

**Handbook of the Federal Competition Authority  
on the Implementation of  
Section 11 para. 3 of the Austrian Competition Act (WettbG)  
("Leniency Programme")**

## **1. Introduction**

Agreements and concerted practises such as fixing of prices or sales quotas or sharing of markets are highly harmful to every national economy. As these practises are considered to be serious infringements of competition law, such agreements are usually made in secrecy and in a highly conspiratorial way, as severe sanctions against such practises are laid down both in Community law and in national laws. Therefore the investigation, termination and sanctioning of such infringements depend essentially on hints from parties involved or associated with cartel members.

For this reason the European Commission and 17 member states of the European Union have enacted a "Leniency Programme", i.e. a programme for cooperative witnesses. Although these programmes differ substantially in detail they all have in common that "they either grant full immunity from fines or a significant reductions of fines which would otherwise have been imposed on a participant in a cartel in exchange for fully and voluntarily disclosing information on a cartel which meets specific criteria prior to or during the investigation of the case."<sup>1</sup>

As it is undisputed that leniency programmes facilitate the detection of cartels and in addition also serve as a deterrent against a participation in illegal cartels as cartel members may pull out at any time and cooperate with the authorities due to such leniency programmes, also Austrian competition law contains a leniency programme, which has been effective since 1<sup>st</sup> January 2006.

The present handbook describes the procedure of the Federal Competition Authority laid down for the implementation of section 11 para. 3 ff of the Austrian Competition Act ("Leniency Programme"). If necessary the Federal Competition Authority will use its practical experiences to review this handbook.

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<sup>1</sup> Commission Notice on the cooperation within the Network of Competition Authorities, Official Journal 2004, C 101/03; footnote 14).

## 2. Immunity from fines (Section 11 para. 3 sentence 1 WettbG)

Section 11 para. 3 of the Austrian Competition Act (WettbG) as amended in 2005<sup>2</sup> reads:

*The Federal Competition Authority may refrain from applying to impose an administrative fine on undertakings or associations of undertakings which*

- 1. have stopped their participation in an infringement of section 1 of the Austrian Cartel Act (KartG) 2005 or Art. 81 para. 1 of the EC Treaty (TEC),*
- 2. inform the Federal Competition Authority about this infringement before the Authority has learned about the facts of the case itself,*
- 3. consequently cooperate with the Federal Competition Authority promptly and without restrictions in order to fully clarify the matter and*
- 4. have not coerced any other undertakings or associations of undertakings to participate in the infringement.*

In order to qualify for a procedure according to section 11 para. 3 WettbG the following requirements must be met:

1. It is either an **infringement**

a. of Art. 81 para. 1 of the EC Treaty:

*“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”*

or

b. of section 1 para. 1 of the Austrian Cartel Act (KartG) 2005:

*“Any 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 (cartels) shall be prohibited.”*

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<sup>2</sup> Federal Legal Gazette No. 62/2002 as amended in 2005 (Federal Legal Gazette No. 62/2005).

These are in particular a participation in forbidden, horizontal or vertical agreements or concerted practises, **e.g.** for the purposes specified in Art. 81 para. 1 of the EC Treaty and section 1 KartG. 2005 (price fixing, market sharing).

2. The undertaking<sup>3</sup> informs the Federal Competition Authority about an alleged infringement **before the Authority** has found out about the facts of the case from other sources.

3. The undertaking **stops** its **participation** in the allegedly illegal act. It should do so only **in accordance with the Federal Competition Authority**, which taking into account the progress of the investigations determines the timing and modalities in such a way that their success is guaranteed.

4. During the investigations **of the Federal Competition Authority the undertaking cooperates genuinely, fully and on a continuous basis with the Federal Competition Authority** and submits to the Authority **all evidence** on the alleged infringement in the undertaking's possession or otherwise **available**. It remains at the Authority's disposal to reply promptly, truthfully and completely to any requests that may contribute to the full clarification of facts. The undertaking does not disclose the fact of its cooperation to other participants in the alleged infringement.

5. The undertaking has not coerced **any other undertakings** to participate in the alleged infringement.

Immunity from fines pursuant to section 11 para. 3 sentence 1 of the Austrian Competition Act (WettbG) may only be granted if all of the above requirements are met. In this respect, however, it is expressly recommended to also refer to Chapter 5 of this Handbook.

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<sup>3</sup> Hereinafter the term "undertakings" also refers to associations of undertakings.

### 3. Reduction of fines (Section 11 para. 3 sentence 2 WettbG)

#### a. Requirements

If the Federal Competition Authority is already in possession of evidence an application for a reduction of fines may be submitted if the other requirements are met (section 11 para. 3 sentence 2 WettbG).

In order to qualify for a reduction of fines the following requirements must be met:

1. An **infringement** of Art. 81 para. 1 EC Treaty or Section 1 para. 1 KartG 2005 exists.
2. The undertaking **stops its participation** in the alleged infringement.
3. During the investigations of the Federal Competition Authority the undertaking **cooperates genuinely, fully and on a continuous basis with the Federal Competition Authority.**
4. The undertaking has **not** coerced any **other undertakings** to participate in the alleged infringement.

The individual requirements are discussed in greater detail in Chapter 2 above. An application for a reduction of fines pursuant to section 11 para. 3 sentence 2 WettbG may only be considered if all of the above requirements are met. In this respect, however, it is expressly recommended to also refer to Chapter 5 of this Handbook.

