



International
Competition
Network

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques

Austria

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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.

[Please include, where applicable, any references to relevant statutory provisions, regulations or policies as well as references to publicly accessible sources, if any.]¹

1. Information on the law relating to cartels

A. Law(s) covering cartels: [availability (homepage address) with an indication of the languages in which these materials are available]	Austrian Cartel Act 2005 ("Cartel Act"): https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004174 English translation: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2- Federal_Cartel_Act_final.pdf Only the German version is authentic.
B. Implementing regulation(s) (if any): [name and reference number, availability (homepage address) with an indication of the languages in which these	None

¹ Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template, but will be removed once the completed template is made public.

materials are available]	
C. Interpretative guideline(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]	<p>Position on Settlements: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf</p> <p>Handbook on Leniency: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Leniency_english.pdf</p> <p>Standpoint on Resale Price Maintenance: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf</p> <p>Guidance on dawn raids: https://www.bwb.gv.at/fileadmin/user_upload/Englische_PDFs/Standpoints%20and%20Handbooks/Guidance_on_dawn_raids_final.pdf</p>
D. Other relevant materials (if any): [availability (homepage address) with an indication of the languages in which these materials are available]	<p>General information about cartels: https://www.bwb.gv.at/en/cartels_and_abuse_control/</p> <p>Whistleblowing system and explanation: https://www.bwb.gv.at/en/cartels_and_abuse_control/whistleblowing_system</p>

2. Scope and nature of prohibition on cartels

A. Does your law or case law define the term “cartel”? [Please quote.] If not, please indicate the term you use instead. [Please quote.]	<p>§ 1 Cartel Act contains a prohibition of cartels, which corresponds to Art 101 TFEU:</p> <p>§ 1. (1) Any agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (cartels) shall be prohibited.</p> <p>(2) Pursuant to para. 1, it shall particularly be prohibited to:</p> <ol style="list-style-type: none"> 1. directly or indirectly fix purchase and selling prices or any other trading conditions; 2. limit or control production, markets, technical development or investments; 3. share markets or sources of supply; 4. apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage; 5. make the conclusion of contracts subject to acceptance by the other contract parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. <p>(3) Any agreements and decisions prohibited pursuant to para. 1 shall be automatically void.</p> <p>(4) Any recommendations to maintain certain prices, price limits, calculation guidelines, trade margins and discounts which aim at or result in the restriction of competition shall be equivalent to a cartel under para. 1 (“recommendation cartels”). This shall not apply to recommendations which explicitly state to be non-binding and which are not or shall not be enforced by exerting economic or social pressure.</p>
B. Does your legislation or case law distinguish between very serious cartel behaviour	<p>The prohibition of anticompetitive agreements in § 1 Cartel Act is almost identical to the prohibition provided for in Art 101/1 TFEU. Consequently, just like Art 101 TFEU, it does not</p>

<p>(“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas²) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</p>	<p>contain any differentiation relating to the mode or seriousness of a cartel infringement.</p>
<p>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the ban on hardcore cartels.]</p>	<p>§ 2 Cartel Act provides for exemptions, e.g. an effects based exemption similar to Art 101 (3) TFEU, a de minimis-defence for minor cartels, exemptions for the book and press sector and cooperatives, see:</p> <p>https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-Federal_Cartel_Act_final.pdf</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>³? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</p>	<p>Like in EU competition law, infringements by object do not require any proof of anticompetitive effects, so it is illegal <i>per se</i>.</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 as a consequence of an infringement of § 1 Cartel Act/Art 101 TFEU as "criminal-offence-like" ("strafrechtsähnlicher Charakter").</p> <p>The Criminal Act as such only contains an explicit prohibition of bid rigging in public tenders (§ 168b StGB).</p>

3. Investigating institution(s)

<p>A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]</p>	<p>Bundeswettbewerbsbehörde (BWB) = Federal Competition Authority</p>
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² 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.

³ For the purposes of this template the notion of ‘*per se*’ covers both ‘*per se*’ and ‘*by object*’, as these terms are synonyms used in different jurisdictions.

B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	Radetzkystraße 2 A-1030 Vienna phone: ++43-1-24508-815-0 fax: ++43-1-5874200 email: wettbewerb@bwb.gv.at website: www.bwb.gv.at (German, English)
C. Information point for potential complainants:	See above, 3B. https://www.bwb.gv.at/en/contact/ Form for complaints, only available in German: https://www.bwb.gv.at/kartelle_marktmachtmissbrauch/beschwerdeeinbringung/
D. Contact point where complaints can be lodged:	See above, 3B.
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 - BKA ^{nw}) 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. According to § 14 Competition Act, law enforcement officials shall assist the BWB in securing investigations and searches of premises. During a search conducted by the BWB the assisting law enforcement officials shall also be authorised to support the BWB in securing documents electronically. According to § 10 para. 1a Competition Act the criminal police, the public prosecutor's office and the courts shall be authorised to provide personal data obtained in accordance with the Code of Criminal Procedure to the BWB (e.g. wire tapping), which are relevant for performing its statutory duties.

