

Leniency programme guidelines

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1 Introduction

I. General remarks

Cartels and other anti-competitive agreements, i.e. agreements between undertakings, for example on price fixing, market sharing and/or customer allocation, are considered serious infringements of EU and national law and are therefore subject to heavy fines of up to 10% of the total global turnover.

Uncovering of such cartels by the European Commission and the competition authorities of the Member States – in Austria, the Federal Competition Authority (hereinafter referred to as the FCA; in German: *Bundswettbewerbsbehörde*, BWB) is the body responsible for this – is difficult because the undertakings involved, aware of the illegality of their actions, regularly act in secret and try to leave as few traces as possible.

Therefore, in addition to their sovereign powers (e.g. house searches, requests for information, questioning of witnesses), the competition authorities often have to rely on information from insiders. Undertakings that are involved in an agreement that violates competition law but wish to extricate themselves should therefore be given an incentive to admit their own participation in such an agreement to the authority, and to fully disclose their information about the other participants and their activities.

Such incentive schemes exist in the form of “leniency programmes” in all jurisdictions of the European Union; generally speaking, they grant immunity from fines to the first undertaking that cooperates with a competition authority before the latter becomes aware of the relevant conduct or has already initiated an investigation on its own. Companies cooperating later may benefit from a reduced fine under certain conditions. In Austria, the leniency programme was introduced into competition law in 2006; so far, 115¹ applications have been filed, and the programme has proven a great success in enforcement. The high number of leniency applications shows that undertakings and lawyers have great confidence in the programme and its application.

The present guidelines are intended to provide undertakings considering an application for leniency to the FCA with initial guidance on the substantive requirements and the procedure to be followed. The FCA has tried to present this matter, which is indeed

¹ As of: 30 April 2022.

complex in detail, as simply and clearly as possible on the one hand, and on the other hand to enable further discussion by referring to the applicable legal bases.

As a general principle, it can already be stated at this point that cooperation with the competition authorities is always the best way to avoid or mitigate otherwise impending sanctions in the context of anti-competitive conduct.

Speaking most generally, undertakings are advised to seek the advice of legal counsel experienced in competition law if they intend to apply for leniency. This is particularly the case if the facts of the case have a dimension that extends beyond Austria, but also with regard to possible consequences under civil and criminal law that go beyond the field of competition law *sensu stricto*, which can only be touched upon in the context of this guide. For an initial overview of whether the leniency programme is an option for the respective undertaking, [Annex 4](#) offers assistance.

For the target group of professional legal practitioners, the guide also contains information on the interpretation of vague legal terms and on issues which have arisen as a result of the most recent amendment to cartel and competition law by the implementation of EU law requirements (see below).

II. Context of this guide

Since the entry into force of the original version of the leniency programme on 1 January 2006, the FCA has always had to set out its practice in implementing this programme in a manual due to an express legal obligation. Taking into account the case law of the highest courts as well as European developments and connecting factors of criminal law (§ 209b of the Austrian Code of Criminal Procedure; *Strafprozessordnung*, StPO), it offered companies intending to make use of the leniency programme a comprehensive and compact overview of all aspects relevant to them.

Whereas § 11b of the Competition Act (*Wettbewerbsgesetz*, WettbG) in its version applicable prior to the entry into force of the Austrian Cartel and Competition Law Amendment Act (*Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021*, KaWeRÄG²) contained merely basic requirements for leniency, and the application practice remained

² Federal Law Gazette I No 176/2021.

to be presented in a handbook by the FCA, transposition of Directive 2019/1/EU (ECN+D)³ mandated the leniency programme to have a precise detailed normative basis. The legislator complied with this requirement by creating an ordinance authorisation in § 11b (4) of the Competition Act, according to which the Federal Minister for Digital and Economic Affairs (BMDW) may issue more detailed provisions on the prerequisites for leniency, in particular on markers and summary applications. This authorisation was exercised by issuing the Ordinance of the Federal Minister for Digital and Economic Affairs on the Application of the Leniency Programme of the Competition Act (Austrian Ordinance on Leniency; *VO Kronzeugen*)⁴. This includes, inter alia, an obligation for the FCA to provide information in a handbook to be published on its website on the technical procedure and the fine reductions it intends to apply upon application for a reduced fine with regard to the order of the requesting undertakings or associations of undertakings (cf. § 7 (4) of the Austrian Ordinance on Leniency). The contents of this document (Reductions of Fines in the Leniency Programme)⁵ are presented in this guide as well and form an integral part of this guide as Annex 3.

As it turns out, provisions relevant for (potential) leniency applicants can be found in various legal or information sources. In addition to the provisions of the Competition Act already mentioned, Chapter 5 of Part II of the Austrian Cartel Act 2005 (*Kartellgesetz 2005*, KartG) (damages for infringements of competition law) as well as § 209b of the Austrian Code of Criminal Procedure (criminal leniency programme for competition law infringements) should be mentioned. In addition, practice-relevant questions (e.g. regarding the handling of leniency statements) repeatedly arise in the context of the enforcement of the leniency programme by the FCA. Therefore, in the interest of transparency, the FCA continues to consider it expedient, even beyond the scope of the manual “Reductions of Fines in the Leniency Programme” pursuant to § 7 (4) of the Austrian Ordinance on Leniency, to publish a document that provides as comprehensive and informative an overview as possible of the many aspects that arise in connection with leniency.

As a matter of principle, it should be noted that the FCA may, within the scope of its discretion, also refrain from applying for a fine or request a reduced fine outside the scope

³ Directive of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Official Journal No L 11, p. 3.

⁴ Federal Law Gazette II No 487/2021.

⁵

https://www.bwb.gv.at/fileadmin/user_upload/Geldbussenreduktionen_im_Kronzeugenprogramm_final.pdf (accessed on 30 April 2022).

of application of the leniency programme, which sets out the conditions for refraining from applying for a fine or applying for a reduced fine.

