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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**Competition Compliance Programmes – Note by Austria**

8 June 2021

This document reproduces a written contribution from Austria submitted for Item 1 of the 133<sup>rd</sup> OECD Working Party 3 meeting on 8 June 2021.

More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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## *Austria*

### 1. General Considerations

1. Competition rules concern everyone who is active in the economic environment. It affects managers, who have to make daily decisions in the interest of their companies as well as employees, who require guidance on how to implement those choices.
2. Companies whose market behaviour fails to comply with competition rules run the risk of incurring high cartel fines and facing other negative sanctions like damaged reputation and loss of confidence by the market and its participants. On that account, effective competition compliance programmes should ensure that cartel infringements ideally do not occur at all.
3. Compared to recent years, a change of spirit in some industries happened. The Austrian Federal Competition Authority (Bundeswettbewerbsbehörde, „BWB“) welcomes and supports all competition compliance efforts by companies as they contribute to the firm rooting of a truly competitive culture in all sectors of economy.
4. In many cases Austrian companies have already implemented programmes to ensure compliance with Austrian and EU competition law. In some instances, competition compliance programmes are developed in reaction to past infringements. The BWB pleads for a more pro-active approach to avoid anticompetitive behaviour in the future. For this purpose, the authority also provides its expertise by publishing guidelines and manuals on various issues.

### 2. Legal Framework

5. Regarding the procedure in Austria, the BWB is the investigative, but not the decision-making body in cartel cases. Decisions are made by the Austrian Cartel Court upon receiving an application from the BWB.
6. According to section 30 para 1 of the Austrian Cartel Act (Kartellgesetz - KartG), when fixing the amount of fines, the severity and duration of the infringement, the enrichment due to such infringement, the degree of responsibility and the economic capacity of the company has to be taken into consideration. Subsequently, mitigating and aggravating reasons are to be taken into account.
7. A competition compliance program that has been implemented in advance, combined with supporting the Competition Authorities in the processing, the determination and clarification of the facts could be seen as a reason for mitigation in the fine fixing procedure. While this is not explicitly listed in the law, in two decisions the Cartel Court has taken compliance efforts into account (see III.1. below).
8. Digression: It should also be mentioned that in principle there is limited criminal enforcement track for anticompetitive behaviour in Austria. This exceptionally only exists for cases relating to public procurement or fraud. According to section 168b of the Austrian Criminal Act (Strafgesetzbuch - StGB), bidding cartels are punishable by imprisonment

(the maximum sentence is 3 years)<sup>1</sup>. However, it should be noted that the Austrian Criminal Court is competent for enforcing those offenses.

### 3. Questionnaire

#### 3.1. What are the drivers for changes of agency policies with regard to acknowledging competition compliance programmes when deciding about charging companies or individuals, penalising or settling cartel cases?

9. In Austria the companies have become more and more aware in dealing with competition law and started setting up compliance programmes. This trend is to be welcomed and strongly related to the increase of the BWB's investigative activity in the last 10-15 years. This general preventive effect is highly important in order to ensure nationwide and sustainable compliance with competition law.

10. There has been a long discussion about the treatment of competition compliance systems. Although the European Commission welcomes the fact that companies are attempting competition efforts, the European Commission is not obliged to take these efforts into account as a mitigating circumstance when setting a fine.

11. For example the former EU-Commissioner for Competition *Joaquin Almunia*<sup>2</sup>, had stated a rigid position that no discount on fines will be granted on the basis that a company had a competition law compliance programme in place:

*“To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed? The benefit of a compliance programme is that your company reduces the risk that it is involved in a cartel in the first place. That is where you earn your reward.”*

12. Also in the brochure "Compliance matters - What companies can do better to respect EU competition rules" published in 2013, the European Commission stated what is expected of companies. It is pointed out that *“the mere existence of a compliance programme will not be considered as an attenuating [...] or an aggravating circumstance”*.

13. In principle, any compliant behaviour should be in the best interest of any company by itself and therefore following the rules should be taken for granted. Apart from that, different elements like size of the company or the relevant sector must be taken into account. Here it is also important to create incentives to generate positive behaviour. The quality of a compliance programme stands or falls by its effectiveness.