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

A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]	Kartellgericht - Cartel Court Kartellobergericht - Austrian Supreme Court as Court of Appeal in cartel matters (Supreme Cartel Court)
B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	Both courts: Schmerlingplatz 11 A-1016 Vienna phone: ++43-1-52152-0 fax: ++43-1-52152-3690
C. Contact point for questions	Dr. Sabine Völkl-Torggler (senior member of the Cartel Court)

⁴ Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

and consultations:	
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 (fines) upon application by the BWB and/or the BKANw. Therefore the position of the investigating agencies in a court procedure may be compared to a prosecutor in competition matters.
E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?	<p>The BWB does not participate in criminal proceedings based on § 168b StGB (bid-rigging; see above 2E). However, § 78 para 1 of the Criminal Procedure Code obliges the BWB to flag 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.</p> <p>Reciprocally, law enforcement officials (criminal police) shall assist the BWB in securing investigations and searches of premises according to § 14 Competition Act. During a search conducted by the BWB the assisting law enforcement officials shall also be authorised to support the BWB in securing documents electronically.</p> <p>The criminal police, the public prosecutor's office and the courts are authorised to provide personal data obtained in accordance with the Code of Criminal Procedure to the BWB, which are relevant for performing its statutory duties (§ 10 para. 1a Competition Act).</p> <p>Furthermore § 209b Austrian Code of Criminal Procedure allows for immunity of individuals against criminal proceedings following cooperation of their company as a leniency applicant.</p>

5. Handling complaints and initiation of proceedings

A. Basis for initiating investigations in cartel cases [complaint, ex officio, leniency application, notification, etc.]	<p>complaint, ex officio, leniency application, cooperation with other national agencies (criminal enforcement), cooperation with the European Commission - Directorate General for Competition (DG COMP), whistleblowing,</p> <p>cooperation with national Competition Authorities within the European Union.</p>
B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)? [If there is a requirement to complete a specific form, please, indicate its location (website address).]	<p>Written submission by using the form published on the BWB's website is strongly recommended:</p> <p>https://www.bwb.gv.at/kartelle_marktmachtmissbrauch/beschwerdeeinbringung/</p> <p>In addition, it is possible to send information anonymously about violations of cartel law via an electronic whistleblowing system. The communication between the whistle-blowers and the AFCA is working via secured anonymous mailboxes. It is technically ensured that information can neither be traced back to AFCA nor by other third parties.</p>
C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate	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

interest required, or is standing to make a complaint limited to certain categories of complainant?]	their legal or economic interest in the decision (see § 36 para 4/4 Cartel Act). (As already mentioned in 4D, only the BWB and/or the BKANw are able to 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? [Please elaborate.]	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 policy⁵

A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]	No official name. The leniency policy is commonly referred to as "Kronzeugenregelung" and based on § 11 b Competition Act (Wettbewerbsgesetz). For the Competition Act, see: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/1-Federal_Competition_Act_final.pdf For the Handbook on Leniency see: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Leniency_english.pdf
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 [only for the first one to come forward or for more	The scope of the leniency programme covers the full range of prohibitions laid down in Section 1 Cartel Act and Article 101 TFEU and is not restricted to collusive agreements between two or more competitors on the same level of the production or

⁵ 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.

<p>participants in the cartel]?</p>	<p>distribution chain.</p> <p>According to § 11 b Competition Act an undertaking is eligible for leniency, if</p> <ul style="list-style-type: none"> - it is the first undertaking to inform the BWB about an infringement in a way the BWB can apply for a search warrant or, if the BWB has already learned about an infringement, provides as first undertaking additional information, which enables the BWB to file an application to the Cartel Court without further investigations, - it has ceased its participation in the cartel activities, - it cooperates without any restrictions with the BWB; - it has not forced other undertakings to participate in the cartel. <p>Further undertakings may be eligible for a reduced fine, if all other conditions are met and they provide information that represents significant added value.</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>Yes, see above 6C.</p> <p>Only the first undertaking that fulfils the leniency criteria receives full immunity.</p> <p>Considering further leniency applicants, the BWB will reduce fines to the following extent:</p> <ul style="list-style-type: none"> - for the second undertaking to meet the requirements (significant added value), between 30% and 50%; - for the third undertaking to meet the requirements (significant added value), between 20% and 30%; - for any subsequent undertaking to meet the requirements (significant added value), up to 20%. <p>In order to determine the level of reduction of fines within the above mentioned ranges, the BWB will consider the time at which the information or evidence has been submitted as well as the actual added value associated with the submitted information or evidence.</p>
<p>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p>	<p>Undertakings and associations of undertakings.</p>
<p>F. What are the conditions of availability of full leniency: [e.g. provide decisive evidence, maintain cooperation throughout, not to be the ringleader, cease the infringement, restitution, etc.]</p>	<p>See above, 6C.</p>
<p>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment): [e.g.: valuable, potential, decisive evidence by witnesses or on basis of written documents, etc.? Must the information be sufficient to lead to an</p>	<p>See above, 6C and 6D.</p>

