

The International Comparative Legal Guide to: **Enforcement of Competition Law 2009**

A practical insight to cross-border enforcement regulation



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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Austria? If more than one, please describe the division of responsibilities between the different authorities.

Cartel Court: The Higher Regional Court Vienna (*Oberlandesgericht Wien*) as Cartel Court (*Kartellgericht*) is charged with enforcing competition law in Austria. The Cartel Court decides only upon application of (i) the Federal Competition Authority (*Bundswettbewerbsbehörde* - "FCA"), (ii) the Federal Cartel Prosecutor (*Bundeskartellanwalt* - "FCP"), (iii) a regulatory authority, (iv) the Austrian Federal Economic Chamber (*Wirtschaftskammer*), (v) the Chamber of Labour (*Kammer für Arbeiter und Angestellte*) (vi) the President's Conference of the Austrian Chamber of Agriculture (*die Präsidentenkonferenz der Landwirtschaftskammern Österreich*) and (vii) every undertaking or every association of undertakings which has a legal or economic interest in the decision of the Cartel Court. However, only the FCA and the FCP may apply for an in-depth investigation of a concentration (second phase merger control proceedings) and for the imposition of fines and penalty payments.

FCA: The FCA (one of the two official parties) is Austria's main authority tasked with investigating and following up on competition cases, to investigate economic sectors, to render opinions on economic policy, etc. However, unlike, for example, the European Commission, the FCA does not have the power to render binding decisions, but only the right to apply for a decision of the Cartel Court.

FCP: The second official party, the FCP, is subordinated to the Austrian Minister of Justice and is in charge of representing public interests in the field of competition law. The FCP is independent of the Cartel Court when fulfilling its tasks.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

In Austria, there are a number of authorities that are entrusted with the regulation of particular sectors:

- *Energie-Control GmbH* (E-Control) is entrusted with monitoring, supporting and regulating the implementation of the liberalisation of the Austrian electricity and natural gas markets. The E-Control Commission is, *inter alia*, the appeal authority for rulings of E-Control.
- The Austrian Regulatory Authority for Broadcasting and Telecommunications (*Rundfunk und Telekom Regulierungs-*

GmbH - "RTR") is entrusted with regulation in the fields of telecommunications and broadcasting. The *Telekom-Control Kommission* is an independent authority, which serves as an appeal authority to the RTR and more importantly to determine undertakings which have significant market power on one or more relevant telecommunications markets and to impose specific obligations to remedy such market power.

- In the field of railway liberalisation, there is the Railway-Control GmbH (*Schienen-Control GmbH*) and the Railway-Control Commission (*Schienen-Control Kommission*).
- In the field of financial markets, the financial market authority (*Finanzmarktaufsicht*) is the competent authority.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Austria?

The FCA will mainly investigate cases which are brought to its attention by a complaint or a leniency application of an undertaking or an individual. Furthermore, the FCA may investigate economic sectors which are, in the public opinion, not considered to be competitive. The FCA may also investigate sectors or particular undertakings more closely if this is on the political (EC or national) agenda.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

Agreements and concerted practices: Section 1 of the Austrian Cartel Act (*Kartellgesetz* - ACA) is almost identically worded to Article 81(1) EC. However, Section 1 para 4 also prohibits unilateral recommendations for prices, price limits, calculation criteria, margins or discounts, which have as their objective or effect a restriction of competition. An exception to this prohibition is non-binding recommendations which shall not be enforced by imposing economic or social pressure. Section 2 of the ACA is almost identically worded to Article 81 (3) EC. In addition Section 2 para 2 ACA sets out restrictions of competition, which shall not be subject to the cartel ban of Section 1: (i) restrictions between undertakings which jointly hold an Austrian market share of not more than 5% or a market share of not more than 25% on any relevant geographical submarket in Austria; (ii) agreements with retailers of books, music supplies, newspapers etc concerning fixed prices; (iii) certain restrictions between cooperatives and their members; (iv) restrictions between groups of certain financial

institutions; and (v) certain agreements, decisions and concerted practices of producers of agricultural products and associations of such producers.

Abuse of a dominant market position: Section 5 ACA is similarly worded to Article 82 EC. One main difference to Article 82 is that joint dominance is not expressly mentioned in Section 5 ACA. However, although the Austrian Cartel Court has not yet rendered any decision concerning joint dominance, it is likely that the rules on joint dominance developed by the European institutions would also be applied by the Austrian competition authorities. As regards the existence of a dominant market position, Section 4 ACA provides for the legal presumption of the existence of a dominant market position, if (i) the undertaking has a market share of at least 30% or (ii) has a market share of more than 5% and is subject to competition of not more than two other undertakings or (iii) holds a market share of more than 5% and belongs to the four biggest undertakings on this market, which have a joint market share of at least 80%. This legal presumption may be rebutted in a proceeding before the Cartel Courts.

