International
Comparative
Legal Guides

Cartels & Leniency

2024

17th Edition

Contributing Editor:
Joseph J. Bial
Paul, Weiss, Rifkind, Wharton & Garrison LLP

glg Global Legal Group

Q&A Chapters

1 **Argentina**
Allende & Brea: Julián Peña & Federico Rossi

8 **Austria**
Preslmayr Rechtsanwälte OG: Mag. Dieter Hauck

16 **Brazil**
Caminati Bueno Advogados: Eduardo Caminati Anders, Marcio C. S. Bueno, Luiz Fernando S. L. Coimbra & Giuliana M. F. Gonçalves e Requena

23 **Canada**
Norton Rose Fulbright Canada LLP: Eric C. Lefebvre, Chris Hersh & Katarina Wasielewski

30 **Chile**
Carey: Lorena Pavic, José Pardo & Fernando Flores

37 **China**
Shanghai Everbright Law Firm: Qixin Chen & Rui Xing

46 **Czech Republic**
bpv Braun Partners s.r.o.: Arthur Braun & Ondrej Poništiak

52 **France**
Aramis: Aurélien Condomines, Pierre Galmiche & Elisa Saez

60 **Germany**
Kümmerlein Simon & Partner Rechtsanwälte mbB: Dr. Torsten Uhlig

68 **Hong Kong**
ONC Lawyers: Dominic Wai & Sherman Yan

76 **India**
Cyril Amarchand Mangaldas: Avaantika Kakkar & Vijay Pratap Singh Chauhan

86 **Japan**
Miura & Partners: Masayuki Atsumi & Haruka Otaki

92 **Singapore**
Drew & Napier LLC: Lim Chong Kin & Dr. Corinne Chew

100 **Slovenia**
Zdolšek – Attorneys at law: Irena Jurca & Katja Zdolšek

107 **Spain**
Callol, Coca & Asociados: Pedro Callol, Manuel Cañadas Bouwen & Laura Moya

120 **Switzerland**
Bär & Karrer: Mani Reinert

126 **Turkey/Türkiye**
ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır

138 **USA**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Joseph J. Bial & Leah R. Hibbler

Austria

Preslmayr Rechtsanwälte OG

Mag. 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 2021. 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 sales, 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 permits 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). 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"). Further, cartel collusion, in particular bid rigging, could also be prosecuted as serious fraud, carrying a maximum sentence of 10 years' imprisonment. Very few convictions on that basis have occurred so far.

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 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 the second instance the Supreme Court as the Higher Cartel Court (*Kartellobergericht*), are the Courts with jurisdiction to decide on violations of the Cartel Act or other antitrust regulations.

The Cartel Court does not proceed and decide *ex officio*. The Federal Competition Authority (FCA), Federal Cartel Prosecutor (FCP), regulators of certain economic branches, Chamber of Commerce, Chamber of Labour, 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 has opened investigations in various industries, including retailers and suppliers for food, electronic appliances, transport, and construction. In many cases, the FCA started

the investigations with 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. The following are exempted from the cartel ban: (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 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 Please provide a summary of the general investigatory powers in your jurisdiction.

The FCA has powers to:

- Order the production of specific documents or information.
- Carry out compulsory interviews with individuals.
- Carry out an unannounced search of business premises.*
- Carry out an unannounced search of residential premises.*
- "Image" computer hard drives using forensic IT tools.*
- Retain original documents.*
- Require an explanation of documents or information supplied.*
- Secure premises overnight (e.g., by seal).*

Please note: * indicates that the investigatory measure requires authorisation by a Court or another body independent of the FCA. In criminal cases, these powers are vested in the criminal prosecutors and are only partly applicable (please see question 1.1).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

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 the 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 them 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 Supreme Court ruled that if a company or individual voluntarily permits 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, as 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 Cartel Act contains no criminal law provisions. Excluding 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), it is unlikely that there are any 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 of 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 discovering 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 authorise the FCA to carry out dawn raids.

There also exists the possibility to conduct "competition monitoring" even without suspicion of competition distortion in a 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. In contrast 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 (Cartel Court 7.7.2022, 24 Kt 4/22a). 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.

Excluding general limitations, such as domestic authority, which may be ignored under certain circumstances, there are no other material limitations on investigatory powers. If a foreign authority conducts a search or other activity upon the request of the FCA, such search or activity does not need to be based on a decision by the Cartel Court and is regulated by the laws in the country where it occurs, which, however, shall not fall below the requirements of Austrian law. Any remedies in that respect must be sought in the country where the activity occurred (VWGH 18.3.2022, Ro 2018/04/0001-5).

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?