initiation of investigations?]	
H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]	Ongoing, full cooperation is required.
I. Are there formal requirements to make a leniency application? [e.g. must applications take a particular form or include particular information/data, must they be in writing or can they be made orally, etc.]	<p>The form which is attached to the Leniency-Manual has to be completed, see page 19 of the Handbook on leniency:</p> <p>https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Leniency_english.pdf</p> <p>Upon completion of the form the undertaking has to perfect the marker by submitting information and evidence to substantiate the alleged infringement. Upon the applicants request the application may be made orally.</p>
J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency ("PGL") and further steps leading to a final leniency agreement / decision?]	<p>After a thorough assessment of the leniency application the BWB issues - upon request - a notice whether it considers § 11 b Competition Act applicable (subject to the continuous cooperation with the BWB).</p> <p>After closing its investigations, the BWB issues a notice indicating the percentage of reduction granted to the applicant.</p>
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?	At the point in time the BWB issues its first notice (see above, 6J) the BWB renders a (conditional) non-binding statement to the leniency applicant (see § 11 b para 4 Competition Act).
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?	<p>On the basis of § 11 b Competition Act (see above, 6A), the BWB decides whether it refrains from the imposition of fines or only imposes reduced fines.</p> <p>However, the decision to grant immunity or leniency reductions is not taken by way of a formal decision or an agreement. Rather, the BWB issues an informal notice (see § 11 b para 4 Competition Act).</p> <p>At that point in time, the BKA_{nw} loses his power to file an application for fines. The Cartel Court - which imposes fines only upon application by the BWB and/or BKA_{nw} - may not impose higher fines than these authorities have applied for.</p> <p>Due to the monocratic structure of the BWB, all decisions of the BWB are taken by the director general.</p>
M. Do you have a marker system? If yes, please describe it.	The submission of the leniency form (see above, 6I) triggers a marker, which needs to be elaborated within a time period set by BWB depending on the complexity of the case. In average, a time period of 2 to 4 weeks is granted.

<p>N. Does the system provide for any extra credit⁶ for disclosing additional violations? [e.g. a hardcore cartel in another market]</p>	<p>The leniency program does not reward the undertaking disclosing a separate infringement with an additional percentage reduction, but the disclosing applicant may qualify for immunity for the separate infringement, if he meets the requirements set out above in 6C and 6D.</p>
<p>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</p>	<p>There is no such legal confidentiality obligation. However, in practice the BWB does not disclose the identity of the applicant until it files an application to the Cartel Court.</p>
<p>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</p>	<p>No.</p>
<p>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</p>	<p>Managing Director, Dr. Peter Matousek - phone: ++43-1-24508-815 303 Deputy Managing Director, Dr. Natalie Harsdorf - phone: ++43-1-24508-815 126 Fax: (+43 1) 587 42 00 E-mail: wettbewerb@bwb.gv.at</p>
<p>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?</p>	<p>There are no explicit provisions in the applicable statute or the Handbook on Leniency. However, in case the conditions (as laid down in 6C and 6D) are not fulfilled (any longer) by the applicant, the leniency benefits may be revoked.</p>
<p>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</p>	<p>The Competition Act contains no provisions on "affirmative leniency".</p>
<p>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate.</p>	<p>As all submissions to the BWB, leniency applications and related materials are treated confidentially. In general, the BWB is obliged to safeguard business secrets according to the (constitutional) provisions of the data protection law (Datenschutzgesetz) and the civil service's confidentiality obligations (Amtsverschwiegenheit).</p>

7. Settlement

⁶ 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 information about participation in another cartel distinct from the one which is the subject of its first leniency application.

