

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Austria****4 June 2019**

This document reproduces a written contribution from Austria submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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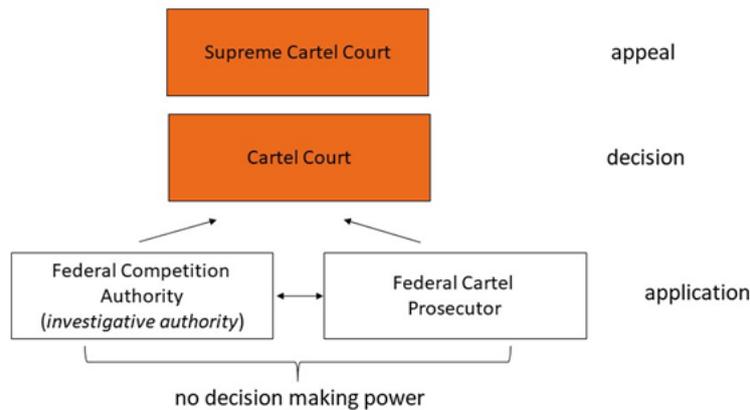
## *Austria*

### 1. The Austrian System - Overview

1. The Austrian competition enforcement system is designed following a purely judicial model. The Federal Competition Authority (*FCA*) is not a decision-making authority in competition law, but an investigative authority similar to a public prosecutor. Binding decisions in anti-trust law are taken exclusively by the specialized Cartel Courts (*CC*) upon application.
2. Although the *FCA* cannot decide formally, it can accept self-imposed obligations of the undertakings involved, issue information notices and decisively influence the decision through the negotiation of settlements (see below). Also the *FCA* conducts all investigations.
3. The Austrian system is adversarial, because the *FCA* is acting as an official party on one side of the procedure in a case brought to *CC* and the involved undertaking on the other side. Thus in the court proceedings the *FCA* acts as counterpart to the accused undertaking.
4. In its capacity as investigative authority, the *FCA* generally acts as an administrative authority. Solely when acting by court order (as in dawn raids), the *FCA* is functionally acting on behalf of the judiciary. If it exceeds the court order, its action is again subject to review under administrative law. Since the *FCA* sets actions in the investigation proceedings (e.g. binding RFIs), these must be reviewable as well. However, these competition enforcement acts are no anti-trust decisions in the actual sense and can be contested (only) within the administrative procedures. However, unlawfully obtained evidence may not be used.

### 2. The Austrian System - Details

5. The Higher Regional Court as a *CC* takes the binding decisions and its decisions are subject to appeal by the Supreme *CC*.



## 2.1. Investigations

6. The preliminary proceedings begin with the first investigation measure taken outwardly. This beginning has an effect on the statute of limitations. An investigation ends either with the closing of the proceedings by FCA or by an application to the court. There exists no possibility to appeal, neither against the beginning of the preliminary investigation, nor against the decision to end the proceedings or to file an application in court. However, specific actions that are taken by the FCA in the course of the preliminary investigation can be contested within the administrative procedures.

### 2.1.1. Possible investigation measures:

- Request for information (competence to issue administrative decision),
- Inspection of documents (competence to issue administrative decision),
- Hearing of persons involved,
- Hearing of witnesses,
- Dawn raids (on an order of the court)

## 2.2. Court decision and appeal/Enforcement system

7. The FCA can bring the following proceedings:

1. *Termination of infringements; commitments:* If an infringement of antitrust law is established, the CC may put remedies into effect and instruct the undertakings involved to (re)establish a lawful condition. Only behaviors that have been concretely determined can be terminated. A *preventive abolition* of infringements is thus not possible. However, the CC can also take a commitment decisions. In that case no infringement has to be established. However, the FCA must clearly and concretely determine the alleged anticompetitive behavior and the CC has to see whether the offered commitments are appropriate. However, there is no separate and full proportionality test conducted, due to the voluntary nature of the commitments.
2. *Declaration:* In the case of terminated infringements, the CC establishes that infringements have taken place in case of a legitimate interest.