The requirements for the application of the Austrian leniency programme can be found in the following **(legal) sources**:

- § 11b of the Competition Act, Federal Law Gazette I No 62/2002 as amended by Federal Law Gazette I No 176/2021
- Ordinance of the Federal Minister for Digital and Economic Affairs on the Application of the Leniency Programme of the Competition Act, Federal Law Gazette II No 487/2021
- Specification pursuant to § 7 (4) of the Ordinance of the Federal Minister for Digital and Economic Affairs on the Application of the Leniency Programme of the Competition Act, Federal Law Gazette II No 487/2021 (Austrian Ordinance on Leniency), by the Federal Competition Authority (Reductions of Fines in the Leniency Programme), published on the website of the FCA

2 Wide scope of the Austrian leniency programme

The applicability of the leniency programme extends to the **entire scope of prohibition** of § 1 Cartel Act 2005 or Art. 101 of the Treaty of the Functioning of the European Union and is not limited to secret agreements between two or more competitors at the same stage of the production or distribution chain (§ 11b (1) 3 lit a of the Competition Act). It thus exceeds the minimum requirements of the ECN+D and also differs from the leniency programmes of the European Commission as well as other EU Member States, whose application is in many cases restricted to horizontal agreements.

Practice tip:

These differing scopes of application must be considered especially in the case of agreements that extend to geographic markets outside the competence of the FCA. It may not be possible to obtain leniency in all jurisdictions covered by the agreement if the infringement is not covered by the leniency programme in those jurisdictions. If and when Art. 101 of the Treaty of the Functioning of the European Union applies, the FCA is obliged under Art. 11 (3) of Regulation No 1/2003 to notify the European Commission (and the national competition authorities) of the initiation of proceedings. However, according to Recital 39 of the Commission Notice on cooperation within the Network of Competition Authorities (Official Journal 2014 C 101/03), the other competition authorities will not use such a notification as a basis for their own investigations. In this case, the leniency statement submitted to the FCA pursuant to Art. 12 of Regulation 1/2003 will be transmitted only with the consent of the undertaking concerned.⁶ Cf. also § 83a of the Cartel Act 2005 on the exchange of leniency statements by the Cartel Court or the Federal Cartel Prosecutor with other national competition authorities.

⁶ Cf. also Art. 31 (6) ECN+D.

3 General conditions for leniency

§ 11b (1) 1, 2 and 4 of the Competition Act read:

“The Federal Competition Authority may refrain from applying for the imposition of a fine on undertakings or associations of undertakings which

1. have terminated their participation in the infringement, unless the Federal Competition Authority considers that continuation of the infringement may reasonably be necessary to preserve the integrity of its investigation,

2. subsequently cooperate truthfully, fully and expeditiously with the Federal Competition Authority for the purpose of a complete clarification of the facts, as well as submit all evidence of the suspected infringement in their possession or to which they have access, and in any case until the Federal Competition Authority has informed the undertakings or associations of undertakings involved in the infringement of the results of the investigation pursuant to § 13 (2) about the results of the investigation, disclose neither the fact nor the contents of the request for action under this provision, unless otherwise agreed with the Federal Competition Authority,

[...]

4. have not coerced other undertakings or associations of undertakings to participate in the infringement.”

I. Termination of participation in an infringement of § 1 of the Cartel Act 2005 or of Art. 101 (1) of the Treaty on the Functioning of the European Union

A prerequisite for leniency – which has been in force already since introduction of the leniency programme in Austria – is that the requesting undertaking terminates its participation in the (alleged) infringement. Similarly, it was already considered an outflow of the undertaking's obligation to cooperate that continuation of participation in an unlawful conduct may nevertheless be necessary in order not to jeopardise the success of the FCA's investigation by the cooperation becoming known at an early stage, which is why the termination should take place in agreement with the FCA. Now, § 11b (1) 1 of the Competition Act expressly clarifies that the FCA considers that continuation of the infringement may reasonably be necessary to preserve the integrity of its investigation. Whether and in what form such a continuation is actually necessary must be assessed separately by the FCA in each individual case and agreed with the undertaking concerned. Such a continuation will regularly be only a passive participation, keeping up appearances towards other participants.

In cases where a summary application (§ 4 of the Austrian Ordinance on Leniency, see Item 6 II.2.) is filed, the procedure for terminating the infringement must be clarified with the European Commission.⁷

II. Cooperation obligation

§ 11b (1) 2 of the Competition Act sets out the basic cooperation requirements for undertakings wishing to avail themselves of the leniency programme. This comprehensive duty to cooperate extends throughout the duration of the FCA's preliminary proceedings. It also includes the prohibition to disclose the fact or the content of the request for leniency until the FCA informs the undertakings involved in the infringement about the results of the investigation pursuant to § 13 (2) of the Competition Act (statement of the objections, which generally reveals the existence of a leniency applicant), unless otherwise agreed. This requirement is also intended to support the integrity of the investigative actions.

⁷ Cf. Art. 22 (3) ECN+D, according to which the European Commission is initially the main contact for applicants.

§ 6 of the Austrian Ordinance on Leniency contains a specification of the duty to cooperate that goes beyond § 11b (1) 2 of the Competition Act:

- **Being available to the FCA**, in particular by helping to establish the facts of the case by, among other things, answering the FCA's enquiries promptly, completely and truthfully. These may relate, inter alia, to the context and further explanation of evidence and the provision of background information. To this end, it is advisable to name a central contact person towards the FCA, be it directly in the undertaking or the legal representative.
- **Presenting all information and evidence** relating to the suspected infringement which is in the possession of the requesting undertaking or to which the latter has access, as well as refraining from suppressing, falsifying or destroying such information and evidence, this also already during the consideration of a request pursuant to § 11b (1) or (2) of the Competition Act. As is already clear from the wording of the provision, the information and evidence relevant for the assessment of the facts are what is meant here.
- **Ensuring that employees of the undertaking**, irrespective of their functions and duties, and – as far as possible and feasible – also former employees from whom information and evidence can be obtained, **cooperate with the FCA** and are available to the latter (for questioning); in addition, the requesting undertaking must obtain or secure all relevant information and evidence in the possession of an employee before the latter leaves the undertaking. The requesting undertaking shall inform the FCA without delay of the planned departure of any employee who may be in possession of relevant information and evidence. This influence must be exercised within the framework of the obligations arising from the employment relationship (including the retroactive ones) and – as the Explanatory Notes⁸ of the Austrian Ordinance on Leniency also state – does not include the exertion of undue pressure. This may also require the undertaking to give assurances to the employee or to refrain from asserting claims. If this appears necessary in individual cases to ensure the success of the investigation (in particular, keeping secret the fact of cooperation with the FCA, cf. § 6 (4) of the Austrian Ordinance on Leniency and the next Item), the undertaking shall coordinate the establishment of contact with former employees with the FCA.
- **Confidentiality of the fact of the request for leniency**, the request for the setting of a marker or summary application, the content of the request as well as of the summary application, the consideration of a request and the cooperation with the FCA from the other undertakings involved in the infringement as well as from third