The Austrian Local Supply Act (*Nahversorgungsgesetz*) expressly prohibits the unequal treatment of resellers by a supplier, unless such behaviour is objectively justified. According to Austrian case law, this non-discrimination obligation conferred upon suppliers does not require a dominant market position in order to be applied. However, it is not yet clear if, at least to a lesser extent, some market power of the supplier is required.

Criminal law: In general there is no criminal liability for infringements of competition. The only exception is Section 168 b of the Austrian Criminal Code (*Strafgesetzbuch*), which sanctions bid-rigging actions in public procurement proceedings with a prison sentence of up to three years. It should be noted that the criminal courts and not the Cartel Court is charged with the prosecution of persons involved in bid-rigging activities. Furthermore, there are reported cases where the FCA asked the public prosecutor to initiate criminal proceedings charging fraud against employees of undertakings involved in a bid-rigging cartel for filing mock tenders.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

In regulated sectors, such as telecommunications, electricity and gas, special provisions apply, most importantly relating to the access of undertakings to networks of other undertakings. Furthermore, the Austrian Telecommunications Act 2003 (*Telekommunikationsgesetz 2003*) authorises the Austrian regulatory authority to impose obligations on undertakings with significant market power (even if such undertakings do not abuse their dominant market position). For example, the authority may impose obligations of non-discrimination, transparency, accounting separation, the duty to give access to network facilities and network functions as well as price control provisions.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

No. However, in critical cases the parties may approach the competition authorities and ask for legal guidance.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

As mentioned above under question 2.2, apart from the official parties and certain chambers, every undertaking or association of undertakings having a legal or economic interest in a decision, may file an application (particularly a complaint) with the Cartel Court. However, since it is very difficult for an individual party to gather sufficient evidence, an undertaking will usually approach the FCA in order to convince it to start investigations (and making use of their investigative powers). To this end, the FCA provides a form which may be downloaded from its website (www.bwb.gv.at) and which should be used for such complaints.

3.3 What proportion of investigations occur as a result of a third party complaint and what proportion occur as a result of the competition authority's own investigations?

Although the FCA regularly launches sector inquiries, the major part of investigations occur as a result of a complaint of a third party or a leniency application of an undertaking concerned.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

Following a complaint or a leniency application, the FCA will require between four months and one year to investigate an average case. Firstly, the FCA will do some research on the undertakings concerned, the relevant markets, etc. Then the FCA will send information requests to the undertakings concerned and, possibly, third parties, will hear witnesses, conduct house searches or inspections, etc. Once the investigation is completed, the FCA may decide to drop the case or to file an application with the Cartel Court.

The Cartel Court will circulate the application to the undertakings concerned which have the opportunity to give statements to the application. In the procedure to take evidence, the Cartel Court will call on witnesses, and expert witnesses, obtain expert opinions etc. Depending on the complexity of the case, the Cartel Court will render a decision in approximately six to 15 months. If the decision is appealed, the Austrian Supreme Court as Higher Cartel Court will usually render its decision in a further four to 12 months.

Please note that Austrian merger control provides for maximum periods within which a decision will have to be reached (first phase: one month; second phase: another five months; appeal: another two months).

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Yes. The FCA is authorised to request undertakings (or associations of undertakings) to provide all necessary information within a reasonable period of time, if this is necessary for the purpose of the FCA's investigation. It should be noted that not only undertakings suspected of anti-competitive conduct, but also all other undertakings (particularly, customers or competitors of suspected undertakings) which may have relevant information, may be requested by the FCA to produce the information they have at their

disposal. If the respective undertaking does not comply with the FCA's request, the FCA will have to apply for a decision of the Cartel Court ordering the undertaking to provide the requested information. Without such an order of the Cartel Court, the information request of the FCA is not enforceable.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

Yes. On application of the FCA, the Cartel Court will have to order a house search, which will be conducted by the FCA, if (i) there is a reasonable suspicion of an infringement of Article 81 or 82 EC or (equivalent national provisions) and (ii) the house search is necessary to obtain information from the business records of the suspected undertaking. In the decision ordering the house search the Cartel Court must exactly define the premises to be searched. When carrying out the searching of the premises, the FCA has the following investigative powers: The FCA may: (a) enter all premises mentioned in the court's order; (b) inspect the premises; (c) take copies of files including files that are stored on computer hard drives; (d) call on independent experts to interpret the files; (e) conduct interviews with the undertaking concerning the whereabouts and the content of files; and (f) may call on the police in order to carry out the house search.