Without an order by the Cartel Court, the FCA can – 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 a maximum of five 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 one per cent of the yearly turnover (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, or 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 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 0.5 per cent of the yearly turnover. If a formal decision is passed, it can be enforced (please see question 8.1 and the fines may amount to one per cent of the yearly turnover). The FCA is not obliged to first request the relevant information by way of a simple request.

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 association 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 45 million (27 Kt 12/21y) and EUR 62 Million (26 Kt 5/21m) for a single company against two construction companies in settlement procedures. With an earlier decision (16 Ok 2/15b), relating to a food retail group and in which 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 of the global group turnover achieved during the last business year no longer constitutes a cap, rather – 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; however, 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 (please see question 1.1) or other criminal infringements by employees under the Act on Responsibility of Legal Entities for Criminal Acts (*Verbandsverantwortlichkeitsgeset*), 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 cases of bid rigging or fraud (please 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 demonstrating clear tendencies. In the case 16 Ok 4/18a, even a request for payment in instalments was refused.

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 to occur 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, please 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 (please 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?

While this has been 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 this 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 such warrant – request a fine; (ii) have ceased 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 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 procedure for gaining leniency is now regulated in an ordinance issued by the Ministry for Digitalisation and Economics. The FCA has issued guidelines. 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.

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; however, the Court may use its own discretion in determining the amount of the fine, though it cannot be higher than requested by the FCA. The Supreme Court ruled (25.5.2023, 16 Ok 8/22w) that the FCA may move for reopening a decided and closed fine case if the FCA gains only afterwards knowledge and evidence of cartel infringements which defendants have not disclosed despite the general obligation to cooperate under the leniency programme.

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

Yes, the Leniency Ordinance 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 which competition authorities have been already contacted.

The FCA sets a deadline 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 by this deadline, it will be considered 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 in writing. However, according to the Leniency Ordinance, the information required 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 if 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, along with supporting documents, may be quite easily accessible to third-party victims in the Court files during a criminal investigation/procedure.

Upon reasoned motion by a party, the Court can, during proceedings – after having balanced the mutual interests – order the opposing party or even a third party to disclose specific pieces of evidence. The evidence plaintiffs seek will likely concern the effects of a competition law infringement, whereas defendants will likely request the disclosure of documents proving the passing on of overcharges. The ECJ has ruled (10.11.2022; C-163/21) that under the Damage Directive the relevant evidence to be disclosed, in the control of the defendant or a third party, also covers those documents which the party to whom the request to disclose evidence is addressed and must be created *ex novo* by compiling or classifying information, knowledge, or data in its possession. The national court is required to restrict the disclosure of evidence to that which is relevant, proportionate, and necessary, taking into account the legitimate interests and fundamental rights of that party.

In case of confidential information, the Court must order effective measures for the protection of such confidential information. For confidential information, the defendant of the application can demand that the evidence is only disclosed *vis-à-vis* the Court, which then decides on the disclosure to the other party or takes the information into account when rendering its decision.

Also, the disclosure of evidence contained in the files of competition authorities can be requested by parties. Upon such motion, the Court must also consider the effectiveness of the public enforcement when judging the proportionality of the request. Documents that were prepared specifically for the proceedings conducted by the competition authority, and which the competition authority created and sent to the parties during its proceedings and settlement submissions, which have been withdrawn, are sometimes called "**grey list documents**". The disclosure of such grey list documents must not be ordered prior to the proceedings before the competition authority being closed.

Even stricter restrictions apply to leniency and (non-withdrawn) settlement submissions in cartel cases (i.e., proceedings concerning cartel behaviour between competitors, not including vertical agreements). The disclosure of these so-called "**black-list documents**" must not be ordered at any time unless such documents or information are available independently from the competition procedure.

Further, under general procedural rules, the parties to a trial may ask each other questions in Court with a view to establish the facts of a case and the relevant documents.

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

According to the Competition Act and the Leniency Ordinance, 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 rules on damage actions (please see section 8) provide for certain limited privileges for leniency applicants (Sec. 37e para. 3 of the Cartel Act) in respect of 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.

The FCA installed an internet whistle-blower system for anonymous information on competition law infringements. In early 2023, an Act to protect whistle-blowers, implementing EC Directive 2919/1937/EU was enacted, containing detailed provisions on the procedures to be followed and on the protection awarded to whistle-blowers with a strong emphasis on the public sector.

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 (please see question 1.1). Rules on leniency in criminal procedure, relating to infringements of cartel law, were introduced in 2010 and are marked to expire on December 31, 2028.