⁸ https://www.bmdw.gv.at/dam/jcr:425b04e9-9cb7-4eec-a208-050c921e555e/FINAL_VO%20Kronzeugen_Erl%C3%A4uterungen.pdf (accessed on 04 July 2022).

parties, with the exception of disclosure to other European competition authorities or competition authorities of third countries, until and insofar as the FCA releases the requesting undertaking from this obligation. In this context, any actions and omissions that could indirectly hint at such cooperation must be avoided. (See also Item I. Termination of participation in an infringement of § 1 of the Cartel Act 2005 or Art. 101 (1) of the Treaty on the Functioning of the European Union)

- **Submitting affidavits** by all current employees and, to the extent possible and feasible, former employees who participated in the infringements under competition law, regarding their knowledge of the cartel and their specific role in the cartel. The wording and purpose of the provision suggest that affidavits are to be submitted only by those current employees who can actually make a contribution to clarification. In case of doubt, consultation with the FCA is recommended in any case.
- Submitting a **declaration of consent to contact other competition authorities (“waiver”)**, provided that the requesting undertaking has submitted requests for leniency in other jurisdictions outside the European Union.⁹

If the obligation to cooperate is not fulfilled, leniency cannot be granted.

Practice tip:

The specifically necessary steps to fulfil the cooperation obligation are to be coordinated on an ongoing basis in close exchange between the undertaking and the FCA. A lack of cooperation with the FCA can still lead to non-application of the leniency programme even later in the preliminary proceedings (i.e. even after the submission of the legally non-binding leniency notice pursuant to § 8 (1) of the Austrian Ordinance on Leniency).

In such a case, it must be examined on the basis of the circumstances of the individual case whether and to what extent a contribution to clarification made up to that point is to be considered cooperation outside the leniency programme and can at best be taken into account to a small extent in order to reduce the fine (§ 30 (3) 3 of the Cartel Act 2005).

⁹ In the case of parallel submission of requests for leniency to competition authorities belonging to the European Competition Network (ECN), information is to be exchanged on the basis of Art. 12 Regulation (EC) 1/2003 and the Commission Notice on cooperation within the Network of Competition Authorities (Recital 40 et seq.).

III. Other undertakings or associations of undertakings were not coerced to participate in the infringement

A further prerequisite for leniency is that the requesting undertaking has not coerced other undertakings to participate in the infringement of § 1 of the Cartel Act 2005 or Art. 101 of the Treaty on the Functioning of the European Union (§ 11b (1) 4 of the Competition Act).¹⁰ “Coercion” in the sense of this provision will probably be present only in exceptional cases, whereby both physical and psychological coercion are to be considered in this context, and in particular the criminal offences of duress (*Nötigung*, § 105 of the Austrian Criminal Code; *Strafgesetzbuch*, StGB) and extortion (*Erpressung*, §§ 144 et seqq. of the Austrian Criminal Code) will also be relevant. Exertion of economic pressure will in any case fulfil the criteria of an offence if it is objectively capable of causing the market exit of the affected undertaking.

¹⁰ Cf. in this context the stricter wording of Art. 17 (3) of the ECN+D concerning immunity from fines for secret cartels, which may be relevant in individual cases in the sense of an interpretation in conformity with the Directive: “Member States shall ensure that all undertakings are eligible for immunity from fines, with the exception of undertakings that have taken steps to coerce other undertakings to join a secret cartel or to remain in it.”

4 Immunity from fines

If the general requirements outlined under Item 3 are met, the FCA will refrain from applying for a fine in its entirety (immunity from fines) if the requirements of lit a or lit b of clause 3 of § 11b (1) of the Competition Act are also met. This is the case if and when the entrepreneur or association of companies

“3. a) are the first to submit to the Federal Competition Authority information and evidence enabling it to make a substantiated application under § 12 (1) directly on suspicion of an infringement of § 1 of the Cartel Act 2005 or Art. 101 (1) of the Treaty on the Functioning of the European Union, or

b) are the first to submit to the Federal Competition Authority, if they/it already have/has sufficient information and evidence from another source to apply for a house search, additional information and evidence enabling it to directly file a substantiated application pursuant to § 36 (1a) of the Cartel Act 2005 before the Cartel Court [...]”

I. Submission of information and evidence enabling the FCA to file a substantiated application for a house search order directly on suspicion of an infringement

The requesting undertaking must be the first to enable the FCA, by submitting information and evidence, to file a substantiated application under § 12 (1) of the Competition Act for a house search order directly on suspicion of an infringement of § 1 of the Cartel Act 2005 or Art. 101 (1) of the Treaty on the Functioning of the European Union. The FCA must not have sufficient information and evidence at the moment of submission yet to adequately justify an application for a house search warrant. These include in particular those stated in the list in § 2 (2) of the Austrian Ordinance on Leniency (see Item 6 I.).

For the assessment of the information provided, see Item 6 I.

II. Submission of information and evidence enabling the FCA to directly file a substantiated application under § 36 (1a) of the Cartel Act 2005 before the Cartel Court

If the FCA already has sufficient information and evidence to apply for a house search pursuant to § 12 (1) of the Competition Act, leniency status within the meaning of § 11b (1) of the Cartel Act (immunity from fines) can still be obtained, but the requirements for a requesting undertaking are increased. This undertaking must now be the first to submit additional information and evidence that will enable the FCA to directly file a substantiated application for the imposition of fines pursuant to § 36 (1a) of the Cartel Act 2005 before the Cartel Court. It must therefore make a significant contribution to clarification and provide the FCA with evidence that directly enables it to successfully prove the infringement in the proceedings before the Cartel Court so that the preliminary proceedings do not need to be continued further.¹¹

Generally, however, full exemption from sanctions is no longer justified if the FCA already has sufficient information and evidence to prove the infringement in proceedings before the Cartel Court.¹² Moreover, immunity from a fine will not be granted if the FCA already intends to refrain from applying for the imposition of a fine on another undertaking in respect of the same alleged infringement on the basis of a request pursuant to § 11b (1) of the Competition Act. Accordingly, immunity from fines can only be granted to one undertaking at a time with regard to an alleged infringement.

