorneys at law, notaries or medical specialists such as psychiatrists or psychologists.

Further, the person claiming a violation of the right to refuse to give evidence must identify each specific document concerned. If this is not possible (e.g. because it would unreasonably delay the search), the person may identify respective categories of documents which will then be separately stored by the FCA in a way to protect it from any unauthorised inspection. Following this, within a period set by the FCA and not shorter than two weeks, the person concerned may identify the specific documents.

In addition, during a house search, the FCA has the right to request from all employees and representatives of the undertaking concerned, information on all documents and matters connected to the subject matter of the investigation.

In respect of “dawn raids”, the Austrian Supreme Court ruled that if a company or individual voluntarily allows the FCA to conduct inspections, e.g. not demanding any “search warrant”, and only on that basis tolerates the search as imposed by law, it will not be protected under the Cartel Act provisions because a “voluntary inspection” (*freiwillige Nachschau*) does not affect the legally protected positions of those searched (16 Ok 7/11 *et al.*).

### 2.3 Are there general surveillance powers (e.g. bugging)?

Surveillance powers are only granted for violations of criminal offences. The Austrian Cartel Act contains no criminal law provisions. Apart from violations of Sec. 168b of the Austrian Criminal Code (“bid-rigging”), which qualifies certain violations regarding tendering procedures as criminal offences, and Sec. 146 *et seq.* of the Austrian Criminal Code (fraud, serious fraud), there are no likely competition-related infringements justifying surveillance activities.

### 2.4 Are there any other significant powers of investigation?

The FCA is empowered to examine potential restraints on competition on a case-by-case basis and undertake general examinations of entire business sectors if impediment of competition is suspected. During its investigations, the FCA may also call upon and question companies or individuals and examine relevant business documentation. The investigation of the FCA

is not limited to information relating to the requirements of a specific cartel law offence but may also include legal and economic information relevant to the evaluation of the alleged infringement (16 Ok 7/11 *et al.*). The investigatory powers of the FCA are not hierarchical – that is, e.g., an information request by the FCA is not a prerequisite for conducting a house search. Rather, these two investigation instruments are independent from each other, such that the possibility to receive documents by way of an information request does not preclude the FCA from obtaining an (extended) search warrant. Further, upon accidentally discovered documents, it is up to the FCA to decide whether it should request a new search warrant for a new proceeding or an extension of the current search warrant (16 Ok 1/13).

The Cartel Court's permission is needed to allow the FCA to carry out dawn raids.

There exists also the possibility to conduct “competition monitoring” even without suspicion of competition distortion in a business sector. The intention is to collect from public sources relevant data as to the development of competition intensity in specific markets, which may then make a basis for further decision-making and course of action, e.g. to undertake a more detailed examination of an entire business sector.

## 2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business and/or residential premises are generally carried out by employees of the FCA. If necessary, and requested by the FCA, they are assisted by experts and/or the police. The undertaking concerned has the right to ask for legal advisors or other confidants to attend; however, the FCA is not obliged to wait for their arrival to start the search.

## 2.6 Is in-house legal advice protected by the rules of privilege?

No. Legal professional privilege under Austrian law is regulated differently than under European law. However, according to both laws, in-house legal advice is not protected by rules of privilege. Differently to European law, Austrian law also does not explicitly provide for legal professional privilege covering correspondence between the client and his external (EU) lawyer outside the immediate possession of the lawyer. Under Austrian law, a lawyer need not testify against his client unless so authorised by the client, which includes the protection of any lawyer-client communication as stored in the lawyer's office. The protection of the confidentiality of the correspondence between a client and his lawyer is a European standard, obviously to be observed when Austrian authorities act for the European Commission. European law may also imply such protection for Austrian cartel proceedings enforcing European cartel law. The FCA seems to follow that view.

## 2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Apart from general limitations, such as domestic authority, which may be ignored under certain circumstances, there are no other material limitations of the investigatory powers.

## 2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The FCA can – without an order by the Cartel Court – by way of a respective decision, order an undertaking or an association of undertakings to present documents – including such stored on off-site servers but normally accessible from the searched site – provide information and copy files for further investigations. In case of disobedience of such an order, the FCA can impose penalty payments at the maximum of 5 per cent of the average daily turnover of the undertaking or the association of undertakings in the last business year for each day of delay with the ordered measures. In case the information provided is incorrect, incomplete, misleading or was not provided at all, the FCA can impose a fine of up to EUR 75,000 (Sec. 11a of the Competition Act).