<p>A. Does your competition regime allow settlement?</p> <p>If yes, please indicate its public availability (link to the relevant rules, guidelines, etc.).</p>	<p>Yes; please see BWB position on settlements https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf</p>
<p>B. Which types of restrictive agreements are eligible for settlement [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</p>	<p>Cartels as well as unilateral conduct, such as abuse of dominance, and the unauthorised implementation of mergers.</p>
<p>C. What is the reward of the settlement for the parties?</p>	<p>Reduction of the fine up to 20%</p>
<p>D. May a reduction for settling be cumulated with a leniency reward?</p>	<p>Yes.</p>
<p>E. List the criteria (if there is any) determining the cases which are suitable for settlement.</p>	<p>A settlement requires the undertaking to produce a settlement submission in which the undertaking acknowledges the facts it is accused of and accepts the legal assessment made by the BWB as well as the maximum amount of the fine suggested by the BWB in its application to the Cartel Court.</p>
<p>F. Describe briefly the system [who can initiate settlement – your authority or the parties, whether your authority is obliged to settle if the parties initiate, in which stage of the investigation settlement may be initiated, etc.].</p>	<p>A settlement decision is still a Cartel Court decision, but only taken based on facts investigated by the BWB and not contested by the undertaking. Consequently there is no necessity of conducting a full investigation.</p> <p>When calculating the fines, the BWB takes into account the speeding up of procedure as well as the contribution to the investigation (see 7E).</p> <p>Settlements can only be initiated by the parties. It is the BWB's discretion if a case is considered suitable for a settlement.</p>
<p>F. Describe the procedural efficiencies of your settlement system [e.g. shorter decision, etc.].</p>	<p>Shorter investigation period, faster court procedure, cost saving, shorter decision.</p>
<p>G. Does a settlement necessitate that the parties acknowledge their liability for the violation?</p>	<p>Yes, see 7E.</p>
<p>H. Is there a possibility for settled parties to appeal a settlement decision at court?</p>	<p>As the settlement procedure leads to a “normal” Cartel Court decision, this decision may be appealed as any other decision of the Cartel Court.</p>

8. Commitment

<p>A. Does your competition regime allow the possibility of commitment?</p> <p>If yes, please indicate its public availability [link to the relevant rules, guidelines, etc..].</p>	<p>yes, see § 27 para 1 Cartel Act:</p> <p>§ 27. (1) Instead of terminating an infringement pursuant to § 26, the Cartel Court may declare commitments made by the undertakings and associations of undertakings concerned to be binding if it is likely that such commitments exclude future infringements. By way of such decision, the proceedings shall be deemed to be closed.</p>
<p>B. Which types of restrictive agreements are eligible for commitment [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</p> <p>Are there commitments which are excluded from the commitment possibility?</p>	<p>Cartels (§ 1 Cartel Act), abuse of a dominant position (§ 5 Cartel Act), retaliatory actions (§ 6 Cartel Act), unauthorised implementation of a merger (§ 17 Cartel Act)</p>
<p>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</p>	<p>It is in the cartel court´s discretion to accept commitments offered by the parties.</p> <p>The cartel court only accepts commitments, if there is a reasonable expectation that the commitments remove a competition problem permanently.</p>
<p>D. Describe, which types of commitments are available under your competition law.[e.g.: behavioural / structural]</p>	<p>Both, behavioural and structural agreements are available; see § 26 Cartel Act, Federal Cartel Act</p>
<p>E. Describe briefly the system [who can initiate commitment – your authority or the parties, in which stage of the investigation commitment may be initiated, etc.]</p>	<p>The authority and the parties are allowed to initiate discussions about commitments, in the end it is the cartel court´s decision to accept the commitments proposed by the undertaking concerned and to declare them legally binding.</p>
<p>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</p>	<p>Yes.</p>
<p>J. Describe how your authority monitors the parties' compliance to the commitments.</p>	<p>Commitments are either monitored by the case handler(s) of a particular case, or the undertaking(s) concerned agree on submitting a (periodically) monitoring report as part of the commitment, or the BWB and the undertaking(s) concerned agree on a monitoring trustee, which reports directly to the BWB.</p>
<p>K. Is there a possibility for parties to appeal a commitment decision at court?</p>	<p>In theory yes, but an appeal is unlikely, as the undertakings concerned have to produce and propose the commitments themselves.</p>

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

<p>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁸, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>Request for information (RFI), interrogations of parties and witnesses, expert opinion, sector inquiries, dawn raids.</p> <p>Only dawn raids require a court warrant.</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, 9A).</p>
<p>C. Can servers located outside the territory (abroad or in a cloud) be inspected? Are there special rules for this investigative power? Please explain!</p>	<p>Yes, the access principle was introduced by amendment of Section 11a para. 1 subpara. 2 Competition Act, enacted in 2017, which now refers to business documents as all documents that “can be accessed at the company or from its premises”.</p> <p>During dawn raids, the BWB is entitled to inspect or examine business documents, irrespective of their form, or to have them inspected or examined by suitable experts, and to make copies and extracts from those documents (Section 11a para. 1 subpara. 2 Competition Act).</p> <p>In this context it is of no consequence whether the electronic data is stored on a storage medium on the premises to be searched or on external storage sites (including cloud services). What matters is that those storage media on which the BWB expects to find certain documents relevant to the investigation can be inspected on the premises that are being searched.</p>
<p>D. 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>To collect evidence not falling within the scope of the Court's search warrant, an additional search warrant or an extension of the original search warrant is required.</p>
<p>E. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe</p>	<p>When enforcing its right to ask for (confidential) information by way of RFIs to do a sector inquiry, the BWB faced legal challenges by some undertakings. However, the Supreme Cartel Court confirmed the BWB's powers to ask for this information.</p>