3. *Fines*: The antitrust fine is a penalty "sui generis", since it is neither a mere coercive measure, nor a criminal or administrative penalty, though it is a *punishment* (also within the meaning of the ECHR) to sanction injustice and to prevent further offences. Fines can only be imposed in case of an established intent or negligence (Section 29 KartG<sup>1</sup>). Fines are primarily intended to sanction unlawful behavior in the past; they are therefore of repressive and preventive nature. Only the FCA and the Federal Cartel Prosecutor can request to impose a fine. The amount requested constitutes the cap, as the CC cannot impose a higher fine than requested. This is also one of the key elements of the well-functioning leniency and settlement procedure.

### 2.3. Possible Applicants for court proceedings

8. In the Austrian antitrust law, the **application-principle** applies. This means that certain bodies have the right to bring antitrust issues to court which then makes the decision. Such an application can be (depending on the matter) made by different institutions:
9. FCA and the Federal Cartel Prosecutor<sup>2</sup> have the right to
  - request to examine a merger
  - request for subsequent measures
  - request for a declaration
  - request to impose fines and penalty payments
10. FCA, the Federal Cartel Prosecutor, certain public chambers as well as undertakings and business associations ("individual procedure") that have a legal interest in the decision have the right to
  - request the termination of infringements
  - file an application for the establishment of an infringement
11. An individual procedure does not exclude a procedure by the FCA and the Federal Cartel Prosecutor.

### 2.4. Appeal procedures: Reassessing the substance/Assessment of evidence

12. The CC decides with written resolutions, which can be appealed against at the Supreme CC. Generally, the deadline is four weeks. Possible reasons that can be taken up in an appeal are (i) certain procedural errors (ii) inadmissibility (iii) incorrect legal assessment of the case or (iv) a change in the legal situation.
13. Facts and evidence that have existed at the time of the decision of first instance and could have been put forward at that time are generally not taken into account in the appeal procedure. According to recent case law, the Supreme Court was limited to legal

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<sup>1</sup> Kartellgesetz (*Austrian Cartel Act*).

<sup>2</sup> Different than the FCA, the Federal Cartel Prosecutor is not an investigation body. While the FCA is an independent authority (not bound by instructions), the Federal Cartel Prosecutor is bound by the instructions of the Federal Minister of Justice.

assessment, thus excluding to reassess the substance of a case.<sup>3</sup> "Substance of the case" includes, in particular, the results of expert opinions, which the court has based its decision on.<sup>4</sup>

14. This was however changed as of May 1, 2017 Section 49 (3) KartG was introduced. It states that the appeal may also be based on substance of the case. However, this is not a full second review of the facts (comprehensive ground of inaccurate fact-finding) but is essentially limited to grossly incorrect judgments and violations of compelling rule of thought.<sup>5</sup>

## 2.5. Composition and competition expertise at courts

### 2.5.1. Professional Judges and Lay Judges

15. As already mentioned, specialized courts are the antitrust decision making bodies in Austria: the CC as first instance and the Supreme CC as second instance. Pursuant to Section 59 par 1 KartG, the senates of the CC consist of a professional judge as chairman, another professional judge and two specialized lay judges.

16. According to Section 57 RStDG<sup>6</sup> judges are generally obliged to continuously train themselves. However, there is no requirement to report (specialized) training in the area in which a judge is active. This means that judges at the CC have the opportunity to educate themselves in the realm of antitrust law, but are not obliged to do so. Since the CC is a specialized Court the judges are generally highly experienced and knowledgeable in the field of competition law.

17. The specialized lay judges are appointed on the proposal of the Minister of Justice in agreement with the Minister of Economy. Authorized bodies for nomination are the Economic Chamber, the Chamber of Labor and the Conference of Presidents of the Austrian Chambers of Agriculture. They must have completed a university degree in law, commerce or economics and have substantial professional experience in the legal or economic field. They are independent in the exercise of their duties and have the powers of judicial office.<sup>7</sup> Lay judges have in-depth knowledge of competition law not only as in practice fluctuation is very low and the lay judges participated in proceedings for more than a decade. In a tie vote, the chairman decides (Section 63 KartG). The specialized lay judges can therefore be overruled by the professional judges.