The FCA can also request the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, to provide information, unless they would risk a criminal prosecution thereby. Such a request can be made with or also without a respective decision by the FCA (a so-called “simple request”). In the absence of a formal decision, a delay or refusal to provide information is not sanctioned. However, incorrect or misleading information can be sanctioned with a fine of up to EUR 25,000. If a formal decision is passed, it can be enforced (see question 8.1). There is no obligation upon the FCA to request the relevant information by way of a simple request first.

Generally, the extent or lack of cooperation will be regarded by the FCA and the Cartel Court in moving for, and in deciding on the amount of, a fine imposed for infringing cartel law.

## 3 Sanctions on Companies and Individuals

### 3.1 What are the sanctions for companies?

According to Sec. 1 para. 3 of the Cartel Act, agreements and decisions that infringe the cartel ban and that are not exempted are void. Apart from that, the Cartel Court can impose fines of up to a maximum of 10 per cent of the undertaking's, or the associations of undertakings', turnover of the last business year. The highest fine to date was EUR 75.4 million for an entire case (five elevator companies) and EUR 30 million for a single company. (16 Ok 2/15b.) With this decision relating to a food-retail group, where the Higher Cartel Court increased the fine by a factor of 10, an important change as to fine calculation in Austria was introduced. The maximum of 10 per cent global group turnover achieved during the last business year no longer constitutes a cap but – contrary to European practice – the basis for the calculation of the fine. In this respect, the Court explicitly deviated from the Fining Guidelines of the European Commission, which have also had quite a practical impact in Austria so far. This view was also repeated in later cases (6 Ok 7/15p). Several other fine decisions were rendered, though fines tend to remain lower as most defendants cooperate and settle. Additionally, third parties can claim compensation for damages incurred due to cartel infringements in civil courts. Under certain conditions, criminal sanctions may be imposed on companies for “bid-rigging” (see the answer to question 1.1) or other criminal infringements by employees under the Act on Responsibility of Legal Entities for Criminal Acts (*Verbandsverantwortlichkeitsgesetz*), which so far has rarely been applied.

### 3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

If the individual is an entrepreneur violating cartel law, the Cartel Act is applicable to him, as it is to any other undertaking. If the individual is a representative of an undertaking, such as a director or general manager, there is no specific sanction against the individual according to the Cartel Act. Criminal sanctions against individuals are only possible in case of “bid-rigging” or fraud (see question 1.1).

### 3.3 Can fines be reduced on the basis of ‘financial hardship’ or ‘inability to pay’ grounds? If so, by how much?

These arguments could play a role in determining the amount of fines. However, there is no case law showing clear tendencies.

### 3.4 What are the applicable limitation periods?

The Cartel Court can impose sanctions when applications referring to violations of the Cartel Act were filed within five years after the termination of the violation. The end of a continuous infringement is considered when the last infringing action is completed. Under criminal law, different limitation periods, also depending on the type of damage caused, may apply. For further information, see question 8.3.

### 3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

As stated above, costs/penalties imposed on employees can only occur within the limited area of criminal infringements (see question 1.1). In this respect, it is questionable whether a company can pay those costs/penalties. An *ex ante* agreement to do so may be void and tax questions could arise. Generally, cartel fines are not tax-deductible.

### 3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Under general rules, yes. However, there are special privileges for employees limiting their liability towards their employer.

### 3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Though this was discussed controversially in literature and case law, the answer is most likely yes. The Cartel Court (29 Kt 132, 133/07; 29 Kt 5/09) and the Supreme Court acting as the Higher Cartel Court (16 Ok 2/15b) have also ruled to that effect, although earlier decisions ruled to the contrary.

## 4 Leniency for Companies

### 4.1 Is there a leniency programme for companies? If so, please provide brief details.

Austria has introduced regulations for a leniency programme in line with the (older) European model. Under the regulations of the

leniency programme (Sec. 11b of the Competition Act), the FCA can refrain from demanding the imposition of a fine against enterprises which, coming first: (i) provide to the FCA information and evidence enabling the FCA to move for a search warrant or – if the FCA already has enough information for that – request a fine; (ii) have stopped their participation in an infringement of the cartel ban (violations of Art. 101 para. 1 TFEU or Sec. 1 para. 1 of the Cartel Act); (iii) cooperated with the FCA to fully clarify the facts of the case and supplied all of the evidence available to them; and (iv) have not forced any other undertaking to participate in the infringement. Additionally, for undertakings not coming first but still providing useful information and/or evidence, the FCA may demand a significantly reduced fine, provided that the other prerequisites have been met.

The FCA has set forth the procedure for gaining leniency in the so-called “Leniency Handbook” published on the FCA’s website, according to which a full reduction of a fine will only be granted to the first applicant notifying a violation to the FCA. In any case, the extent of a potential reduction of fines depends significantly on the time of the application. The timing of a leniency application is, therefore, of the essence.