Other undertakings can obtain a reduction of fines (see Item 5 immediately below) if they meet the general requirements (cf. Item 3).

In addition, there is still the possibility of a so-called “partial immunity” (see also Item 5 I.).

¹¹ Cf. the explanatory notes to the Austrian Cartel and Competition Law Amendment Act 2012, Government Bill 1804 Supplements to the Stenographic Minutes of the National Council 24. GP 14.

¹² Cf. the explanatory notes to the Austrian Cartel and Competition Law Amendment Act 2012, Government Bill 1804 Supplements to the Stenographic Minutes of the National Council 24. GP 14.

5 Reduction of fines

Pursuant to § 11b (2) of the Competition Act, the FCA may apply for a reduced fine against companies that do not meet the requirements of § 11b (1) 3 lit a or b of the Competition Act, provided the other requirements ((1) 1, 2 and 4) are met. In order to qualify for a reduction of the fine, the FCA must be provided with information and evidence relating to the suspected infringement that represents significant added value compared to the information and evidence already in its possession (§ 11b (2) of the Competition Act; § 7 (1) of the Austrian Ordinance on Leniency).

In fulfilment of its obligation under § 7 (4) of the Austrian Ordinance on Leniency, the FCA has published on its website a specification¹³ regarding the procedure for fine reduction, the content of which is also reproduced in these guidelines and, as Annex 3, forms an integral part of these guidelines.

I. Concept of added value

The term “added value” refers to the extent to which the information or evidence provided, by virtue of its nature and/or level of detail, enables the FCA to prove the relevant facts more conclusively or completely than would have been possible without that information or evidence, respectively.

In determining the extent of the respective reduction within the respective applicable range, the time of submission of the additional information and evidence (from which the rank of the respective leniency applicant is derived)¹⁴ as well as the extent of the added value compared to the already known information and evidence shall be taken into account (§ 11b (2) of the Competition Act; § 7 (2) of the Austrian Ordinance on Leniency). Ultimately, the determination of the extent of the reduction, irrespective of the temporal

¹³

https://www.bwb.gv.at/fileadmin/user_upload/Geldbusenreduktionen_im_Kronzeugenprogramm_final.pdf (accessed on 30 April 2022).

¹⁴ This rank of the leniency applicant results either from the date of the request for the setting of a marker which has been completed within the relevant time limit (§ 3 of the Austrian Ordinance on Leniency) or from the date of the request for leniency if no application for the setting of a marker has been filed (§ 2 of the Austrian Ordinance on Leniency).

“rank” from the setting of a marker, will always also be the result of an overall consideration of all circumstances of the individual case.

If information and evidence are presented to the FCA by undertakings that make it possible to establish additional facts in order to request higher fines, these additional facts will not be taken into account towards the submitting undertaking upon application for the reduced fine (“partial immunity”, § 7 (3) of the Austrian Ordinance on Leniency).

II. Range of reductions

The FCA will request fines with reductions to the following extent:

Rank	Scope of reduction
in relation to the first undertaking fulfilling the requirement of significant added value	between 30% and 50%
in relation to the second undertaking fulfilling the requirement of significant added value	between 20 % and 30 %
in respect of any other undertaking fulfilling the requirement of significant added value	up to 20 %

In individual cases where the added value of the information or evidence provided is exceptionally significant, the FCA may apply a reduction that exceeds the range of reductions provided. Such exceptionally significant added value may arise, for example, from the volume or high level of detail of the information and evidence submitted, from the high probative value with regard to essential elements of the infringement, or if information and evidence are submitted very early in the preliminary proceedings. Finally, the FCA assesses the amount of the reduction by considering all relevant circumstances of the individual case (see also Item 5 I.).

III. Settlement

In addition, companies eligible for a reduced fine pursuant to § 11b (2) of the Competition Act have the possibility to seek an amicable termination of the proceedings (settlement) before the Cartel Court and thus obtain a further reduction of the fine (settlement reduction). Use of the leniency programme therefore does not exclude settlement; rather, the two instruments can be used together. An undertaking wishing to terminate a procedure by mutual agreement shall make an acknowledgement to that effect, acknowledging the authority's factual submissions and sharing its legal assessment. The FCA's position on settlements published on its website provides guidance on this.¹⁵

¹⁵

https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (accessed on 30 April 2022).

6 Procedure

An undertaking wishing to make a request for proceedings under § 11b (1) or (2) of the Competition Act may contact the FCA in advance (for contacts see Item 9). The same is also available for a confidential first contact – if necessary under preservation of the anonymity of the undertaking. However, here the FCA shall not provide any information on whether a request for leniency or marker has already been set concerning these facts.

If a request for proceedings under § 11b (1) or (2) of the Competition Act is submitted to the FCA only after the FCA has filed a request for a fine or for a declaratory judgement with the Cartel Court against that undertaking in respect of the same facts, it will as a matter of principle be disregarded. In these cases, it is conceivable that the cooperation of the undertaking in the proceedings before the Cartel Court will be taken into account in the calculation of the fine (e.g. as a mitigating reason for the substantial contribution to the clarification of the infringement pursuant to § 30 (3) 3 of the Cartel Act 2005).

I. Request for leniency

If an undertaking wishes to make use of § 11b (1) or (2) of the Competition Act, it must submit to the FCA a request for leniency pursuant to § 2 of the Austrian Ordinance on Leniency or an application for the setting of a marker pursuant to § 3 of the Austrian Ordinance on Leniency.

The FCA recommends using the form it provides ([Annex 1](#)). A request for leniency may be submitted in writing or orally in German or English, or in any other way that does not require the requesting undertaking to take possession, custody or control of the submitted statement. The FCA may require a translation into German (§ 5 of the Austrian Ordinance on Leniency).