⁷ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

⁸ “Searches/raids” means all types of search, raid or inspection measures.

them.	Court warrants authorizing dawn raids were appealed several times. The appellants claimed i.a. that there was no/not enough evidence to authorize a dawn raid or that the BWB should have used less extensive investigation methods, such as RFIs or oral interrogations. So far the Supreme Cartel Court dismissed all appeals against search warrants.
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10. Procedural rights of businesses/ individuals

<p>A. Key rights of defence in cartel cases: [e.g.: right of access to documents in the possession of the enforcing authority, right to a written statement of the case against the defendant, right to respond to that case in writing, right to respond orally, right to confront companies or individuals that make allegations against the defendant, right to legal representation before the enforcing authorities, right not to self-incriminate, etc.] Please indicate the relevant legal provisions.</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 of RFIs.</p>
<p>B. Protection awarded to 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? Please indicate the relevant legal provisions.</p>	<p>The BWB is obliged to safeguard the confidentiality of business secrets according to the (constitutional) provisions of the data protection law (Datenschutzgesetz) and the civil service's confidentiality obligations (Amtsverschwiegenheit).</p>

11. 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 on the merits of the case must</p>	<p>According to § 33 Cartel Act a fine may be imposed only if an application to impose a fine was filed within <u>five years</u> of termination of an infringement.</p> <p>This limitation period is interrupted with effect from the date, on which action aimed at the investigation or prosecution of the infringement by the BWB is notified to at least one of the</p>
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<p>be made? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</p>	<p>undertakings or associations of undertakings, which has or have participated in the infringement. This notification might be in the form of a dawn raid, oral interviews of witnesses or suspects or RFIs.</p> <p>Each interruption shall start time running afresh; however, the limitation period shall in any case expire no later than ten years from termination of such infringement. The duration of any proceedings before a Court shall not be included in the limitation period.</p> <p>Please see § 33 Federal Cartel Act.</p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</p>	<p>There are no such investigation deadlines.</p> <p>Considering the deadline for a court decision on the merits, please see above, question 11.A.</p>
<p>C. 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 on the merits of the case must be made?</p>	<p>According to § 33 Cartel Act a fine may be imposed only if an application to impose a fine was filed within <u>five years</u> of termination of an infringement.</p> <p>This limitation period shall be interrupted with effect from the date on which action aimed at the investigation or prosecution of the infringement by the BWB is notified to at least one of the undertakings or associations of undertakings which has participated in the infringement. Each interruption shall start time running afresh; however, the limitation period shall in any case expire no later than ten years from termination of such infringement. The duration of any proceedings before a Court shall not be included in the limitation period.</p>
<p>D. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits?</p>	<p>There are no such investigation deadlines.</p> <p>Considering the deadline for a court decision on the merits, see 11A.</p>
<p>E. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions? (see also 15A)</p>	<p>Appeals against decisions of the Cartel Court have to be filed within four weeks (after the decision was issued in writing), in cases of interim measures within two weeks, see § 49 para 2 Cartel Code.</p>

12. Types of decisions

<p>A. List which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]</p>	<p>termination of infringements (§ 26 Cartel Act), commitments (§ 27 Cartel Act), finding of an infringement (§ 28 para 1 Cartel Act), finding of applicability of the Austrian Cartel Act (§ 28 para 2 Cartel Act), imposition of fines (§ 29 Cartel Act), interim measures (§ 48 Cartel Act).</p>
<p>B. List any other types of decisions on the merits of the case relevant particularly in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A).</p>	<p>-</p>
<p>C. Can interim measures⁹ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both¹⁰.) 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 the Cartel Court, the court is authorized to impose interlocutory injunctions (interim measures) upon application by one of the parties (§ 48 Cartel Act).</p> <p>All parties have to be heard before the decision on interim measures is adopted. For interim measures to be adopted the applicant has to provide prima-facie-evidence proving that the requirements (i.e. the existence of an anticompetitive agreement) for a cease-and-desist order are given.</p>

13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

<p>A. Grounds for the imposition of procedural sanctions / fines [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</p>	<p>Obstruction of BWB's order to provide information by RFI or oral statement, obstruction of BWB's right to examine files of an undertaking; see § 11a para 1 lit 1 to 3 Competition Act.</p> <ul style="list-style-type: none"> - non-provision of requested information, - late provision of requested information, - wrong or incomplete provision of information.
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⁹ 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].

