

# Retailer settlement and amendments to Cartel Act

September 15 2016 | Contributed by [Preslmayr Attorneys at Law](#)

[Introduction](#)  
[Amendments](#)  
[Damages Directive](#)  
[Comment](#)

## Introduction

On June 30 2016 a cartel fine based on a settlement (for further details please see "[New settlement policy](#)") amounting to €10.2 million was imposed on the Austrian grocery chain SPAR Österreichische Warenhandels-AG and its subsidiaries (collectively, 'SPAR') due to vertical price collusions in the food retail sector, which included 16 product divisions such as beer, flour and non-alcoholic beverages.<sup>(1)</sup>

Earlier in 2015, regarding dairy products, SPAR, after controversial searches of its premises in 2012 and a hard fought confrontation with the cartel authorities, refused a settlement and thus a record €30 million fine was imposed on the company by the Supreme Court, which increased the initial €3 million fine tenfold. In its reasoning, the Supreme Court also separated the Austrian system of fine calculation from longstanding European practice.<sup>(2)</sup>

In August 2016, Minister of Justice Wolfgang Brandstetter circulated a draft for an amendment to the Cartel Act 2005 for consultation. In addition to the implementation of the EU Damages Directive (2014/104/EC), which must be enacted by December 2016, the draft addresses other issues, as discussed below.

## Amendments

In *SPAR* relevant documents were stored on servers outside the search site and therefore were not expressly covered by the search warrant, thus leading to a dispute as to whether the searched entity was obliged to provide access. The investigating antitrust authority extended the search warrant to include these electronic documents. SPAR objected. The Higher Administrative Court ruled that the extension was lawful. This provision will now be expressly included in the law and investigative authorities will be permitted to access electronic documents not physically stored at the search site (eg, cloud drives). This access can be enforced by fines.

To prevent limitation from expiring during ongoing investigations, the five-year limitation period for fines will be suspended during investigations, even if performed against only one cartel member (eg, information found during a search of one cartel member also suspends the limitation period for initially undiscovered other cartel members). To avoid redundant investigative measures infringing the fundamental right to prevent limitation from expiring, the total limitation period is capped at 10 years. Intermediate proceedings (eg, lengthy appeal procedures conducted only to induce limitation) are not included in this cap.

In respect of merger procedures, the draft contains provisions regarding the Cartel Court's right to decide on (ancillary) antitrust issues in the course of clearing a joint venture.

## Damages Directive

## AUTHORS

[Dieter Hauck](#)



[Christian Kern](#)



With regard to compensation procedures, based on Austrian case law, it will always be presumed that a cartel has caused damage. This presumption can be rebutted by the defendant. The burden of proof will be on defendants regarding passing on of damages as a defence, which is generally accepted by the law. The draft also reiterates the joint and several liability of cartel members. Small and medium-sized businesses employing less than 250 people that have an annual turnover not exceeding €50 million or a balance sheet total not exceeding €43 million and a share of the relevant market during the competition violation of less than 5% are exempted from the joint and several liability, if unlimited liability would endanger their viability. Such companies are liable only towards their direct and indirect customers or suppliers, as the case may be. The limitation period for compensation will be extended to five years, starting when the competition violation is discovered. This period is then suspended during investigations or procedures by the competent competition authority. The draft further implements the disclosure of evidence in compensation procedures according to EU Directive 2014/104/EC.

To promote the existing leniency programme regarding the fine procedure, the draft also contains an exception for principal witnesses who disclose a secret and horizontal cartel from joint and several liability of compensation payments. If the fine of a principal witness was pardoned due to his or her disclosure, he or she bears liability only for his or her direct and indirect buyers and vendors (unless the other damaged parties cannot gain full compensation from the other liable cartel members).

## **Comment**

In light of recent remarkable cartel cases (eg. in the grocery sector, transport and haulage sector (for further details please see "[Forwarding agencies' cartel and its consequences](#)") and truck sector), and in connection with stricter European law standards, legislatures worldwide, including Austria, want to strengthen their authorities' powers and to support the rights of injured persons to claim damages. Further, a balance must still be struck between enhancing private enforcement on the one hand and protecting generally successful leniency programmes on the other.

*For further information on this topic please contact [Dieter Hauck](#) or [Christian Kern](#) at Preslmayr Attorneys at Law by telephone (+431 533 16 95) or email ([hauck@preslmayr.at](mailto:hauck@preslmayr.at) or [kern@preslmayr.at](mailto:kern@preslmayr.at)). The Preslmayr Attorneys at Law website can be accessed at [www.preslmayr.at](http://www.preslmayr.at).*

## **Endnotes**

(1) Cartel Court 29 Kt 10/16m.

(2) Supreme Court, October 15 2015, 16 Ok 2/15b, 16 Ok 8/15k.

---

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).