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, in recent years, the FCA has extensively used, and further promotes, negotiated settlements, which may be combined with leniency applications. In response to widespread criticism on settlements, 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, please 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 amendments to the law in 2017 have tried to provide a basis for a limited review of important questions 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. The Higher Cartel Court can and will only to a very limited extent consider questions of fact. Only if the Higher Cartel Court believes that the taking of evidence was faulty or incomplete, and thus remands the procedure to the Cartel Court, will (further) cross-examination of witnesses be permitted. 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.

The Cartel Act 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 FCA's final decision that an undertaking culpably and illegally infringed the provisions specified in the respective decision. However, the burden of proof as to whether the plaintiff suffered damage by the defendant's infringement, and to what extent, 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 therefor is, amongst others, that the claims of the injured parties result from the same set of facts or are based on the same legal title.
- Still, it must be considered that the individual claims remain separated. Consequently, the jurisdiction of Courts may be determined on that basis or, if the individual claims are below certain thresholds, the appeal to the Supreme Court may be barred in that respect.

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 that occurred and the injuring party. Different rules may apply in cases of criminal behaviour relating to natural persons.

However, the limitation period is 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 damages 10 years after the occurrence of the damage; the time limits only run from the end of the infringement. These limitation periods are paused during proceedings for (1) a 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. These rules apply to older claims that were not time barred by December 26, 2016, unless old rules effective on that date are more beneficial to the harmed party. It was discussed whether this provides for a retroactive effect and whether such effect is permissible under the EU, while the latter was confirmed (ECJ June 22 2022, C267/20). Furthermore, limitation as to interest may pose issues, as under Austrian law this is separately regulated from limitation for the main claim (Sec. 1480 ABGB) providing for a three-year limitation period.

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

The law now explicitly permits the passing-on defence. In addition, 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 Austrian 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.

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. See in relation to costs also ECJ February 16, 2023, C-312/21.

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 damage claim for cartel conduct resulted in a damages 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 popular driving courses. After the fines became final, cartel damage claims (which were very low, with 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.

Currently, several big cases following up on the Cartel Court's decision in a banking cartel, an elevator cartel case (please see question 3.1) and the trucks cartel are under trial. Several complex questions of law are being discussed and have been decided at different levels of the Court system. However, so far, no final damage award has emerged. If and what settlements were concluded is kept confidential, for obvious reasons.

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 circumstances, 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). The declared reason for the publication is to facilitate private enforcement of damage claims. When a decision by the Cartel Court is partly confirmed, partly amended by the Supreme Court, only the decision by the Supreme Court, and not the one by the Cartel Court, shall be published (November 8, 2021, 16 Ok 2/21m). The Supreme Court ruled (May 25, 2023, 16 Ok 8/22w) that the FCA may move for reopening a decided and closed fine case if the FCA gains only afterwards knowledge and evidence of cartel infringements which defendants have not disclosed despite the general obligation to cooperate under the leniency programme.

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

The FCA has during the past years actively conducted raids and fined several companies following settlement procedures, mostly concentrating on vertical infringements. Important sectors affected included waste-management, construction, submetering and carpenters. Several big cartel damage cases are still under trial. The Cartel Court files, including any leniency documents that may be included there, are not protected as final 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 (please also see question 4.4).

The FCA has some history in researching specific industries (*Branchenuntersuchungen*) and has developed a tendency for competition monitoring. Recently, gasoline, e-car loading infrastructure and other industries have triggered special interest.

The quite influential position of the General Director for Competition is still vacant and the procedures for a new appointment are underway, triggering some interest and discussion by the public and the stakeholders in the competition law scene.

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, merger and cartel law and follow-on cartel damage procedures and general litigation. 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 OG
Am Getreidemarkt 1
1060 Vienna
Austria

Tel: +43 1 533 1695 520
Email: hauck@preslmayr.at
URL: www.preslmayr.at

Preslmayr Rechtsanwälte provide their clients with expertise in business law. Our clients, both from Austria and around the world, are large and medium-sized businesses as well as individual entrepreneurs. Many of our clients have depended on us to solve their complex legal problems for 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.

www.preslmayr.at

PRESLMAYR
RECHTSANWÄLTE

International Comparative Legal Guides

The **International Comparative Legal Guide** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

Cartels & Leniency 2024 features 18 Q&A jurisdiction chapters covering key issues, including:

- The Legislative Framework of the Cartel Prohibition
- Investigative Powers
- Sanctions on Companies and Individuals
- Leniency for Companies
- Whistle-blowing Procedures for Individuals
- Plea Bargaining Arrangements
- The Appeal Process
- Damages Actions

The International Comparative Legal Guides are published by: glg Global Legal Group