¹⁰ Only for agencies which answered "yes" to question 2.B. above

investigative measures, etc.]:	
B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):	Administrative sanction up to € 75,000 imposed by BWB.
C. On whom can procedural sanctions be imposed?	Undertakings and associations of undertakings
D. Criteria for determining the sanction / fine:	§ 11a para 5 Competition Act in conjunction with § 19 VStG (Administrative Enforcement Act 1991): gravity of the infringement, intention of the undertaking (negligence/intention); further aggravating and mitigating factors can be taken into consideration. Evaluation is on a case-by-case basis.
E. Are there maximum and / or minimum sanctions / fines?	Fines must not exceed € 25,000, only if the RFI was rendered as a formal decision (Bescheid), fines must not exceed € 75,000 (see § 11a para 5 Competition Act). There are no provisions on minimum fines.

14. Sanctions on the merits of the case

A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined): On whom can sanctions be imposed? [E.g.: representatives of businesses, (imprisonment for individuals), businesses, in the case of associations of companies the associations or the individual companies?]	<p>Grounds for the imposition of fines as sanctions on the merits: participation in cartels (§ 1 Cartel Act, Art 101 TFEU); abuse of a dominant market position (§ 5 Cartel Act, Art 102 TFEU); retaliatory actions (§ 6 Cartel Act); unauthorized implementation of a merger (§ 17 Cartel Act), non-compliance with a commitment decision (§ 27 Cartel Act);</p> <p>The Supreme Cartel Court has characterized the fines imposed by the Cartel Court as "criminal-offence-like" sanctions.</p> <p>In Austria, sanctions can be imposed on undertakings and associations of undertakings.</p>
B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]	<p>See § 30 para 1 Cartel Act: Gravity and duration of the infringement; enrichment; degree of responsibility; economic capacity.</p> <p>§ 30 para 2 and 3 Cartel Act contain a non-exhaustive list of aggravating and mitigating factors, e.g. repeat offender, agitator or ancillary participation and contribution to the Court's fact finding.</p>
C. Are there maximum and / or minimum sanctions / fines?	<p>§ 29 lit 1 Cartel Act provides for that fines may not exceed 10 % of the total turnover achieved in the last business year.</p> <p>There are no minimum sanctions / fines.</p>
D. Guideline(s) on calculation of fines: [name and reference number, availability (homepage address) and indication of the languages in	No national 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.

which these materials are available]	On the legal basis, see above 14B.
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?	As a general principle, the decision is enforceable only when it becomes final (§ 43 Auß StrG). However, the Cartel Court may declare the decision provisionally binding and enforceable, if this is deemed necessary to prevent detriments to a party or the public interest.

15. Possibilities of appeal

A. Does your law provide for an appeal against 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 requirements?	<p>According to § 38 Cartel Act the parties are able to appeal against the Cartel Court's decisions.</p> <p>The general grounds for appeal regulated in the Code of Civil Procedure (Zivilprozessordnung - ZPO), i.e. breaches of procedural requirements (e.g. right to be heard), incorrect legal appraisal and the incorrect adoption of facts (contradiction with the protocol), are applicable in competition cases as well.</p> <p>Furthermore § 49 para 3 Cartel Code states, that an appeal may also be based on the fact that due to the contents of the files significant doubts exist regarding the correctness of the relevant facts on which the decision of the Cartel Court was based.</p>
B. Before which court or agency should such a challenge be made? [if the answer to question 15/A is affirmative]	<p>Oberster Gerichtshof als Kartellobergericht -Austrian Supreme Court as Court of Appeal in cartel matters (Supreme Cartel Court).</p> <p>See 4A.</p>