Together with the Leniency Handbook, the FCA has published a “notification form”.

The Cartel Court decided, as confirmed by the Supreme Court (16 Ok 5/10), that it has no jurisdiction to evaluate the application of the law by the FCA, but the Court may use its own discretion in determining the amount of the fine, except that it cannot be higher than requested by the FCA.

### 4.2 Is there a ‘marker’ system and, if so, what is required to obtain a marker?

Yes, the Leniency Handbook provides for the possibility to obtain a “marker” upon submitting certain essential information on the infringement. This information includes: the name and address of the undertaking seeking the marker as well as of the undertaking participating in the alleged infringement; information on the products and area concerned, the duration and the type of the alleged infringement; and information on whether it is intending to apply for leniency with other competition authorities or what competition authorities have been already contacted. In this regard, the FCA recommends using the form attached to the Leniency Handbook.

The FCA sets a period of a maximum of eight weeks to provide the additional information necessary to fulfil the requirements for leniency according to Sec. 11b para. 1 of the Competition Act (as stated in question 4.1). If the undertaking provides the additional information within the time it will be considered as submitted at the time of setting the marker.

In “Network Cases”, i.e. in cases in which the European Commission is particularly well-placed to deal with the case and the leniency applicant intends to apply or has already applied for leniency with the European Commission, the FCA may grant the leniency applicant a so-called “Summary Application Marker”. The Summary Application Marker confirms that this leniency applicant will be given a time limit to complete its application in case the FCA should become active in this case.

### 4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

As mentioned above, leniency applications are generally made by using the notification form published by the FCA, which must be

filed with the FCA via fax or email. According to the Leniency Handbook, however, the information required in the notification form can also be provided orally at the FCA (minutes will be taken by the FCA).

#### 4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

As the leniency application procedure is an administrative procedure, the respective administrative law principles apply. Based on these principles, the FCA is fundamentally obliged to keep information confidential to the extent that access to such information by third parties would interfere with the parties' interests. In past leniency cases, the FCA has kept this confidentiality to the extent known. As soon as the FCA has applied to the Cartel Court to fine the members of a cartel, the parties of the Court proceeding (i.e. the FCA, the FCP and the members of the cartel) will have access to the files of the Cartel Court.

However, it is important to know that in case criminal behaviour is suspected (e.g. bid-rigging), the Official Parties are obliged by law to notify the public criminal prosecutor of such suspicion. This notification and supporting documents may be quite easily accessible to third-party victims in the Court files during a criminal investigation/procedure. The Supreme Court ruled (16 Ok 3/10) that the Cartel Court is obliged to provide its files – that may include leniency documents as presented by the FCA or the parties to the Court – to the Public Prosecutor, if so requested. This may also apply to other Courts requesting a file, based on rules regulating assistance amongst Courts and administrative authorities, respectively.

The European Court of Justice (ECJ) ruled on the protection of leniency documents – partly originating from Austrian cases – generally giving national judges a wide discretion on such disclosure questions. See also EU Directive 2014/104/EU of November 26, 2014, which was implemented in 2017. The respective Austrian law provides for quite a differentiated system on the disclosure of documents from the files of competition authorities, including leniency documents, upon a respective order by a national civil court, typically ruling in a cartel damage case.

#### 4.5 At what point does the 'continuous cooperation' requirement cease to apply?

According to the Competition Act and the Leniency Handbook, the entrepreneur or association of undertakings must cooperate with the FCA until the end of its investigation. According to the letter of the law, this would mean that the obligation to cooperate ends with the beginning of the Court procedure. However, since it is standard practice that the FCA only states the exact amount of the fine requested during a later stage of the Court procedure, until then a certain amount of cooperation would be required or is practically recommended.

#### 4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, there is no 'leniency plus' or 'penalty plus' policy in Austria. The new rules on damage actions (see section 8) provide for certain limited privileges for leniency applicants (Sec. 37e para. 3 of the Cartel Act) in respect to the otherwise joint liability of cartel members being defendants in follow-on damage claims.

## 5 Whistle-blowing Procedures for Individuals

### 5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Based on the Amendment 2017, the FCA installed an internet whistle-blower system for anonymous information on competition law infringements. Otherwise, any information provided by an individual to the FCA may and will be considered under the general rules on evidence. Employees are not subject to individual fines, except under criminal law (see question 1.1). Rules on leniency in criminal procedure, in particular relating to infringements of cartel law, were introduced in 2010 (Sec. 209a and 209b of the Criminal Procedure Code). These provisions on leniency in criminal procedures are marked to expire on December 31, 2021.