Pursuant to the rules laid down in Regulation (EC) No 1/2003, the European Commission may request the FCA to obtain the order from the Cartel Court that an inspection will have to be undertaken.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Yes. The undertaking concerned has to cooperate with the competition authorities and provide answers to all questions posed by the FCA concerning the whereabouts and the content of certain documents/files. However, beyond this duty, the undertaking concerned is not required to actively support the investigations.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Austrian competition law does not provide for the removal of original documents. However, the competition authorities may take copies of documents found in the course of the house search. If the party does not allow the inspection of a document, the document will be sealed and handed over to the Cartel Court, which will decide whether and to what extent the FCA may inspect and/or copy the document. Please also refer to question 14.2.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Yes. The owner of relevant data is under the obligation to give the FCA access to this data and to provide it in a common file format.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

For the main powers of the competition authorities please refer to questions 4.1, 4.3 and 14.2. There are no other specific investigative

powers. Austrian law allows the surveillance of persons (bugging the telephone) only if those persons are suspected of a criminal offence. As mentioned above, the only infringements of competition which also constitute criminal offences are bid-rigging or fraud. Thus, in such exceptional cases surveillance may be ordered by a criminal court.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Already in the stage of investigation (before a court proceeding has been opened), the FCA has to give the suspected undertaking opportunity to render a statement on the results of the FCA's investigations. Only if the FCA plans to apply for a fine or a periodic penalty payment before the Cartel Court, the suspected undertaking has no right to be heard by the FCA. However, in the proceeding before the Cartel Court the suspected undertaking will have to be heard on the subject of the proceeding and of the applications and submissions of the other parties. A decision of a court that is based on results of the investigation with regard to which the suspected undertaking's right to be heard was violated may be appealed.

4.9 How are the rights of the defence respected throughout the investigation?

Persons who would, *inter alia*, be in danger of criminal prosecution or an immediate proprietary disadvantage if they testified have the right to refuse the testimony. Please also refer to questions 4.4 and 14.2.

4.10 What rights do complainants have during an investigation?

Not only the suspected undertakings but also every other party of the proceeding has the right to be heard and the right to refuse to testify as described in questions 4.8 and 4.9 above. However, in practice, individuals will often merely file a complaint with the FCA in order to convince the authority to make the necessary application before the Cartel Court. In such cases the individual will not be a party to the court proceeding and will thus not have to be heard by the Cartel Court. As a witness the individual may still refuse to testify if the conditions set out in question 4.9 are met.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Undertakings that are subject to a house search or an information request have the same rights relating to their right to refuse a testimony, etc as a suspected undertaking.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Cartel Court may take interim measures if an applicant (see question 1.1) provides sufficient evidence showing that an infringement of competition law is likely in the case at hand.

6 Time Limits

- 6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

A fine may only be imposed if the respective application is made within five years of the date the restriction of competition ended. In practice, the competition authorities do not prosecute violations of competition law, which occurred before the entry into force of the Cartel Act 2002, i.e. before July 1, 2002.

7 Co-operation

- 7.1 Does the competition authority in Austria belong to a supra-national competition network? If so, please provide details

The FCA belongs to the European Competition Network.

- 7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

With regard to the enforcement of the Articles 81 and 82 EC in Austria, Article 12 of Regulation (EC) No 1/2003 applies (please refer to the chapter on the European Union). As regards the application of Austrian competition provisions equivalent to the Articles 81 and 82 EC, the ACA provides that the FCA may request information from other competition authorities if this is necessary for fulfilling its tasks.

8 Leniency

- 8.1 Does the competition authority in Austria operate a leniency programme? If so, please provide details.

Yes. The successful leniency applicant may either not be fined at all or at least have a reduced fine imposed on it.

No fine: The FCA may abstain from applying for the imposition of a fine if the undertaking (or association of undertakings):

- ceased to participate in a cartel;
- informed the FCA of the cartel;
- efficiently and thoroughly cooperates with the FCA in order to clarify the facts concerning the cartel; and
- did not force the other undertakings or associations of undertakings to participate in the cartel.

Reduction: Furthermore, if the FCA is already aware of the cartel, the FCA may apply for a reduced fine, if the undertaking (or association of undertakings):

- ceased to participate in a cartel;
- efficiently and thoroughly cooperates with the FCA in order to clarify the facts concerning the cartel; and
- did not force the other undertakings or associations of undertakings to participate in the cartel.