14. While compliance programmes are not explicitly listed in the Austrian law as mitigating or aggravating factor in the calculation of fines, the Austrian Cartel Court has taken compliance efforts into account in a number of decisions. For example, against the Austrian dairy suppliers *Emmi* (2013)<sup>3</sup> and *NÖM* (2014)<sup>4</sup>, the Austrian Cartel Court

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<sup>1</sup> There is also a criminal liability for companies according to the Association Responsibility Act (Verbandsverantwortlichkeitsgesetz - VbVG).

<sup>2</sup> European Commission, Compliance and Competition policy, SPEECH/10/586, Brussels (25.10.2010), available at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_10\\_586](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_586).

<sup>3</sup> 26 Kt 105/13 - *Emmi*, available at <https://edikte.justiz.gv.at/edikte/Emmi>.

<sup>4</sup> 29 Kt 60/14 - *NÖM*, available at <https://edikte.justiz.gv.at/edikte/NOEM>.

considered a reduction of a total of 10% for (i) the cooperation with the BWB in the analysis of the electronic documents found during the dawn raid, (ii) the pressure situation from powerful food retailers and (iii) the compliance efforts. The Austrian Cartel Court has not made a further breakdown of the percentage values within the three mentioned elements.

15. Specifically, in the settlement proceedings *Vöslauer* (2015)<sup>5</sup> and *Pfeiffer* (2015)<sup>6</sup>, the fine was reduced for the implementing of compliance programs before dawn raids were conducted by the BWB. In the cases *Grundig* (2014)<sup>7</sup>, *Samsung* (2015)<sup>8</sup>, *Nikon* (2015)<sup>9</sup>, *iRobot* (2017)<sup>10</sup> and *Pioneer* (2017)<sup>11</sup>, no explicit reduction of the fine was made due to compliance programs. In the statement for the amount of the fine, there was an indication that suitable steps have been taken to prevent future violations, whereby the fine was assessed as sufficiently general and special preventive.

16. However, all these decisions were **settlements** between BWB and the relevant companies. There is no jurisprudence by the Supreme Court on the matter so far.

### 3.2. Which criteria are used by agencies to determine an effective competition compliance programme?

17. The purpose of reduction in connection with competition compliance programmes might be to encourage companies to step up their efforts in this direction in order to prevent violations. The company should **in advance** do everything (economically) possible to minimize potential risks. Those measures must be adapted to each individual case. If despite an (effective) compliance program violations occur, this must not be a sign of unserious implementation per se, but has to be looked at more closely in a case-by-case analysis.

18. Companies in Austria have already benefited from reduction in fines so far. This concerned for example cases in which violations were eliminated as part of the company's compliance measures **before** the Austrian BWB discovered them during their investigation. If in addition the companies fully cooperated with the BWB, this finally led to a reduction of the fine.

19. On the question, if a fine reduction is appropriate, the Head of BWB Director General *Theodor Thanner* argued that the consideration of effective compliance programmes when calculating fines could be a further incentive for companies.<sup>12</sup> However, this should be handled strictly and must be examined separately in each individual case.

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<sup>5</sup> 24 Kt 35/15 - *Vöslauer*, available at <https://edikte.justiz.gv.at/edikte/Voeslauer>.

<sup>6</sup> 26 Kt 9/15 - *Pfeiffer*, available <https://edikte.justiz.gv.at/edikte/Pfeiffer>.

<sup>7</sup> 24 Kt 17/14 - *Grundig*, available at <https://edikte.justiz.gv.at/edikte/Grundig>.

<sup>8</sup> 24 Kt 35/15 - *Samsung*, available at <https://edikte.justiz.gv.at/edikte/Samsung>.

<sup>9</sup> 24 Kt 7/15 - *Nikon*, available at <https://edikte.justiz.gv.at/edikte/Nikon>.

<sup>10</sup> 24 Kt 7/17k - *iRobot*, available at <https://edikte.justiz.gv.at/edikte/iRobot>.

<sup>11</sup> 128 Kt 5/17f - *Pioneer*, available at <https://edikte.justiz.gv.at/edikte/Pioneer>.