A request for leniency pursuant to § 2 of the Austrian Ordinance on Leniency must contain the following information and evidence:

- Name and address of the requesting undertaking
- Name and address of all other undertakings which participated or are participating in the alleged infringement

- A detailed description of the alleged infringement, including the products concerned, the territories affected, the duration and nature of the alleged infringement and an estimate of the market volume affected thereby
- Precise details of the alleged cartel contacts (in each case date, manner, places, persons involved)
- The name, function and address of all natural persons who, to the knowledge of the requesting undertaking, have participated or are participating in the alleged infringement
- Any other evidence of the alleged infringement in the possession of or to which the requesting undertaking has access
- Detailed explanations of the evidence provided in the context of the request
- Information on past or possible future requests for leniency in relation to the alleged infringement to other European competition authorities or competition authorities of third countries¹⁶

Practice tip:

As a matter of principle, the same documents and evidence must be submitted both in the case of a request for immunity and in the case of a request for the reduction of a fine. For indeed in many cases an undertaking will be unaware of whether or not it is the first to submit information to the FCA on a particular matter.

The FCA must examine the submitted documents *ex ante* and grant, if the requirements are met, leniency regardless of whether a house search has been (successfully) requested or carried out. This also follows from the explanatory notes to the Cartel and Competition Law Amendment Act (*Kartell- und Wettbewerbsgesetznovelle*) 2012, according to which the assessment is to be made “*exclusively on the basis of the type and quality of the information and evidence submitted by the applicant*”.¹⁷

¹⁶ “European competition authorities” means the European Commission and the national competition authorities as defined in Art. 35 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal No L 1 of 04 January 2003 p. 1 (cf. Art. 2 (2) and (4) of the ECN+D).

¹⁷ Cf. EB Austrian Cartel and Competition Law Amendment Act 2012, Government Bill 1804 Supplements to the Stenographic Minutes of the National Council 24. GP 14.

II. Special forms of a request for leniency

1. Marker

If an undertaking wishes to make use of § 11b (1) or (2) of the Competition Act, it can also submit an application to the FCA for the setting of a so-called marker pursuant to § 3 of the Austrian Ordinance on Leniency. Since a request to set a marker is only intended to establish the order of receipt, not all requirements of a request for leniency pursuant to § 2 of the Austrian Ordinance on Leniency have to be fulfilled.

The marker secures the rank of the requesting undertaking in the order of receipt of applications pursuant to § 11b (1) or (2) of the Competition Act for a certain period of time.¹⁸ Initially, the undertaking provides only brief information to the FCA and subsequently completes the same within a deadline to be set by the FCA. Assigning a marker allows the requesting undertaking to approach the FCA at an early stage and then complete its internal investigation to gather the information and evidence necessary to meet the minimum evidence requirements for leniency.

The FCA recommends using the form sheet it provides (Annex 2). A request for the setting of a marker may be submitted in German or English in writing or orally or in any other way so that the requesting undertaking does not have to take possession, custody or control of the submitted statement. The FCA may require a translation into German (§ 5 (1) of the Austrian Ordinance on Leniency).

A request to set a marker must comprise at least the following information (§ 3 (2) of the Austrian Ordinance on Leniency):

- Name and address of the requesting undertaking
- Name and address of all other undertakings which participated or are participating in the alleged infringement
- Cause for concern that led to the request to set a marker¹⁹
- The products and territories concerned by the alleged infringement
- The duration and nature of the alleged infringement

¹⁸ Cf. the possibility under Art. 21 (5) ECN+D, according to which markers can also be granted for applications for reduction of fines.

¹⁹ Such cause may be, for example, an internal compliance investigation of the undertaking, the discovery or processing of violations of other legal provisions in the undertaking, or a complaint from customers.

- Information on past or possible future requests for leniency in relation to the alleged infringement to other European competition authorities or competition authorities of third countries²⁰

This information will enable the authority to determine whether, and if so, how many other companies have already made applications to the FCA in relation to the same infringement, or whether the FCA is already aware of the same infringement from other sources.

The FCA sets a time limit of usually no more than eight weeks, within which the marker must be supplemented with the information required to meet the evidence thresholds of § 11b (1) 1 lit a or b of the Competition Act. If a request to set a marker has been submitted to several competition authorities in parallel, the FCA will try to take into account the relevant procedure of the other competition authorities when setting the deadline.

If the undertaking has completed the application for the setting of a marker within the reasonable period of time to be defined by the FCA in accordance with the relevant evidence thresholds by submitting the information and evidence, all information and evidence submitted will be deemed to be an application for leniency and to have been submitted at the moment when the application for the setting of a marker was originally submitted (§ 3 (3) of the Austrian Ordinance on Leniency).

Practice tip:

It is advisable to request the setting of a marker in particular if, upon (internal) disclosure of an undertaking's participation in an anti-competitive agreement, the detailed circumstances are only the subject of further investigation or it is to be expected that other companies involved will also seek cooperation with the FCA. In this way, an advantageous earlier rank can be secured. However, if the marker is not completed correctly, this advantage can be lost again.

²⁰ "European competition authorities" means the European Commission and the national competition authorities as defined in Art. 35 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal No L 1 of 04 January 2003 p. 1 (cf. Art. 2 (2) and (4) of the ECN+D).

2. Summary application

If an undertaking has already submitted a request for leniency or for the setting of a marker to the European Commission with regard to the same alleged infringement, and if this application relates to more than three Member States as affected territories²¹, an undertaking may submit a so-called summary application²² to the FCA (§ 4 of the Austrian Ordinance on Leniency). The submission of such summary applications is possible irrespective of the rank of the requesting undertaking as a leniency applicant in proceedings before the European Commission or the FCA, i.e. not only for the first leniency applicant but also in cases where the requesting undertaking is eligible merely for fine reduction. Summary applications do not require the same amount of information as requests under § 2 of the Austrian Ordinance on Leniency do.

