

The International Comparative Legal Guide to:

Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



Published by Global Legal Group

Austria

Bernhard Kofler-Senoner



Alexander Baratsits



CHSH Cerha Hempel Spiegelfeld Hlawati

THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The statutory basis for the cartel prohibition are Sections 1, 2 and 3 of the Austrian Cartel Act (*Kartellgesetz* 2005, “KartG” or “Cartel Act”). The Cartel Act does not contain any criminal law provisions. However, Sec 168b of the Austrian Criminal Code (*Strafgesetzbuch*) qualifies certain types of anti-competitive agreements, with regard to tendering procedures, as criminal offences (“bid rigging” - up to three years imprisonment).

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

The central provision of the cartel prohibition is Sec 1 subs 1 KartG which states that all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, are prohibited. Sec 1 subs 2 KartG lists hardcore infringements (such as price fixing, sharing of markets or sources of supply). Sec 1 subs 4 KartG prohibits so-called “Recommendation Cartels” (*Empfehlungskartelle*), which are unilateral practices providing recommendations such as observance of fixed prices. This specific prohibition goes beyond the comparable cartel law prohibition under Art 81 EC Treaty.

Sec 2 subs 1 KartG sets out exemptions to the cartel prohibition for cartels which (i) contribute to the improvement of production or distribution of goods, or promote technical or economic progress while (ii) allowing consumers a fair share of the resulting benefit, (iii) as long as the imposed restrictions are indispensable for the attainment of these objectives and (iv) do not eliminate competition for substantial parts of the products in question. The Cartel Act further exempts cartels which have only a minor effect on the Austrian market (the respective *de-minimis* rule applies in case of a combined market share of the undertakings concerned of less than 5% on the entire domestic market and less than 25% in a domestic regional market).

According to Section 3 of the Cartel Act, the Federal Minister of Justice is empowered to adopt (in consultation with the Federal Minister of Economics and Labour) block exemptions for certain types of agreements (e.g. vertical agreements on distribution) in the form of regulations (*Verordnungen*), in particular by way of reference to block exemptions released by the European

Commission (e.g. European Commission Regulation 2790/99 on the application of Art 81 subs 3 of the EC Treaty to categories of vertical agreements and concerted practices). The Federal Minister of Justice has not yet adopted such regulations under the new regime. However, the Austrian Federal Competition Authority (*Bundeswettbewerbsbehörde*, “FCA”) has declared on various occasions that it considers agreements that fulfil the criteria set out in the European Commission’s block exemptions to be in line with Austrian cartel law. Nevertheless, until the adoption of Austrian block exemptions, a certain lack of legal certainty remains.

1.3 Who enforces the cartel prohibition?

Austrian cartel law is mainly enforced by the Austrian Cartel Court (*Kartellgericht*), the FCA and the Federal Cartel Prosecutor (*Bundeskartellanwalt*, “FCP”).

The main decision making body is the Cartel Court. Its rulings may be appealed to the Appellate Cartel Court (*Kartellobergericht*) as final instance. However, the Cartel Court is not empowered to open proceedings *ex-officio* but only upon a petition being filed. The following entities are entitled to file a petition to the Cartel Court to discover a cartel or to gain an order ceasing the cartel: (i) the FCA; (ii) the FCP; (iii) regulators of certain economic branches (such as telecoms, broadcasting, energy); (iv) the Chamber of Commerce, the Chamber of Labour and the Presidential Conference of the Austrian Chamber of Agriculture; and (v) any undertaking or association of undertakings, which have an economic or legal interest in the decision.

Fines due to a violation of cartel law may only be imposed by the Cartel Court upon application by either the FCA or the FCP.

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

The stages of the competition control proceedings are: a) investigation (only the FCA is entitled to investigate); b) petition to the Cartel Court for discovery of a cartel or to gain an order ceasing/desisting the cartel (by any party listed in 1.3); a petition to impose fines may only be filed by the FCA or FCP; c) proceedings conducted by the Cartel Court (for the proceedings the principle of judicial investigation is applied with aspects of civil procedure) which may end with a court order or a dismissal of the petition; and d) the Parties may appeal to the Appellate Cartel Court.

1.5 Are there any sector-specific offences or exemptions?

The Cartel Act contains some sector-specific exemptions (Sec 2

subs 2 KartG), *inter alia* relating to (i) agreements with retailers fixing retail prices for books, art prints, music supplies, journals and newspapers, (ii) certain restrictions of competition between members of cooperative societies, as well as between cooperative societies and their members, (iii) certain anti-competitive agreements in the banking sector or (iv) certain agreements in the agricultural sector.

With reference to the Minister of Justice's authority to enact a group exemption regulation (Sec 3 KartG, see under question 1.2 above), to date no such group exemption has been enacted. However, it is expected that any such future group exemption regulations will refer to the European Commission's group exemption regulations according to Art 81 subs 3 EC Treaty.

1.6 Is cartel conduct outside Austria covered by the prohibition?

The Austrian Cartel Act generally applies whenever the circumstances of the case have an impact on the Austrian market, irrespective of whether these circumstances have been realised in Austria or abroad ("effects-doctrine").

