



International
Competition
Network

ANTI-CARTEL ENFORCEMENT TEMPLATE

CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques

Austria

22/10/2008

ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

A. Law(s) covering cartels:	Cartel Act http://www.bwb.gv.at/BWB/Gesetze/default.htm (German version only).
B. Implementing regulation(s) (if any):	None.
C. Interpretative guideline(s) (if any):]	Leniency-Manual http://www.bwb.gv.at/BWB/Service/Kronzeugenregelung/default.htm (German only).
D. Other relevant materials (if any):	None.

2. Scope and nature of prohibition on cartels

A. Does your law or case law define the term	§ 1 Cartel Act contains a prohibition of cartels which corresponds to Art 81 EC
---	---

<p>“cartel”?</p> <p>If not, please indicate the term you use instead.</p>	
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?</p>	<p>The prohibition of anticompetitive agreements in § 1 Austrian Cartel Act is almost identical to the prohibition provided for in Art 81/1 EC Treaty. Consequently, just like Art 81 EC, it does not contain any definitions or differentiations according to the mode or seriousness of infringement.</p>
<p>C. Scope of the prohibition of hardcore cartels:</p>	<p>§ 2 Cartel Act provides for a general de minimis-defence and exemptions for the book and press sector, cooperative societies and members of banking groups.</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>?</p>	<p>Just like in EC competition law, infringements by object do not require any proof of anticompetitive effects.</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>The Supreme Cartel Court characterized the fines imposed because of an infringement of § 1 Cartel Act/Art 81 EC as "criminal-offence-like" ("strafrechtsähnlicher Charakter"). The Criminal Act as such only contains an explicit prohibition of bid-rigging (§ 168b StGB).</p>

3. Investigating institution(s)

<p>A. Name of the agency, which investigates cartels:</p>	<p>Bundeswettbewerbsbehörde (BWB) = Federal Competition Authority</p>
<p>B. Contact details of the agency:</p>	<p>Praterstraße 31 A-1020 Vienna phone: ++43-1-24508-0 fax: ++43-1-5874200 email: wettbewerb@bwb.gv.at website: www.bwb.gv.at (German, English)</p>
<p>C. Information point for potential complainants:</p>	<p>See above in 3/B. form for complaints:</p>

¹ In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

	http://www.bwb.gv.at/BWB/Service/Formblaetter/fbb010106.htm
D. Contact point where complaints can be lodged:	See above in 3/B.
E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	The Federal Cartel Prosecutor (Bundeskartellanwalt - BKAnw) is also entitled to initiate Cartel Court proceedings. He has not been conferred with investigatory powers himself, but he may request information from the BWB or ask the BWB to conduct investigations.

4. Decision-making institution(s)² [to be filled in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases:	Kartellgericht - Cartel Court
B. Contact details of the agency:	Schmerlingplatz 11 A-1016 Vienna phone: ++43-1-52152-0 fax: ++43-1-52152-3690
C. Contact point for questions and consultations:	Dr. Friedrich Heigl, President of the Cartel Senate
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	The Cartel Court can only impose sanctions upon application by the BWB and/or the BKAnw.
E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?	The BWB does not participate in the criminal proceedings based on § 168b StGB (bid-rigging; see above). However, § 78 para 1 of the Criminal Procedure Act (stop) obliges the FCA to denounce any suspicion of criminal offences which comes to its knowledge in the course of its activities to the Criminal Investigation Department or the Public Prosecution Office.

² Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

5. Handling complaints and initiation of proceedings

A. Basis for initiating investigations in cartel cases:	complaint; ex officio; leniency application.
B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?	Written submission by using the form published on the BWB's website is strongly recommended: http://www.bwb.gv.at/BWB/Service/Formblaetter/fbb010106.htm
C. Legal requirements for lodging a complaint against a cartel:	No legal requirements for lodging a complaint before the BWB. However, undertakings are also entitled to directly apply for a cease-and-desist-order before the Cartel Court, if they prove their legal or economic interest in the decision. (As already mentioned in 4/D, only the BWB and/or the BKA _{nw} can apply for the imposition of fines.)
D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?	No such legal obligation.
E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?	No such legal obligation.
F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?	No such time limit.

6. Leniency policy³

A. What is the official name of your leniency policy (if any)?	No official name. The leniency policy is commonly referred to as "Kronzeugenregelung" and regulated in § 11 (3) Competition Act (Wettbewerbsgesetz - WettbG, available at the BWB's website: http://www.bwb.gv.at/BWB/Gesetze/default.htm - German only) and the Leniency-Manual issued by the BWB
---	---

³ For the purposes of this template the notion of 'leniency' covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like 'leniency' 'amnesty' and 'immunity' are considered as synonyms.