<sup>12</sup> *Thanner/Becka*, *Anerkennung von Compliance & die digitale Herausforderung im Kartellrecht*, *Compliance Praxis Magazin*, 4/2018, 30.

20. The amount of the discount would be significantly lower than for example in leniency cases, in the range of maximum 5% and is depending on the individual circumstances (see also above III. 1.).

21. *Thanner* considers the following aspects in deciding whether competition compliance programmes could lead to a reduction of fines<sup>13</sup>:

1. Tone from the top: Compliance must be supported by the management
2. Issue of compliance must be taken very seriously and measures have to be set at all relevant levels
3. No „one fits all-model“: The programme needs to be tailor made to the individual needs of each individual company
4. Courses and manuals must be offered and updated constantly
5. The programme has to be effective: Resisting internal and external stress tests, such as mock dawn raids
6. The Programme entails a certain quality: not just fulfilling the minimum standards
7. Consistent documentation and comprehensibility of measures set in the company to enhance compliance
8. Regular reviews and updates of implemented measures
9. In case a violation occurs, an extensive cooperation with the authorities is required
10. The cooperation with authorities must last until the antitrust proceedings have been completed
11. The disclosure of evidence and, where appropriate, the provision of leniency application is very welcome
12. Prevention of a new violation as the ultimate goal

22. Please note: The described points above are part of a dynamic process. Therefore, each case must be considered in detail and all elements weighed individually in each single case.

### **3.3. How have advocacy policies evolved to incentivise more and better competition compliance?**

23. The BWB endeavors to constantly expand its preventive work to sensitize companies to the topic of antitrust law. For this reason, in 2016 the BWB published a joint brochure with the Austrian Chamber of Commerce (Wirtschaftskammer Österreich - WKO). The brochure was printed in large numbers and distributed to numerous companies from different industries. The brochure offers a practical guide, especially for (small and medium) companies that do not have a legal department. Moreover, the cooperation with the Austrian Chamber of Commerce is a great advantage, as there is a high level of acceptance for the brochure by the companies.

24. In addition, the BWB periodically publishes manuals, handbooks and guidelines specifically on topics like fair conduct in business, dawn raids, settlements, resale price

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<sup>13</sup> *Thanner/Becka*, Anerkennung von Compliance & die digitale Herausforderung im Kartellrecht, Compliance Praxis Magazin, 4/2018, 34.

maintenance or leniency programme as well as organizes several events like Competition Talks (lunch-talk based expert talks) and the Cartel Law Moot Court, where students have the opportunity to deal with cases close to reality and defend their positions in front of a jury. This helps to develop an understanding for competition law already during the academic education and sensitise future managers, lawyers (or even enforcers).

25. The above-described guidelines are basically non-binding but provide a useful overview of the BWB's likely enforcement practice and clarify which cases, as a general rule, the BWB considers questionable from an antitrust point of view. In many instances different interest groups, consumer protection organisations, companies and other interested parties were provided with the draft of the guidelines beforehand and were invited to comment on the draft.

#### **3.4. Competition compliance programmes do not exist in a vacuum. What can be learnt from the wider set of compliance rules?**

26. Compliance is more than following the rules. Primarily, the company itself takes a risk if it does not follow to the rules of law. Compliance management systems include more than just compliance with competition rules. Data protection, criminal/anti-corruption law, labour law and other delicate fields stay in a functional interaction with competition compliance. Therefore, it is important not to lose sight of one thing at the expense of the other. It is advisable for companies to set up a clear internal documentation with measures that have already been taken in each respective fields and tasks that have to be fulfilled in the future.

27. Compliance programs should not be perceived by undertakings as a formal tool for reducing fines in the case in which they are caught. The primary objective of the compliance program must be to prevent the violation of competition rules. Compliance programs should be made in accordance with specifics of each company for example size, sector and available resources.

#### **3.5. What is new or remains to be explored in the area of competition compliance?**

28. It is important to keep up to date. Both in terms of the legal framework as well as global developments in different areas. The advancing digitization will also continue to have an impact on the economy and competition. Here it is important to react quickly to developments and adapt compliance competition programs to the latest standards.