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16. Private enforcement

A. Are private enforcement of competition law and private damage claims possible in your jurisdiction? If there is no legal provision for private enforcement and damage claims, what are the reasons for it?	<p>Yes, private enforcement (individual actions) as well as private damages claims are possible.</p> <p>Regarding private enforcement (individual actions), § 36 para. 4 subpara. 4 Austrian Cartel Act permits individual actions targeted against a cartel or an abuse of a dominant position (e.g. finding of an infringement, interlocutory actions). However, an application requesting the examination of mergers, subsequent measures pursuant to § 16 subpara. 1, a finding pursuant to § 28 para. 1a subpara. 1 as well as fines and periodic penalty payments may solely be filed by the Federal Competition Authority or the Federal Cartel Prosecutor</p> <p>Regarding private damages claims, the Austrian legislator has implemented Directive 2014/104/EU (EU Damages Directive) into §§ 37a to 37m Austrian Cartel Act, to simplify private</p>
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	actions for damages for infringements of competition law.
B. Laws regulating private enforcement of competition law in your jurisdiction [indication of the provisions and languages in which these materials are available; availability (homepage address)]	<p>Regarding private damages claims, the Austrian legislator has implemented Directive 2014/104/EU (EU Damages Directive) into §§ 37a to 37m Austrian Cartel Act, to simplify private actions for damages for infringements of competition law.</p> <p>§§ 37a to 37m Austrian Cartel Act also refer to the Non-Contentious Proceedings Act and the Code of Civil Procedure, as damages claims in competition matters follow in general the rules regarding damages established in Austrian civil law.</p> <p>Please see §§ 37a to 37m Federal Cartel Act</p>
C. Implementing regulation(s) on private enforcement (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]	<p>Regarding private enforcement (individual actions), please see above, answer 16.A and § 36 para. 4 subpara. 4 Federal Cartel Act.</p> <p>Regarding private damages claims, please see above, answers 16.A and 16.B and §§ 37a to 37m Federal Cartel Act.</p>
D. .On what grounds can a private antitrust cause of action arise? / In what types of antitrust matters are private actions available?	Please see above, answer 16.A.
E. What pleading standards must the plaintiff meet to file a stand-alone or follow-on claim?	<p>Regarding stand-alone claims (individual actions) there is no explicit threshold or pleading standard. As the procedure to file applications against infringements of the Austrian Cartel Act follows the Non-Contentious Proceedings Act (AußerstreitG), the principle of judicial investigation is on the judge. As a result, it is on the claimant(s) and the defendant(s) to plea and offer evidence in their interest.</p> <p>In general, the finding of an infringement of a competition agency is not a prerequisite to initiate a stand-alone or follow-on claim in competition matters.</p> <p>Regarding damages claims (follow-on claims), § 37j para 1 Austrian Cartel Act states, that in „proceedings relating to an action for damages for harm caused by an infringement of competition law, it shall be sufficient to substantiate the claim to such an extent that any facts and evidence are contained which are reasonably available to the claimant and which sufficiently support the plausibility of the claim for damages.”</p> <p>§ 37i para. 1 Austrian Cartel Act holds that “a legal dispute on the compensation for harm caused by an infringement of competition law may be interrupted until the proceedings by a competition authority concerning such infringement of competition law have been discharged.”</p> <p>In addition, § 37i para 2 Austrian Cartel Act holds that „a court which decides on the compensation for harm caused by an infringement of completion law shall be bound by the finding of an infringement of competition law as made in a final decision of a competition authority or a court which decided on the decision of a competition authority at the respective stage of appeal.”</p>
F. Are private actions available	The only criminal offence targeting competition infringements in the Austrian Criminal Code is an explicit prohibition of bid

<p>where there has been a criminal conviction in respect of the same matter?</p>	<p>rigging in public tenders (§ 168b Austrian Criminal Code).</p> <p>However, a damages claim (follow-on action) based on a criminal conviction of an undertaking/association of undertakings active in a bid rigging cartel is permissible.</p>
<p>G. Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private damages cases?</p>	<p>Regarding disclosure and use of evidence included in the files, the disclosure of leniency submissions or settlement submissions must not be ordered at any time (§ 37k para 4 Austrian Cartel Act)</p> <p>In addition, § 37e para 3 holds, that a „person who has voluntarily disclosed to a competition authority knowledge of and participation in a secret cartel between competitors and who in turn by decision or termination of proceedings benefits from immunity from fines to be imposed for the infringement (leniency), shall only be liable to his own direct and indirect purchasers or suppliers, unless the other injured parties would otherwise be unable to obtain full compensation from the other liable parties.”</p> <p>In general, undertakings which have infringed competition law through joint behaviour shall be jointly and severally liable for the harm caused by the infringement of competition law (§ 37e para 1 Austrian Cartel Act). However, the amount of contribution of an infringer under a leniency programme is limited to the amount of the harm it caused to its own direct or indirect purchasers or suppliers (§ 37e para 4 Austrian Cartel Act).</p>
<p>H. Name and address of specialised court (if any) where private enforcement claims may be submitted to</p>	<p>Regarding stand-alone claims (individual actions) in competition matters, the specialised Cartel Court and the Austrian Supreme Court as Court of Appeal in cartel matters (Supreme Cartel Court) are the only courts empowered to decide on competition cases. Please see above, answers 4.A and 4.B.</p> <p>For damages claims (follow-on actions), there are no specialised courts, as damages claims for competition infringements follow the rules for civil law claims. Therefore, the legal venue is determined by the amount in dispute and the place of jurisdiction.</p>
<p>I. Information about class action opportunities</p>	<p>At the moment, the applicability for class actions in Austria is limited, as the only possibility to bring class actions for damages would be to assign a claim for damages to an association such as the Arbeiterkammer (chamber of labour) or the Verein für Konsumenteninformation (organisation for consumer information). Consequently, class actions have not been a success story regarding damages claims in competition matters in Austria (yet).</p> <p>For further information, please see: Georg E. Kodek, Die "Sammelklage" nach österreichischem Recht, ÖBA 2004, 615; Alexander Klauser, Warum Österreich eine echte Sammelklage braucht, Der Standard 2017/40/01.</p>
<p>J. Role of your competition agency in private enforcement actions (if at all)</p>	<p>§ 37i para. 1 Austrian Cartel Act holds that “a legal dispute on the compensation for harm caused by an infringement of competition law may be interrupted until the proceedings by a competition authority concerning such infringement of competition law have been discharged.”</p> <p>Regarding the disclosure and use of evidence included in the</p>