A summary application must contain at least the following information in short form (§ 4 (2) of the Austrian Ordinance on Leniency):

- Name and address of the requesting undertaking
- Names and addresses of all other undertakings involved in the alleged infringement
- The products and territories concerned by the alleged infringement
- The duration and nature of the alleged infringement
- The Member State or Member States where the evidence of the alleged infringement is likely to be found
- Information on past or possible future requests for leniency in relation to the alleged infringement to other European competition authorities or competition authorities of third countries

Upon receipt of such a summary application, the FCA will acknowledge it and grant the requesting undertaking a “Summary Application Marker”. With this, the FCA confirms that the requesting undertaking will be granted a period of time to complete if the FCA takes action in the case. If the requesting undertaking is the first applicant with regard to the alleged infringement before the FCA, it will be informed of this circumstance (§ 4 (3) of the Austrian Ordinance on Leniency).

If the European Commission receives full applications and national competition authorities receive summary applications in relation to the same alleged infringement, the applicant’s main contact during the period before it is clarified whether the European

²¹ Cf. Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 2004/101, 43 et seqq, Recital 14.

²² Cf. the form sheet at https://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf (accessed on 30 April 2022).

Commission will pursue the case in whole or in part shall be the European Commission, in particular when it comes to issuing instructions regarding further internal investigations. The European Commission shall inform the national competition authorities concerned of the state of affairs during this period upon request (Art. 22 (3) ECN+D).

If the European Commission informs the authority that it does not intend to pursue the case either in whole or in part, the FCA must set a deadline of usually no more than eight weeks and the summary application must be supplemented with the information and evidence required to meet the evidence requirements of § 11b(1) or (2) of the Competition Act (§ 2 (2) of the Austrian Ordinance on Leniency) before the expiry of this deadline. Prior to this moment, the FCA may request clarification only on information submitted in the summary application. Only if this is absolutely necessary for the delineation or allocation of the case, the FCA may request already in advance the information and evidence which must be submitted by the undertaking for a request for action pursuant to § 11b (1) or (2) of the Competition Act. Otherwise, the principles for the completion of a marker explained under Item 6 II.1 apply *mutatis mutandis*. In particular, it must be taken into account that the facts have already been ascertained by the applicant undertaking for the contact with the European Commission.

If the requesting undertaking has completed the summary application within the time limit set by the FCA by submitting the information and evidence within the meaning of § 2 (2) of the Austrian Ordinance on Leniency, and if the summary application covers the same products and territories concerned as well as the same duration of the alleged infringement as the updated request for leniency submitted to the European Commission, all information and evidence submitted shall be deemed to have been submitted at the moment the summary application was filed.

In other respects, Recitals 24 to 27 of the ECN Model Leniency Programme are authoritative for summary applications in network cases.²³

²³ ECN Model Leniency Programme, https://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (accessed on: 23 May 2022).

III. Notifications by the FCA in connection with a request for leniency

1. Confirmation of receipt

As soon as possible after receipt of the request for leniency or the application for the setting of a marker or the summary application, the FCA will confirm receipt of the same to the undertaking in writing, stating the date and time (§ 5 (2) of the Austrian Ordinance on Leniency).

2. Leniency Notice

After receipt of the complete statement as defined in § 2 (1) of the Austrian Ordinance on Leniency (i.e. request for leniency, timely completion after application for the setting of a marker, timely supplementation after submission of a summary application) and after a detailed examination of the information and evidence submitted with regard to the fulfilment of the evidence thresholds set out in § 11b (1) 1 lit a or lit b of the Competition Act or with regard to whether these constitute a significant added value within the meaning of § 11b (2) of the Competition Act and after reviewing the other prerequisites for the application of these provisions, the FCA will inform the requesting undertaking as soon as possible by way of a legally non-binding written notification – subject to the fulfilment of the undertaking's cooperation obligation – whether leniency will be granted and thus the FCA will apply § 11b (1) or (2) of the Competition Act (§ 8 (2) of the Austrian Ordinance on Leniency). In this notification, the FCA will also provide information on the respective reduction of the fine pursuant to § 7 of the Austrian Ordinance on Leniency, as far as this is possible from the overall context and the status of the investigation. At the very least, the FCA will announce the range of reductions it is considering.

There is no right of appeal against this leniency notice by the FCA.

Practice tip:

If an undertaking has submitted a request pursuant to § 11b (1) of the Competition Act, and the FCA considers that the requirements for full immunity from a fine are not met, the request pursuant to § 11b (1) of the Competition Act shall be considered as a request for a reduction of the fine pursuant to § 11b (2) of the Competition Act.

3. Notification of the Federal Cartel Prosecutor by the FCA

The Federal Cartel Prosecutor (*Bundeskartellanwalt*)²⁴, who as the second official party in the cartel proceedings also has the right to file applications with the Cartel Court, will be informed by the FCA without delay by sending a copy of the confirmation of receipt pursuant to § 5 (2) of the Austrian Ordinance on Leniency. Likewise, a copy of the Leniency Notice pursuant to § 8 (1) of the Austrian Ordinance on Leniency will be sent to the Federal Cartel Prosecutor at the appropriate time.

The FCA's notifications to the Federal Cartel Prosecutor are relevant in two respects:

- On the one hand, pursuant to § 36 (3) of the Cartel Act 2005, the Federal Cartel Prosecutor is not entitled to file an application for the imposition of a fine for the infringement in question if the FCA has informed him that it is proceeding against an undertaking within the meaning of § 11b (1) or (2) of the Competition Act.
- On the other hand, a prompt notification of the Federal Cartel Prosecutor in connection with his duties under § 209b of the Austrian Code of Criminal Procedure (withdrawal from prosecution due to cooperation with the public prosecutor's office in connection with an infringement under competition law) is important with regard to a possible criminal prosecution of alleged infringements (see Item 7 on § 209b of the Austrian Code of Criminal Procedure and the more detailed requirements for action by the Federal Cartel Prosecutor).

4. Submission of applications to the Cartel Court by the FCA

The immunity from fines pursuant to § 11b (1) of the Competition Act may be applied only to one undertaking at a time with regard to the same infringement, even if, for example, another applicant fulfils the (higher) threshold of evidence of clause 3 lit b, but an undertaking has already fulfilled the threshold of lit a with the evidence and information submitted (see Item 4 II.). Provided that the FCA has filed an application for a fine against at least one other undertaking involved in the infringement, it shall file an application for a declaratory judgement pursuant to § 28 (1a) of the Cartel Act 2005 against the first leniency applicant who fulfils the requirements of § 11b (1) of the Competition Act.