#### b. Level of reductions of fines

Section 11 para. 4 sentence 2 WettbG reads:

*“[In the handbook to be published by the Federal Competition Authority] it has to be specified in any case [...] when [the Federal Competition Authority] requests a reduction of fines upon finding out about an infringement and to which extent this reduction will be granted. The level of reduction depends on the time of disclosure of the additional information and its added value relative to the evidence already in the Authority’s possession.”*

The Federal Competition Authority intends to reduce fines to the following extent:

- for the first undertaking to meet the requirements laid down in section 11 para. 3 sentence 2, between 30 % and 50 %;
- for the second undertaking to meet the requirements laid down in section 11 para. 3 sentence 2, between 20 % and 30 %;
- for any subsequent undertaking to meet the requirements laid down in section 11 para. 3 sentence 2, up to 20 %.

In order to determine the **level of reduction** of fines within the above mentioned ranges, the Federal Competition Authority will consider the **time** at which the information has been submitted as well as the **added value** of the information or evidence, i.e. the extent to which the submitted information or evidence due to its quality and/or comprehensiveness may help the Federal Competition Authority to prove the facts of the respective case in a more conclusive or more complete way than it would otherwise have been possible.

In some specific cases, in which the added value of the submitted information or evidence is extraordinarily big or extraordinarily small, the Federal Competition Authority will provide for a reduction of fines which, depending on the case, may be bigger or smaller than the above specified.

When determining the value of the submitted evidence the Federal Competition Authority will generally consider information submitted in writing or evidence referring to the time of the facts to be proven as containing a higher added value than information referring to a later time. Furthermore evidence immediately proving the facts in questions will be considered as representing a higher added value than evidence which just represents an indirect reference to the case.

#### **4. Procedure**

If an undertaking wishes to benefit from leniency pursuant to section 11 para. 3 WettbG it has to turn to the Federal Competition Authority **using the application form** (see Annex), which is an integral part of this handbook. The form should be submitted by fax or e-mail (for telephone number and/or address please refer to Chapter 6 below). Upon the applicant's request and for well-founded reasons the undertaking may also submit its application orally at the Federal Competition Authority, where the application will be recorded by completing the application form. The date of receipt of the duly and fully completed form determines whether an application for

immunity or a reduction of fines may be considered and to which extent the fine may be reduced.

This, however, only applies if the undertaking subsequently cooperates fully and without restrictions with the Federal Competition Authority in accordance with the procedure laid down in the relevant laws and in this handbook.

After careful examination of the submitted information or evidence and the relevant facts of the case (and if necessary after further contacts with the undertaking in question), the undertaking will be notified as soon as possible and in a non-binding way if – provided the requirements laid down in section 11 para. 3 subpara. 3 WettbG (i.e. full cooperation with the Federal Competition Authority in the investigation of the case) are met – the Authority intends to refrain from requesting a fine or intends to grant a reduction of fines. In the latter case the Authority will inform the applicant of the prospective level of reduction.

On the undertaking's request the Federal Competition Authority will notify the undertaking without the above reservations after completing its investigations.

The Federal Competition Authority notifies the Federal Cartel Prosecutor of its intention to proceed in compliance with section 11 para. 3 WettbG. As a result the latter is no longer authorised to request a fine because of the infringement in question (section 36 para. 3 KartG 2005).

The Cartel Court must not impose a higher fine than requested (section 36 para. 2 KartG 2005).

## **5. Cases in which the requirements pursuant to section 11 para. 3 WettbG are not (fully) met**

The present handbook exclusively deals with the procedure of the Federal Competition Authority envisaged for the implementation of section 11 para. 3 ff of the Austrian Competition Act and does not imply that the Authority, acting according to its best judgement, may not **request immunity from fines or a reduction of fines also in other cases.**

These may be cases which are not eligible for a procedure according to section 11 para. 3 ff WettbG as they do not meet one or several of the requirements laid down in section 11 para. 3

WettbG. It is to be noted that in these cases the decision of the Federal Competition Authority to refrain from requesting a fine or to request a reduced fine does not affect the right of the Federal Cartel Prosecutor to request such fines.

In any case the Federal Competition Authority will inform the Federal Cartel Prosecutor of the reasons for its action also in such cases and will try to reach mutual consent on the actions to be taken.

## **6. Contact person / address**

Applications of undertakings requesting the Federal Competition Authority to proceed according to section 11 para. 3 of the Austrian Competition Act (WettbG) have to be submitted exclusively to the following people:

Dr. Peter Matousek

Tel: (+ 43 1) 245 08 303

or

Dr. Stefan Keznickl

Tel: (+ 43 1) 245 08 326

Fax: (+43 1) 587 42 00

e-mail: [wettbewerb@bwb.gv.at](mailto:wettbewerb@bwb.gv.at).

## **Application for a procedure pursuant to section 11 para. 3 WettbG 2005**

1. **Details of the undertaking submitting the application:**
  - 1.1. Name and legal form of the undertaking
  - 1.3. Address
  - 1.4. Contact person in the undertaking (name, position, telephone number)
  - 1.5. Legal representative (name, address, telephone number)
2. Description of **the type of infringement** (e.g. price fixing, market sharing, price maintenance etc).
3. Details on the **affected markets**:
  - 3.1. Which products/services are affected by the infringement?
  - 3.2. Which geographic area is affected by the infringement?
  - 3.3. During which period of time did the infringement take place?
4. Indicate **other undertakings involved in** the infringement (name, legal form and address of the undertakings).
5. Indicate the competition authorities to which you have applied for leniency.