### 2.5.2. Expert witness/expert opinion

18. The expert evidence is central to the proceedings before the CC.<sup>8</sup> Expert witnesses are persons with special expertise in a particular field, e.g. in the economic area. If a court does not have sufficient expertise in a certain field necessary for a case, it may ask an expert

<sup>3</sup> Gruber, Das Kartell- und Wettbewerbsrechts-Änderungsgesetz 2017 (Teil 2), ÖZK 2017/5, 182.

<sup>4</sup> Matousek/Harsdorf, Das Neue reizt, ecolex 2017/5, 384.

<sup>5</sup> Matousek/Harsdorf, Das Neue reizt, ecolex 2017/5, 385; 15/SN-230/ME XXV.GP.

<sup>6</sup> Richter- und Staatsanwaltschaftsdienstgesetz (*Judiciary and Public Prosecutor Service Act*).

<sup>7</sup> Sole et al, Das Verfahren vor dem Kartellgericht<sup>2</sup>, 2019.

<sup>8</sup> Sole et al, Das Verfahren vor dem Kartellgericht<sup>2</sup>, 2019 S. 109.

for its (written) opinion. However, the expert's opinion is subject to the free assessment of evidence by the court.

19. When the expert evidence is heard, the parties must be granted a fair hearing. This is done by giving the parties the opportunity to comment on the expert opinion.

20. In antitrust proceedings, expert opinions play a role mostly in merger and abuse cases, since in those cases the judges mostly rely on their experience.

## 2.6. Duration of proceedings/Statute of limitations

21. A fine can only be imposed if the application is filed within five years of the termination of the infringement. This period is interrupted as soon as at least one of the companies involved in the infringement or a participating business association is notified of an act of the FCA aimed at investigating or prosecuting the infringement. With each interruption, the deadline begins to run again. However, it ends in any case ten years from the termination of the infringement. The duration of proceedings before a court is not included in the deadline (Section 33 KartG).

## 2.7. Austrian particularity: Settlements<sup>9</sup>

22. Settlements (= consensual termination of proceedings) are of particular importance in the Austrian competition law system. From a legal point of view, a settlement does not constitute a settlement *between* the FCA and the accused undertaking, because the FCA's lack of decision-making power. Therefore, the "settlement" is always subject to judicial assessment by an independent Court, since it is a decision of the CC, which, without carrying out a full procedure, is based on facts investigated by FCA and not disputed by the accused undertaking. However, if not convinced the CC may conduct a full procedure. On the basis of the acknowledgment of the undertaking and available evidence, the FCA requests the antitrust court to impose a fine, with a "settlement discount" of up to 20%.

23. The taking of evidence before the CC may be shortened insofar as the accused undertaking does not oppose the FCA's application. Nonetheless, an antitrust tribunal review will take place before a fine is imposed. Within the scope of such a proceeding, the CC can (and has already done so) demand additional arguments from the FCA if it finds the undisputed facts to be inadequate.<sup>10</sup> The Austrian anti-trust law does not contain legal norms governing the exact procedure of such settlements. The mode has developed within the given legal framework, summarized and clarified by the position paper on settlements published by the FCA.

24. For companies such as public authorities, settlements are advantageous in that they avoid time-consuming and cost-intensive antitrust proceedings, quickly create legal certainty and establish antitrust-compliant behavior. Settlements thus have a positive impact on the length of proceedings.

25. A settlement is possible in each type of procedure and there are basically no requirements until when or at what time a settlement procedure must be initiated. Most

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<sup>9</sup> Guidelines of FCA on settlements, [https://www.bwb.gv.at/fileadmin/user\\_upload/PDFs/PDFs3/BWB\\_Settlements\\_english.pdf](https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf).

<sup>10</sup> *Schicho/Xeniadis*, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ZWF 2015/1, 2.

settlements have so far been made promptly after a dawn raid or before a request to impose a fine. However, in some cases, a settlement took place only after the first date of the court's motion, and sometimes even after a trial before the CC and supreme CC.<sup>11</sup>

26. The strict statute of limitations also affect a possible settlement. Conversations about a consensual termination of the proceedings must therefore be terminated positively within a fixed period of time. Otherwise, the FCA will request a fine at the CC. Discussions on a settlement are conducted open-ended for both parties. Both the FCA and the accused undertaking can refrain from a consensual termination of proceedings at any time.

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<sup>11</sup> *Schicho/Xeniadis*, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ZWF 2015/1, 2.