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*	Not Applicable
Carry out compulsory interviews with individuals	Yes*	Not Applicable
Carry out an unannounced search of business premises	Yes*	Not Applicable
Carry out an unannounced search of residential premises	Yes*	Not Applicable
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	Not Applicable
■ Right to retain original documents	Yes*	Not Applicable
■ Right to require an explanation of documents or information supplied	Yes*	Not Applicable
■ Right to secure premises overnight (e.g. by seal)	Yes*	Not Applicable

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

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

There are no specific or unusual features of the investigatory powers.

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

In general, surveillance powers are only foreseen if a criminal offence has been committed. Since the KartG contains no criminal provisions, there are no surveillance powers included for

infringements against the cartel prohibition (except for bid rigging in criminal proceedings, see under question 1.1 above).

2.4 Other powers of investigation.

Besides ordering the production of specific documents or information (*Auskunftsverlangen*, §11a Competition Act, *Wettbewerbsgesetz*) and the power to perform house searches there are no other special powers of investigation.

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

The FCA carries out searches together with organs of public security (police) if requested by the FCA (the FCA might also support the European Commission in case of searches based on European cartel law). Neither the Cartel Act nor the Competition Act contains a provision whereby the FCA must await legal advisors before performing searches. However, the Competition Act refers to Sec 142 of the Code of Criminal Procedure ("CCP") which provides for the right of attendance of a trusted third party (e.g. a legal advisor).

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

No, in-house legal advice is not protected by rules of privilege. Further, even though the rules of privilege are recognised when the FCA is acting for the European Commission (in-house legal advice not being covered by such rules of privilege), rules of privilege are generally doubtful under the pure Austrian legal system.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals.

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 in connection with a cartel investigation?

If an undertaking or association of undertakings does not obey an order to produce documents or information, the Cartel Court may impose coercive penalty payments for each day of delay in performing the ordered production of documents or information (Sec 35 KartG). The daily penalty payments may reach a maximum of 5% of the average daily turnover of the undertaking in the last business year. Furthermore, the Cartel Court may in such cases impose fines up to a maximum of 1% of the turnover in the last business year.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

First, provisions in agreements and decisions infringing the cartel prohibition are void. Second, the Cartel Court (upon application of the FCA or the FCP) may impose fines on undertakings or associations of undertakings up to a maximum of 10% of the group turnover achieved in the last business year. Third, persons or undertakings who suffered damages due to cartel law violations may also claim for damages in civil courts.

3.2 What are the sanctions for individuals?

Except for the specific case of bid-rigging (see under question 1.1 above), there are no specific sanctions for individuals, such as managing directors or other key employees. Only if an individual can be characterised as an entrepreneur, the same rules and sanctions apply as to undertakings or associations of undertakings.

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

The Cartel Court has the ability to impose a fine, if the application to impose the fine has been filed within five years of the termination of any conduct determined to be illegal under the KartG. A continuous infringement is considered to be ended when the last infringing act has been ceased. For infringements ended before 1.1.2006 a limitation period of three years generally applies.

3.4 Is cartel conduct by individuals potentially an extraditable offence?

No, since cartel conduct is generally not a criminal offence under Austrian law which would be a prerequisite for it to qualify as an extraditable offence (except for bid rigging, see under question 1.1 above).

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

Not applicable.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

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

There is a cartel leniency programme in Austria. According to Sec 11 subs 3 Competition Act, the FCA may refrain from making an application to the Cartel Court to impose a fine against an undertaking or association of undertakings which (i) end their involvement in an infringement of Sec 1 KartG or Art 81 EC Treaty, (ii) inform the FCA about such infringement before the FCA gets to know the facts of the case, (iii) cooperate unrestrainedly and expeditiously with the FCA to fully clarify the facts of the case and (iv) did not coerce other undertakings or associations of undertakings to participate in the infringement.

Partial leniency (i.e. reduction of fines) is available under preconditions (i), (iii) and (iv) above in cases where the authorities already know of the case.

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

No, there is no marker system in Austria.

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

Generally, a leniency application has to be made in writing (the FCA has published a specific form to be filed by e-mail or telefax). In exceptional cases, the information required in the form may be provided orally at the FCA (minutes will be taken by the FCA).

4.4 To what extent will the application be treated confidentially and for how long?

Since the respective proceeding is an administrative procedure, the FCA (according to administrative law principles) is obliged to keep information confidential to the extent access to such information by third parties would interfere with the party's interests.

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

According to the principles of the leniency programme, the undertaking or association of undertakings applying for leniency has to cooperate until the end of the FCA's investigation.

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.

Not applicable.