	(http://www.bwb.gv.at/BWB/Service/Kronzeugenregelung/default.htm - German only).
B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?	Both.
C. Who is eligible for full leniency?	<p>According to § 11/3 Competition Act an undertaking is eligible for leniency, if</p> <ul style="list-style-type: none"> - it has ceased its participation in the cartel activities, - it informs the BWB about the infringement before the authority learned otherwise about it, - it cooperates without any restrictions with the FCA; - it has not forced other undertakings to participate in the cartel. <p>If the BWB has already learned about the infringement the undertaking may be eligible for a reduced fine, if all the other conditions are fulfilled.</p>
<p>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</p> <p>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</p>	<p>For (full) leniency § 11/3 Competition Act requires that the BWB has no knowledge of the infringement prior to the application. If the BWB already has knowledge about the infringement, according to the Leniency-Manual the undertaking is eligible for a reduction in fines if the information it represents "added value" in respect to the information already in the BWB's possession. What matters is not so much the procedural stage (whether an investigation has been opened or not, but the information the BWB has at the time when the leniency application is filed.</p>
E. Who can be a beneficiary of the leniency program (individual / businesses)?	Only undertakings may qualify for leniency (individual persons only in the case of sole proprietorship).
F. What are the conditions of availability of full leniency:	See above answer to 6/C.
G. What are the	See above answers to 6/C and 6/D.

conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):	
H. Obligations for the beneficiary after the leniency application has been accepted:	Ongoing, full cooperation is required.
I. Are there formal requirements to make a leniency application?	The form which is attached to the Leniency-Manual has to be completed. Upon completion of the form the undertaking has to perfect the marker by submitting information and evidence to substantiate the alleged infringement. Upon the applicant's request the application may be made orally.
J. Are there distinct procedural steps within the leniency program?	After a thorough assessment of the leniency application the BWB issues - upon request - a notice whether it considers § 11/3 Competition Act applicable (subject to the continuous cooperation with the BWB). After closing its investigations the BWB issues a notice without the said reservation thereby indicating the precise percentage reduction granted to the applicant.
K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?	In principle at the point in time the BWB issues its first notice (see reply 6/J.) the BWB makes a (conditional) informal commitment to the leniency applicant.
L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?	On the basis of § 11/3 Competition Act the BWB decides whether it refrains from the imposition of fines (or only imposes reduced fines). However, the decision to grant lenient treatment is not taken by way of a formal decision or an agreement. Rather, the BWB issues an informal notice. At that point in time, the BKANw may not impose fines anymore. The Cartel Court - which imposes fines only upon application by the BWB and/or BKANw - may not impose higher fines than these authorities have applied for.
M. Does your legislation have a marker system? If yes, please describe it.	According to the Leniency-Manual the submission of the leniency form (see above) triggers a marker which is to be elaborated within a given time period.
N. Does the system provide for any extra credit⁴ for disclosing	The leniency program does not reward the undertaking disclosing a separate infringement with a additional percentage reduction. The disclosing applicant therefore may merely qualify for immunity for the

⁴ Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal

additional violations?	separate infringement if he is the first to report the cartel previously unknown to the Authority.
O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.	No such legal confidentiality obligation. However, in practice the BWB does not disclose the identity of the applicant until it lodges the application to impose a fine with the Cartel Court.
P. Is there a possibility of appealing an agency's decision rejecting a leniency application?	No.
Q. Contact point where a leniency application can be lodged:	Dr. Peter Matousek - phone: ++43-1-24508-303 Dr. Stefan Keznickl - phone: ++43-1-24508-326 fax and email: see above in 3/B
R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?	There are no particular provisions either in the applicable statute or the Leniency Manual. However, in case the conditions as laid down in the Leniency Manual were not fulfilled by the applicant, the BWB may refrain from issuing a notice to the applicant upon completion of the investigation.
S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?	The Competition Act contains no provisions on "affirmative leniency".

7. Investigative powers of the enforcing institution(s)⁵

A. Briefly describe the investigative measures available to the enforcing agency such as requests	Request for information (RFI), interrogations of parties and witnesses, expert opinion, dawn raids. Only dawn raids require a court warrant.
--	---

information about participation in another cartel distinct from the one which is the subject of its first leniency application.

⁵ "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

<p>for information, searches/raids⁶, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>RFIs can be issued without prior Court approval. However, they are enforceable only, if the Court ordered the provision of information (upon application by the BWB).</p>
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</p>	<p>Yes. A court warrant is needed (see above).</p>
<p>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</p>	<p>Evidence not falling within the scope of the Court's search warrant may not be collected but will require an additional search warrant or an extension of the original search warrant.</p>
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>When enforcing its right to ask (confidential) information by way of RFIs to do a sector inquiry, the BWB faced legal challenges by some of the undertakings questioned. The Supreme Cartel Court, however, confirmed the BWB's powers to ask for this information. One undertaking, which persisted in refusing the information and provided it only when the Cartel Court decided on penalty payments, was even fined for its refusal.</p>

8. Procedural rights of businesses / individuals

<p>A. Key rights of defence in cartel cases:</p>	<p>No access to the BWB's file, but full access to the Cartel Court's file in the course of the Court proceedings;</p> <p>The BWB has to inform the company about the results of its investigations before it initiates proceedings against it (§ 13 Competition Act).</p> <p>The parties have a right to be heard in the Cartel Court's proceedings (§ 15 Außerstreitgesetz/AußStrG - Law Governing Proceedings in Matters Other than Legal Disputes).</p> <p>Right not to self-incriminate has been acknowledged by the Supreme Cartel Court in the context with RFIs.</p>
<p>B. Protection awarded to</p>	<p>The BWB is obliged to safeguard the confidentiality of business</p>

⁶ "Searches/raids" means all types of search, raid or inspection measures.