9 Decisions and Penalties

- 9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Mainly, the Cartel Court may render (i) declarations of current and, provided the applicant has a legitimate legal interest, past infringements of competition, (ii) orders to terminate infringements, decisions on the imposition of (iii) fines and (iv) penalty payments. All these decisions may also be taken in the form of an interim measure. Please note that the Cartel Court may not award compensation for damages to the applicant.

- 9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Austrian competition law does not distinguish between companies and individuals but rather refers to 'undertakings'. As under EC law the term 'undertaking' extends to any entity engaged in an economic activity, regardless of its legal status. Thus, companies, partnerships, sole traders, cooperatives, etc. may form an undertaking and may therefore be subjected to a fine by the Cartel Court. The criminal offences of bid-rigging and fraud apply to the responsible employee or manager of the respective undertaking.

- 9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

If an undertaking (i) does not, following a respective order of the Cartel Court, provide information or documents or (ii) provides incorrect or misleading information, the Cartel Court has the right to impose fines of up to 1% of the turnover achieved by the undertaking in the last business year. Furthermore, the Cartel Court may impose on an undertaking periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day.

10 Commitments

- 10.1 Is the competition authority in Austria empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Instead of rendering an order of termination the Cartel Court is empowered to accept commitments from the undertakings concerned if it can be expected that these commitments will exclude future infringements. Commitments are also very common in merger control proceedings.

- 10.2 In what circumstances can such commitments be accepted by the competition authority?

Please see question 10.1 above.

- 10.3 What impact do such commitments have on the investigation?

If the Cartel Court deems the offered commitments to be sufficient to resolve its competition concerns, the proceeding will be suspended.

11 Appeals

- 11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

A party may appeal to the Higher Cartel Court against a procedural decision of the Cartel Court such as an information request or the order of a house search. However, such an appeal does not have suspensive effect.

- 11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Against the decision of the Cartel Court, an undertaking has the right to appeal to the Supreme Court as Higher Cartel Court within four weeks from the date of receipt of the Cartel Court's decision.

12 Wider Judicial Scrutiny

- 12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

As mentioned above, the Cartel Court is competent to enforce competition law in Austria: (i) Interim measures of the Cartel Court; (ii) final decisions of the (Higher) Cartel Court; and (iii) settlements concluded before the (Higher) Cartel Court constitute execution warrants which will be enforced by (a) the competent District Courts or (b), in case of fines and penalty payments, by the Cartel Court.

- 12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The FCA may provide administrative assistance in competition matters to the (Higher) Cartel Court and other courts and administrative authorities including the regulators and the FCP. Moreover, pursuant to the EC Cooperation Notice, OJ 2004, C101/52 the European Commission and the competition authorities of other Member States may be called by the national court as *amici curiae*.

13 Private Enforcement

- 13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Yes. One can distinguish three main legal instruments:

- As mentioned above, a third party which has a legitimate legal or economic interest may directly apply for a decision of the Austrian Cartel Court (for the different types of decision please see question 9.1 above).
- Pursuant to the Austrian Unfair Competition Act a third party may also sue an undertaking before the Austrian commercial courts for injunctive relief or for damages resulting from an infringement of competition.
- Moreover, a third party may bring an action for damages before the Austrian civil courts ("private enforcement").

- 13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To date there has been only one reported successful private enforcement action for damages in Austria (District Court Graz, 16.3.2007, 4 C 463/06 h - *Grazer Fahrschulen*).

14 Miscellaneous

- 14.1 Is anti-competitive conduct outside Austria covered by the national competition rules?

The ACA applies to anti-competitive conduct which has an impact on the Austrian market, irrespective of whether the conduct is realised in Austria or abroad.

- 14.2 Please set out the approach adopted by the national competition authority and national courts in Austria in relation to legal professional privilege.

It is established under Austrian law that a lawyer must not give evidence against his client, unless he is released from his obligation by the client. According to this principle, also attorney-client communication, which is found in the office of the lawyer, is protected. However, attorney-client communication found by the competition authorities in the course of a house search in the client's office or private premises is not protected. Therefore, on the basis of the law as it stands, the competition authorities are entitled to use such attorney-client communication as evidence in the competition proceeding.

- 14.3 Please provide, in no more than 300 words, any other information of interest in relation to Austria in relation to matters not covered by the above questions.

There is no other additional information to provide.

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ATTORNEYS AT LAW

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