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

No, there are no settlement or plea bargaining procedures foreseen according to the Cartel Act.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

Decisions of the Cartel Court are subject to appeals which are heard by the Appellate Cartel Court. The appeal has to be filed within four weeks of service of the decision. The Appellate Cartel Court serves as court of last resort.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

As set out above, the competition authority cannot impose fines in Austria. The FCA and the FCP may, however, initiate proceedings before the Cartel Court with the aim of imposing fines. After a fine has been imposed by the Cartel Court, the Appellate Cartel Court is competent to adjust the fine as a result of an appeal (filed either by the undertaking(s) concerned or the FCA/FCP) on the grounds that

the Cartel Court has not accurately assessed the case and set the fine. Such an adjustment might not be specifically frequent but also not too rare.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

With respect to actions for damages, no specific statutory basis for bringing Austrian or EC competition law-based actions for damages exists. However, such claims might be based on the general principles of tort (especially Sec 1295 and 1311 of the Austrian Civil Code). In such case, the plaintiff has to prove that: (i) the defendant has violated Austrian or EC cartel law; (ii) the violation has caused damage to the plaintiff; (iii) such damage has been in the protective scope of the violated law; and (iv) the defendant has acted intentionally or negligently.

Claims for damages may also be based on Sec 1 of the Austrian Unfair Competition Act under specific circumstances.

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

The Austrian Code for Civil Procedure does not provide for class actions comparable, for instance, to the USA. However, one may distinguish between two cases where several plaintiffs may combine their actions against one and the same defendant:

Several plaintiffs may join their claims for damages provided that, *inter alia*, their claims are directed against the same defendant; are based on the same title (e.g., the plaintiffs have been parties to the same contract with the defendant); or result from the same facts (e.g., the plaintiffs have all been affected by the same unlawful behaviour of the defendant). It has to be noted, however, that in all such cases, even though only one proceeding takes place, the claims of the plaintiffs remain separate, i.e. the court may hold that some claims are justified and some are not, or each plaintiff may freely dispose over its claims (e.g., settle the dispute regardless of the will of other plaintiffs).

The Austrian Code for Civil Procedure further provides for a second option which has also been used in the past. Several plaintiffs may assign their individual claims to a collective plaintiff who then opens proceedings against one and the same defendant.

8.3 Have there been successful civil damages claims in the past?

There has been only one case, which was taken to the court by the Austrian Chamber of Labour in 2006 as a test case, which has been successful to date.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

The Cartel Act has been amended as of 1 January 2006 with the main changes being the implementation of the leniency programme and the adaptation of the law to the provisions of Art 81 and 82 EC Treaty.

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

After having been introduced on 1 January 2006, the Austrian leniency programme has seen its first big case in 2007 (related to an elevator and escalator cartel). At the same time, increasing efforts can be observed to push private enforcement. In this context the Austrian Ministry of Justice has proposed a draft statute on class actions amending the Austrian Civil Procedure Code (such draft statute is currently under discussion).

**Dr. Bernhard Kofler-Senoner LL.M**

CHSH Cerha Hempel Spiegelfeld Hlawati
Parking 2
1010 Vienna
Austria

Tel: +43 1 5143 5581
Fax: +43 1 5143 538
Email: bernhard.kofler-senoner@chsh.at
URL: www.chsh.at

Bernhard Kofler-Senoner is an attorney at CHSH Cerha Hempel Spiegelfeld Hlawati. He leads CHSH's competition practice group and has acted for CHSH in prominent competition proceedings before the European Commission and Austrian competition authorities. With offices in Austria, Slovakia, Belgium (Brussels), Hungary, Romania and Poland, CHSH offers comprehensive cartel law advice in Central-, Southeastern- and Eastern Europe. Bernhard Kofler-Senoner graduated from Innsbruck University in 2001 and from Fordham University in 2002. Additionally, the Fulbright grantee taught European competition law at Fordham University as an assistant. He is the author of numerous articles on Austrian and European competition law.

**Mag. Alexander Baratsits MAS**

CHSH Cerha Hempel Spiegelfeld Hlawati
Parking 2
1010 Vienna
Austria

Tel: +43 1 5143 5595
Fax: +43 1 5143 538
Email: alexander.baratsits@chsh.at
URL: www.chsh.at

Alexander Baratsits is an associate at CHSH Cerha Hempel Spiegelfeld Hlawati and is member of CHSH's competition practice group.

Alexander Baratsits graduated from Linz University in 2001 (Management) and 2005 (Law). He was manager of a private radio station (1997-2002) and is author of various articles on Austrian Media, IP and Cartel Law.

CHSH

Cerha Hempel Spiegelfeld Hlawati

With over 165 lawyers and offices in Vienna, Bratislava, Brussels, Budapest, Bucharest and in alliance with BSJP in Warsaw, Gdansk, Katowice, Poznan and Wroclaw, CHSH Cerha Hempel Spiegelfeld Hlawati is one of the biggest and most renowned law firms in Austria.

For more than eight decades CHSH has stood for creative solutions and has specialised in commercial law, banking, finance and capital markets, competition law, international taxation, administrative business law, real estate and project development as well as commercial litigation and arbitration.

CHSH is member of Lex Mundi - The World's Leading Association of Independent Law Firms.

2004 and 2005 CHSH was elected "Austrian Law Firm of the Year" by the renowned Magazine International Financial Law Review (IFLR).