<p>business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?</p>	<p>secrets according to the (constitutional) provisions of the data protection law (Datenschutzgesetz) and the civil service's confidentiality obligations (Amtsverschwiegenheit).</p>
--	--

9. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?</p>	<p>According to § 33 Cartel Act a fine may only be imposed by the Cartel Court if the application has been filed within 5 years after the termination of the infringement.</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</p>	<p>No.</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?</p>	<p>Appeals against decisions of the Cartel Court have to be filed within four weeks (after the service of the decision).</p>

10. Types of decisions

<p>A. Please list which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1.</p>	<p>Finding of applicability (in non-Art-81-EC-cases); Order to bring the infringement to an end; Commitment decision; Imposition of fines.</p>
<p>B. Please list which types of decisions on the merits of the case can be</p>	<p>All types of decisions referred to above (if adequate).</p>

<p>made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).</p>	
<p>C. Can interim measures⁷ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁸.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</p>	<p>During the infringement proceedings before Cartel Court, the latter is also authorised to take decisions on interim measures upon application by one of the parties to the proceeding (§ 48 Cartel Act). The opponent has to be heard before the decision on interim measures is adopted. For interim measures to be adopted the applicant has to produce <i>prima-facie</i>-evidence proving that the requirements for a cease-and-desist order (i.e. the existence of an anticompetitive agreement) are given.</p>

11. Sanctions for procedural breaches (non-compliance with procedural obligations)⁹

<p>A. Grounds for the imposition of procedural sanctions / fines:</p>	<p>false or misleading information in a merger notification; false, misleading or incomplete provision of information or non-compliance with a Cartel Court's order to provide information.</p>
<p>B. Type and nature of the sanction (civil, administrative, criminal, combined):</p>	<p>Civil sanction (It is imposed by the Cartel Court).</p>
<p>C. On whom can procedural sanctions be imposed?</p>	<p>undertakings (individuals only in case of sole proprietorship).</p>
<p>D. Criteria for determining the sanction / fine:</p>	<p>§ 30 Cartel Act: Gravity and duration of the infringement; enrichment; negligence/fault; economic strength of the undertaking; contribution to the Court's fact finding.</p>
<p>E. Are there maximum and / or minimum sanctions / fines?</p>	<p>§ 29 Cartel Act provides for that fines in the cases cited above may not exceed 1% of the total turnover achieved in the last business year.</p>

⁷ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

⁸ Only for agencies which answered “yes” to question 2.C. above

⁹ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

12. Sanctions on the merits of the case

<p>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</p> <p>On whom can sanctions be imposed?</p>	<p>Grounds for the imposition of fines as sanctions on the merits: participation in cartels (§ 1 Cartel Act, Art 81 EC); abuse of a dominant market position (§ 5 Cartel Act, Art 82 EC); retaliatory measures (§ 6 Cartel Act); unauthorised implementation of a merger (§ 17 Cartel Act), non-compliance with a commitment decision (§ 27 Cartel Act);</p> <p>Their legal nature is not entirely clear - there are diverging opinions on it in legal doctrine. In some instances the Supreme Cartel Court has characterised the fines imposed by the Cartel Court as "criminal-offence-like" sanctions.</p>
<p>B. Criteria for determining the sanction / fine:</p>	<p>See above in 11/D on the criteria of § 30 Cartel Act.</p>
<p>C. Are there maximum and / or minimum sanctions / fines?</p>	<p>§ 29 Cartel Act provides for that fines in the cases cited above may not exceed 10 % of the total turnover achieved in the last business year.</p>
<p>D. Guideline(s) on calculation of fines:</p>	<p>No guidelines. In past cases the European Commission's guidelines on fines were taken as a point of reference for the calculation. This has been acknowledged by the Supreme Cartel Court insofar as the legal criteria for their imposition and the underlying valuations are comparable.</p>
<p>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</p>	<p>As a general principle, the decision is enforceable only when it becomes final (§ 43 AußStrG). However, the Cartel Court may declare the decision provisionally binding and enforceable, if necessary to prevent detriments to a party or the public interest.</p>

13. Possibilities of appeal

<p>A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural</p>	<p>According to § 39 Cartel Act the parties can appeal against the Cartel Court's decisions. There are no special provisions regarding the grounds for appeal against a prohibition decision of the Cartel Court, the general grounds for appeal regulated in the Code of Civil Procedure (Zivilprozeßordnung - ZPO) Grounds of appeal are breaches of procedural requirements (e.g. right to be heard), incorrect legal appraisal and the incorrect adoption of facts (contradiction with the protocol).</p>
--	---

requirements?	
B. Before which court or agency should such a challenge be made?	Oberster Gerichtshof als Kartellobergericht (Supreme Court acting as Supreme Cartel Court).