²⁴ <https://www.justiz.gv.at/home/justiz/justizbehoerden/bundeskartellanwalt.36c.de.html> (accessed on 30 April 2022).

7 Privileged status of employees in criminal prosecutions (§ 209b of the Austrian Code of Criminal Procedure)

In addition to the avoidance or reduction of fines under competition law (directed against the undertaking) through cooperation within the framework of the leniency programme pursuant to § 11b of the Competition Act, in cases where an infringement of competition law also constitutes a criminal offence, the danger of possible criminal liability of the employees acting on behalf of the undertaking in question is an important aspect to be considered. § 209b of the Austrian Code of Criminal Procedure contains complementary provisions to § 11b of the Competition Act which also allow natural persons to be exempt from punishment due to their cooperation with the law enforcement authorities.

Federal Law Gazette I No 243/2021 re-enacted the provision of § 209b of the Austrian Code of Criminal Procedure in a slightly modified form and put it into effect for a limited period of time until the end of 2028. The existence of such a provision in Austrian law is now obligatory due to EU law requirements (Art. 23 of the ECN+D).²⁵

§ 209b of the Austrian Code of Criminal Procedure creates the possibility of a “criminal immunity” for employees of an undertaking that has made a substantial contribution to the clarification of an infringement of competition law towards the FCA, the European Commission, or the competition authority of another EU member state. § 209b of the Austrian Code of Criminal Procedure is applicable to those cases in which the same facts violate the prohibition norms under competition law (§ 1 of the Cartel Act 2005, Art. 101 of the Treaty on the Functioning of the European Union) and meet the definitions of the criminal offences of anti-competition agreements in award procedures (§ 168b of the Austrian Criminal Code) and/or submission fraud (§§ 146 et seqq. of the Austrian Criminal Code).

The Federal Cartel Prosecutor shall notify the public prosecutor of any proceeding of the FCA pursuant to § 11b (1) or (2) of the Competition Act or of any such proceeding of the

²⁵ Cf. Explanations to Government Bill 1175 Supplements to the Stenographic Minutes of the National Council 27. GP 2.

European Commission or of competition authorities of other Member States (§ 84 of the Cartel Act 2005), if it would be disproportionate in view of the weight of the undertaking's contribution to the clarification of an infringement within the meaning of § 11b (1) 3 of the Competition Act and the active participation of the individual employees therein to prosecute such employees who participated in such infringement on behalf of the undertaking for an offence committed by such infringement. Since the amendment of the Austrian Code of Criminal Procedure published in Federal Law Gazette I No 243/2021, not only the weight of the undertaking's contribution to the elucidation of the competition law infringement in connection with the leniency programme pursuant to § 11b of the Competition Act is taken into account, but also the active participation of the individual employees of this undertaking in the context of this leniency cooperation is. Thus, the benefit of § 209b of the Austrian Code of Criminal Procedure is to be enjoyed only by those employees of an undertaking who actively participate in the investigation of the infringement.²⁶

Notification of the public prosecutor by the Federal Cartel Prosecutor is generally considered only after the FCA has filed an application for immunity from fines or a reduction of fines with the Cartel Court, as only at this moment a final decision has been made on the leniency status of the undertaking.²⁷ The notification pursuant to § 8 (1) of the Austrian Ordinance on Leniency is only a legally non-binding notification, as at this moment the leniency status can still be lost, especially in the event of a violation of the cooperation obligation.

There is no legal entitlement of an undertaking's employees to intervention by the Federal Cartel Prosecutor.²⁸

After such a notification by the Federal Cartel Prosecutor, the public prosecutor shall close the preliminary proceedings against those employees who have disclosed to the public prosecutor and the court all their knowledge of their own acts and other facts relevant to the clarification of the offences committed by the infringement, under reserve of subsequent prosecution.

Despite the slight change in the legal situation that has occurred in the meantime, the "Handbook on the Leniency Programme" published by the Federal Ministry of Justice

²⁶ Cf. Explanations to Government Bill 1175 Supplements to the Stenographic Minutes of the National Council 27. GP 3.

²⁷ § 209b of the Austrian Code of Criminal Procedure refers to the waiver of a fine and the application for a reduced fine in § 11b (1) and (2) of the Competition Act, but not to earlier points in time such as the notification pursuant to § 11b (3) of the Competition Act.

²⁸ *Schroll in Fuchs/Ratz WK Austrian Code of Criminal Procedure § 209b Recital 4.*

(BMJ) provides interpretative guidance on § 209b of the Austrian Code of Criminal Procedure.²⁹

Practice tip:

It is recommended to inform the Federal Cartel Prosecutor already during the ongoing investigation with the FCA which employees have participated in the clarification of the infringement and now wish to take advantage of § 209b of the Austrian Code of Criminal Procedure.

²⁹ Cf. details at <https://www.bmj.gv.at/themen/Kronzeugenregelung.html> (accessed on 30 April 2022).

8 The privileged status of infringers under a leniency programme and the leniency statement in antitrust damages proceedings

The Austrian Cartel and Competition Law Amendment Act 2017³⁰ transposed the Damages Directive 2014/104/EU³¹ into national law. The provisions contained therein, which have the purpose of guaranteeing effective enforcement of claims for damages for infringements of competition law (private enforcement), comprise a number of special regulations, in particular to maintain the attractiveness of the antitrust leniency programme.

I. Terminology

Since the provisions of Chapter 5 of Part II of the Austrian Cartel Act 2005 (*“Damages for Infringements of Competition Law”*) are based on the Damages Directive, they partly contain different definitions than those of national competition law. The concept of leniency under the law on damages (*“A person who has voluntarily disclosed his knowledge of a secret cartel between competitors and his participation in it to a competition authority and who has been granted immunity from the fine to be imposed on account of his participation in the cartel by means of a decision or discontinuation of the proceedings”*, § 37e (3) of the Cartel Act 2005) is much narrower, since, in contrast to the national leniency programme (see Item 2), only undertakings that have obtained full immunity from fines (§ 11b (1) of the Competition Act) are covered here. Furthermore, the leniency concept of this section, following Union law, covers only secret horizontal but not vertical or non-secret cartels. § 37b (4) of the Cartel Act 2005 defines a leniency statement (more broadly than the concept of an infringer under a leniency programme) as *“a voluntary statement by a person involved in a cartel between competitors about his knowledge of the cartel and about his participation therein, made to a competition*

³⁰ Federal Law Gazette I No 56/2017.