	<p>files, the court may also request the disclosure of evidence included in the files of courts or authorities by way of legal and administrative assistance if such evidence cannot be reasonably obtained by the parties concerned or by a third party concerned (§ 37k para 1 Austrian Cartel Act). However, the court has to grant the competition authority the opportunity to give an opinion on the requested information and on the circumstances, e.g, if the competition authority deems the request proportionate (§ 37k para 2 Austrian Competition Act).</p> <p>There are many restrictions regarding the disclosure and use of evidence in the files of the competition authority. Please see answers 16.G, 16.L and § 37k Federal Cartel Act.</p>
<p>K. What is the evidentiary burden on plaintiff to quantify the damages? What evidence is admissible?</p> <ul style="list-style-type: none"> • Role of your competition agency in the damage calculation (if at all) 	<p>In proceedings relating to an action for damages for harm caused by an infringement of competition law, it shall be sufficient to substantiate the claim to such an extent that any facts and evidence are contained which are reasonably available to the claimant and which sufficiently support the plausibility of the claim for damages. (§ 37j para 1 Austrian Cartel Act.)</p> <p>According to § 37l Austrian Cartel Act, the Cartel Court, the Federal Cartel Prosecutor and the Federal Competition Authority may, upon request of a court, assist a court which has to quantify damages in fixing the amount of compensation.</p>
<p>L. Discovery / disclosure issues:</p> <ul style="list-style-type: none"> • can plaintiff obtain access to competition authority or prosecutors' files or documents collected during investigations? • is your competition agency obliged to disclose to the court the file of the case (in follow-on cases)? • summary of the rules regulating the disclosure of confidential information by the competition agency to the court • summary of the rules regulating the disclosure of leniency-based information by the competition agency to the court 	<p>Regarding the disclosure and use of evidence included in the files, the court may also request the disclosure of evidence included in the files of courts or authorities by way of legal and administrative assistance if such evidence cannot be reasonably obtained by the parties concerned or by a third party concerned (§ 37k para 1 Austrian Cartel Act). However, the court has to grant the competition authority the opportunity to give an opinion on the requested information and on the circumstances, e.g, if the competition authority deems the request proportionate (§ 37k para 2 Austrian Competition Act).</p> <p>There are many restrictions regarding the disclosure and use of evidence in the files of the competition authority. A competition authority may only be ordered to disclose the following categories of evidence included in its files when the competition authority has closed the proceedings:</p> <ol style="list-style-type: none"> 1. information that was prepared specifically for the proceedings before the competition authority, 2. information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and 3. settlement submissions associated with such proceedings that have been withdrawn (§ 37k para 3 Austrian Cartel Act). <p>In addition, the disclosure of leniency submissions or settlement submissions must not be ordered at any time (§ 37k para 4 Austrian Cartel Act).</p> <p>Please see § 37k Federal Cartel Act.</p>
<p>M. Passing-on issues:</p> <ul style="list-style-type: none"> • how is passing-on regulated/ treated in your 	<p>In an action for damages for harm caused by an infringement of competition law, the defendant may invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the</p>

<p>jurisdiction?</p> <ul style="list-style-type: none">• is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?	<p>infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant. A successful defence shall be without prejudice to the right of the claimant to claim compensation for loss of profits.</p> <p>Indirect purchasers may bring damages claims as well, but they face a more difficult standard of proof: Where an indirect purchaser claims compensation for damages against the infringer passed on to him from a purchaser at an earlier stage in the supply chain, the indirect purchaser shall bear the burden of proving that such overcharge has been passed on to him.</p> <p>For more details on passing-on of overcharges, please see § 37f Federal Cartel Act.</p>
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