## 6 Plea Bargaining Arrangements

### 6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There are no explicit early resolution, settlement or plea-bargaining procedures foreseen in the Cartel Act and the Competition Act. However, the FCA in recent years has extensively used, and further promotes, negotiated settlements which may be combined with leniency applications. In response to widespread criticism on settlements, especially regarding a lack of information and transparency of settlement decisions, the FCA published guidelines on its settlement policy in 2014. The benefit of such settlement is seen in the reduction of procedural costs for the FCA and the defendant(s) and a low PR profile, as well as in reduced fines and less detailed reasoning in published decisions. The latter could have a significant impact on civil follow-on damage claims.

A different situation may occur in a criminal procedure, where certain possibilities exist to close the procedure without a formal conviction by paying a fine proposed by the public criminal prosecutor ("*Diversion*"). For criminal leniency, see question 5.1.

## 7 Appeal Process

### 7.1 What is the appeal process?

Decisions of the Cartel Court can be appealed to the Supreme Court acting as the Higher Cartel Court. The Higher Cartel Court is the highest instance in cartel matters and its decision is legally final. Normally, the Higher Cartel Court will only consider questions of law. The Amendment 2017 has tried to provide a basis for a limited review of important question of fact by the Supreme Court. However, the Supreme Court is traditionally reluctant to do so.

### 7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, it does.

### 7.3 Does the appeal process allow for the cross-examination of witnesses?

As the procedure at the Higher Cartel Court is a written procedure on questions of law, the cross-examination of witnesses is not possible. Despite some amendments to the law in 2017, the Higher Cartel Court can and will only to a very limited extent consider questions of fact. Only if the Higher Cartel Court believes the taking of evidence was faulty or incomplete, and thus remands the procedure to the Cartel Court, will (further) cross-examination of witnesses be allowed. However, the rules and traditions of witness questioning may considerably differ from the practices in the US or UK.

## 8 Damages Actions

### 8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Austrian Cartel Law provides for specific rules as to limitation periods, passing-on of damage, interest and binding effects of decisions by competition authorities in "follow on" actions. This may result in an advantage for follow-on actions. These rules have been significantly modified by the EU Directive (2014/104/EU). The Directive was incorporated into national Austrian law in 2017.

The Cartel Act now clarifies that there is a claim for compensation for the resulting damage and states a legal presumption that a cartel causes damage. The Cartel Act also specifies that interests for the damage start to run from the time of the occurrence of the damage.

Moreover, the Cartel Act clarifies that the civil courts are bound to the Cartel Court's, the European Commission's or the Competition Authority's final decision that an undertaking culpably and illegally infringed the provisions specified in the respective decision. However, the burden of proof of whether the plaintiff suffered damage by the defendant's infringement, and to what exact damage, remains with the plaintiff. The Court can estimate the damage caused by a cartel infringement.

Furthermore, the Court can order – subject to complex rules – parties of the case or third parties, including competition authorities, to disclose documentary evidence and shall act to protect confidential information contained therein. If parties fail to follow such Court orders, the Court can impose fines of up to EUR 100,000.

### 8.2 Do your procedural rules allow for class-action or representative claims?

The Austrian procedural rules do not explicitly provide for class action or representative claims such as, for example, US class proceedings. However, Austrian law knows of ways by which claims of several injured parties can be brought together in one Court proceeding:

- The injured parties can assign their individual claims to a collective plaintiff which then opens the Court proceeding against one and the same defendant.
- Under certain preconditions, the injured parties can join their claims for damages in one single Court procedure. A precondition thereof is, amongst others, that the claims of the injured parties result from the same set of facts or the claims are based on the same legal title.

### 8.3 What are the applicable limitation periods?

The generally applicable limitation period for damages is three years. The period starts to run as soon as the injured party has gained enough knowledge of the damage which occurred and the injuring party. Different rules may apply in cases of criminal behaviour relating to natural persons.

However, the limitation period was regulated differently for antitrust law. Compensation for damages becomes time-barred five years after knowledge of the damage, damaging party, damaging activities and the fact that these activities are in violation of competition law. It is not possible to claim damage 10 years after the occurrence of damage. The time limits only run from the end of the infringement. These limitation periods are paused during proceedings for (1) decision of a Competition Authority, (2) investigation measures of a Competition Authority, or (3) settlement negotiations until one year after a final legally binding decision or the end of negotiations.

### 8.4 Does the law recognise a "passing on" defence in civil damages claims?

The law now explicitly allows the passing-on defence. Also, as a logical balance, indirect customers are stated to have a claim against the cartelists.

