

# The Handbook of Competition Enforcement Agencies

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## Overview

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Austrian competition law is mainly regulated by the Cartel Act and the Competition Act. The Cartel Act is, for the most part, harmonised with substantive EU cartel law and regulates topics such as cartel prohibition, abuse of a dominant position and the compulsory merger control regime. The legal framework provides for the involvement of the following Austrian authorities in the enforcement of Austrian cartel law.

#### Federal Competition Authority

The Federal Competition Authority (FCA) is the key enforcement agency in Austria. It generally oversees the functioning of competition in Austria and has been given extensive investigation powers, including house searches (based on an order of the Cartel Court) and the power to order the production of specific documents or information. In contrast to the European Commission, the FCA is not a decision-making body. On the basis of its investigations, it is entitled to file petitions to the Cartel Court, which will then decide on the case (eg, cease-and-desist orders, fines). In terms of merger control, all concentrations triggering a filing obligation under the Austrian merger control regime have to be notified to the FCA, which will carry out the phase I proceedings (four weeks) and may apply for an in-depth examination of the merger before the Cartel Court (phase II) in the case that competition issues arise.

The FCA is headed by a director general and is an independent authority.

#### Further authorities

The Federal Cartel Prosecutor (FCP) represents the public interest in competition matters and is bound by the instructions of the minister of justice. The FCP may ask the FCA to provide information or may request investigations. Further, the FCP (similarly to the FCA) has the power to apply for an in-depth examination in merger control proceedings and to file petitions with the Cartel Court.

The main decision-making body is the Cartel Court. Its rulings may be appealed to the Appellate Cartel Court as final instance. The Cartel Court is

generally not empowered to open proceedings ex officio but only upon a petition being filed (eg, by the FCA, the FCP or undertakings with a certain economic or legal interest). 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.

#### Developments in 2008

According to the FCA's website, in 2008 the FCA carried out a sector inquiry in relation to the energy sector (petrol pricing), which stemmed at least partially from public debate regarding the strong price increases in this sector.

Furthermore, 275 concentrations were notified with the FCA, signifying a decline of 19.4 per cent in comparison to the previous year (341 notifications), apparently due to prevailing global market conditions. With regard to phase I proceedings, in three cases, the notified concentrations were cleared subject to remedies. These cases related to the natural gas business (*Energie AG Oberösterreich/Oberösterreichische Ferngas AG/LINZ AG*), to the building industry (*Kurz Hoch- und Ingenieurbau GmbH/Ing Hans Bodner Bau GmbH & Co*) and to output services (*Post vier Beteiligungs GmbH/Raiffeisen Informatik Beteiligungs GmbH*).

With regard to phase II proceedings, four concentrations were finally approved without remedies and two under certain remedies. The latter concentrations related to the motor vehicles production industry (*21 Centrale Partners SA/Microcar SAS*) and the concrete ties for railway switches production industry (*VAE Eisenbahnsysteme GmbH/Kirchdorfer Fertigteilverteilung GmbH/TSF-A GmbH*).

In terms of cartel law enforcement, the Appellate Cartel Court (acting as court of appeal) confirmed the Cartel Court's decision to fine five producers of elevators and escalators an amount of €75.4 million because of violations of the cartel law prohibitions. This was the highest fine ever imposed with respect to a cartel law violation in Austria. Additionally, the Austrian leniency programme, which was introduced on 1 January

2006, was applied in three cases, whereby in one instance the Cartel Court fined two undertakings active in the wholesale of chemical products because of violations to the cartel law prohibition and in a second instance six owners of driving schools (one case still pending).

The new federal government, which was elected in September 2008, agreed to reform the structure of Austria's competition authorities based on an evaluation of their existing structure. During the election campaign proposals were discussed to provide the FCA with decisional competence in first instance and to merge the FCP with the FCA. However, so far, no consensus has been reached regarding a respective reform.

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CHSH's competition practice group is led by Bernhard Kofler-Senoner, who has acted for national and international clients in prominent competition proceedings before the European Commission and Austrian competition authorities. CHSH's competition practice group advises clients in merger control proceedings, administrative and civil antitrust litigation with regard to horizontal and vertical competition restraints and abuse of a dominant position as well as compliance matters. In terms of CHSH's CEE presence, CHSH not only advises on Austrian and European competition law but also offers comprehensive competition law advice in Central, South-eastern and Eastern Europe. CHSH is member of Lex Mundi – The World's Leading Association of Independent Law Firms.