³¹ Directive of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Official Journal No L 349, p. 1.

authority for the purpose of obtaining immunity from or reduction of a fine to be imposed on account of such participation by means of a decision or discontinuance of proceedings; this also covers the recording of a statement”.

II. Privileged status of the infringers under a leniency programme in the damages provisions

An infringer under a leniency programme (secret horizontal cartel) is liable only to its direct and indirect customers or suppliers, unless the other aggrieved parties cannot obtain full compensation from the other liable parties (§ 37e (3) of the Cartel Act 2005).

An infringer’s recourse against such an infringer under a leniency programme for compensation of the damage to direct or indirect customers or suppliers of the infringer (compensation amount) is limited to the amount of the damage caused by the infringer under a leniency programme to its own direct or indirect customers or suppliers (§ 37e (4) of the Cartel Act 2005).

Leniency statements also benefit from privileged status. § 37k of the Cartel Act 2005 allows disclosure requests by civil courts concerning evidence to courts or authorities *“if such evidence cannot be procured by the parties or a third party with reasonable effort”*. However, disclosure of leniency statements (and settlement submissions) may not be ordered (§ 37k (4) of the Cartel Act 2005). Use of evidence from the files of a competition authority is as a matter of principle inadmissible unless its presentation can be ordered (§ 37k (5) of the Cartel Act 2005). This prohibition does not cover information that is independent of competition authority proceedings, even if this information is present in the files of a competition authority (i.e. for example an email that constitutes evidence). By the Austrian Cartel and Competition Law Amendment Act 2021³², § 37a of the Cartel Act 2005 was supplemented with a paragraph 3 insofar as § 37k (5) 2 and (6) as well as § 37m (3) of the Cartel Act 2005 shall apply to the use of evidence in all court proceedings (and not only damages proceedings). Leniency statements (and settlement submissions) may be used only in proceedings before the competition authority (including the appeal proceedings) and proceedings on the allocation of the fine among several jointly and severally liable co-participants.³³

³² Federal Law Gazette I No 176/2021.

³³ Cf. Explanations to Government Bill 951 Supplements to the Stenographic Minutes of the National Council 27. GP 24.

III. The FCA's handling of leniency statements

Leniency programmes are an important instrument of public law enforcement. The incentives and protective mechanisms for companies considering the filing of such applications must therefore be safeguarded comprehensively and legally secured.

For this reason, the FCA, based on its legal obligation, is particularly concerned with comprehensively safeguarding the privileged status of leniency statements (and settlement submissions) established under EU law by Directive 2014/104/EU and the ECN+D.

Therefore, in the following, in addition to the presentation of the basis for the delimitation of the documents privileged under Section 5 of Part II of the Competition Act 2005 as well as the scope of this privileged status, the approach of the FCA will be outlined.

Art. 2 (16) of Directive 2014/104/EU defines a leniency statement as *“an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information”*. What is relevant here is above all that the statement has been formulated specifically for this purpose. This also follows from the specification of the otherwise identical definition of the leniency statement in Art. 2 (1) 17 of the ECN+D, according to which it does *“not [include] evidence that exists irrespective of the enforcement proceedings, whether or not such information is in the file of a competition authority, namely pre-existing information.”*

In this sense, the FCA understands the term leniency statement broadly, in that it covers not only the (original) oral or written leniency statement pursuant to § 2 of the Austrian Ordinance on Leniency³⁴, but also any subsequent reports, supplements or affidavits submitted for further clarification in accordance with the cooperation obligation. Whether a particular document actually falls within the scope of the privileged status, will usually have to be clarified on a case-by-case basis. Evidence such as emails, other correspondence or other records (e.g. business records, notes, calendar entries) that

³⁴ Nor a duly completed marker or summary application.

already existed prior to the leniency statement are in any case not covered by this protection.

Practice tip:

A corresponding marking of all documents contained in requests for leniency, which the undertaking considers to be covered by the term “leniency statement” within the meaning of Art. 2 (16) of Directive 2014/104/EU or Art. 2 (1) 17 of the ECN+D when applying these principles, will subsequently facilitate the safeguarding of the special privileged status of these documents both in antitrust enforcement proceedings and in any further follow-up proceedings and is therefore recommended by the FCA.

It is emphasised that the FCA, in accordance with the purpose of uncovering and prosecuting cartel violations, is in any case authorised to use leniency statements comprehensively (i.e. also against undertakings involved in the same infringement and different from the leniency applicant) in its own applications for declaratory judgement, cease-and-desist orders and fines to the Cartel Court as well as in the preliminary proceedings for the granting of the right to be heard pursuant to § 13 (2) of the Competition Act.

The FCA may also be obliged to provide administrative assistance to the public prosecutor’s office under Art. 22 of the Federal Constitution (*Bundes-Verfassungsgesetz*, B-VG) in conjunction with § 76 (1) of the Austrian Code of Criminal Procedure, which may also include the transmission of leniency statements. The extent to which these documents will then be used by the public prosecutor’s office and whether they will then become the subject of the accused’s inspection must be clarified in the corresponding criminal proceedings. In this context, the FCA refers to the effectiveness of competition law enforcement as mandated by primary EU law. However, the documents used in penal preliminary proceedings may not be used in subsequent court proceedings, such as damages proceedings, in accordance with the protection in Chapter 5 of Part II of the Cartel Act 2005.

9 Contacting the FCA

The relevant contact person is published on the FCA website at <https://www.bwb.gv.at/kartelle/marktmachtmissbrauch/kronzeugenregelung> and is available for confidential contact. Requests from undertakings pursuant to §§ 2 or 3 of the Austrian Ordinance on Leniency as well as summary applications are to be sent to the Legal Department at the following address:

wettbewerb@bwb.gv.at

Bundeswettbewerbsbehörde (Federal Competition Authority)

Radetzkystraße 2

A-1030 Vienna

Phone: (+ 43 1) 245 08 0

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