Cases under the old legal situation, where these questions may be dealt with in some detail, are currently under trial. We note that the German Federal Supreme Court has generally accepted the defence (KZR 75/10, June 28, 2011) and a certain reference to this decision was made by the Austrian Supreme Court (4 Ob 46/12m). Furthermore, the Supreme Court has explicitly accepted the standing of the indirect purchaser to sue for damages (7 Ob 48/12b) and has implied certain acceptance of the passing-on defence in additional cases. Quite recently, lower German Courts have stated rather restrictive views on the passing-on defence.

### 8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The cost rules for civil damages follow-on claims in cartel cases are based on the general cost rules of the Code of Civil Procedure. Thus, the losing party of the civil procedure 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 the (statutory) lawyers' tariff. The assessment base of the costs is the amount in dispute.

### 8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

In Austria, only one (very minor) successful follow-on civil damages claim for cartel conduct resulted in a damage award. In 2006, the Cartel Court identified some driving schools as cartel members and imposed a total fine of EUR 75,000 on them. The driving schools had identical prices for the most demanded driving courses. After the fines became final, cartel damage claims (very low, the individual claim not reaching EUR 500) against the cartel members were assigned by potentially injured parties to the Austrian Federal Chamber of Workers and Employees.

According to price observations of the Chamber, prices for driving courses in Graz decreased by 22 per cent after the breaking up of the cartel. Thus, the Court stated that the damage can be equated with the price differential between the cartel price and the price after breaking up the cartel. Hence the Court ruled that the driving schools must pay back course fees in that amount.

Currently, several big cases following up on the Cartel Court's decision in a banking cartel and an elevator cartel case (see question 3.1) are under trial. Several complex questions of law are being discussed at different levels of the Court system. We are not aware of any settlements for substantial parts of material claims made to date.

## 9 Miscellaneous

### 9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Each final decision (whether to grant, dismiss or overrule the claim) on the prohibition or establishment of infringements and the adjudication of fines, on a merger and further measures imposed after clearance of a merger, as well as action for an injunction shall be published by the Cartel Court via the respective public medium of communication of the Court (the so-called “*Ediktsdatei*”) and

on the FCA website. Such publication shall include the names of the parties and the essential content of the decision, including the imposed sanctions, whereas, at the same time, the justified interest of the undertakings to protect their business secrets shall be observed. Under certain circumstance, the Courts can determine an obligation to pay for future damages, even if the damage has not yet occurred. As to the extent of publication, Austrian Courts follow European practice that business secrets will be protected (16 Ok 6/14i).

### 9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

The FCA has conducted raids and fined several companies after settlement procedures, mostly concentrating on vertical infringements. Several big cartel damage cases are still under trial. The Cartel Court files, including any leniency documents that may be included there, are not finally protected in case an administrative authority (e.g. Public Prosecutor) or a (criminal) Court requests to receive a file based on rules on assistance amongst Courts and administrative authorities (see also question 4.4).

The FCA has some history in researching specific industries (“*Branchenuntersuchungen*”) and has recently developed a tendency for competition monitoring. In the past, affected areas were energy, gasoline prices, food retailers, cement and mobile phone services. For future activities besides the monitoring of banks, the health care sector was named, as well as ATMs, undertakers and airlines.



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Mag. Dieter Hauck earned his Master of Laws from the University of Vienna in 1989. After completing a postgraduate course in International Studies at the University of Vienna in 1990, he began practising as a lawyer, and has been a partner in the firm since May 1995. A member of the Studienvereinigung Kartellrecht e.V. (Cartel Law Academic Society), he specialises – on top of a general commercial practice – in EU, public procurement, merger and cartel law and follow-on cartel damage procedures. In all these matters, sound legal and tactical advice – in and out of court – is for Dieter Hauck as essential as a solution-oriented direct approach, effective case management and quick reactions to challenging situations.



Preslmayr Rechtsanwälte provide their clients with expertise in business law. Our clients, both from Austria and around the world, are primarily large and medium-sized businesses in manufacturing, banking, trade, information technology, advertising, tourism and telecommunications. We also advise investors. Many our clients have depended on us to solve their complex legal problems for many years. We regard this as a sign of our clients' trust and satisfaction. Close cooperation with our clients is an essential element of our mutual success.

In advising our clients, we consider not only legal aspects but, above all, commercial objectives as well. We view ourselves as legal guides and problem-solvers with a knack for business, who work together with experts from other disciplines whenever necessary. This synergy of legal expertise, business sense and service-oriented management will also ensure the excellence of our services in the future.

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